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

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

REPORTS

OF CASES RELATING TO

MARITIME LAW CASES

CONTAINING ALL

DECISIONS OF THE COURTS OF LAW AND EQUITY

IN

The United Kingdom.

EDITED BY

GEOFFREY HUTCHINSON,

BARRISTER-AT-LAW.

VOL. XVIII., NEW SERIES.

From 1929 to 1936.

LONDON:
THE FIELD PRESS (1930) LTD., THE "LAW TIMES" OFFICE, FIELD HOUSE,
BREAM'S BUILDINGS, E.C. 4.

1937.

INDEX

TO

NAMES OF THE CASES

REPORTED IN THIS VOLUME.

PAGE

Admiralty Commissioners *v.* Owners of the *M/V Valverda* 620
Adriatic, The 259
Aeneas, The 571
Akties. Steam *v.* Arcos Limited 409
Aldington Court, The 264
Anastasia (Owners of) *v.* Ugleexport Charkow 360, 404, 482
Andrea Sanguineti fu Davide *v.* Ugleexport, Moscow 470
Argonaut Marine Insurance Company Limited, *Reg.* 306
Arpad, The 510
Baarn, The 434
Baarn (*No.* 2), *The* 506
Barras *v.* Aberdeen Steam Trawling and Fishing Company Limited 384
Bathori, The 355, 458
Beldis, The 598
Bergens Dampskibs Assurance Forening *v.* Sun Insurance Office Limited 172
Board of Trade *v.* Hain Steamship Company Limited 15
Bremen, The 252
Burnett Steamship Company Limited *v.* Joint Danube and Black Sea Shipping Agencies 443
Carlton, The 240
Carras *v.* London and Scottish Assurance Corporation Limited 581
Castor, The 312
Champion, The 453
Chatwood, The 165
China Navigation Company Limited *v.* Attorney-General 288
Chr. Knudsen, The 347
Clan Line Steamers Limited *v.* The Board of Trade. 1
Corporation of Trinity House *v.* the *Cedar Branch* (Owners of) 151
Cosmopolitan Shipping Company (Inc.) *v.* Hatton and Cookson Limited (Liverpool) 130
Croft *v.* Dunphy 370
Croxteth Hall, The ; *Celtic, The* 121
Croxteth Hall, The ; *Celtic, The* 184

PAGE

Dagmar, The 41
Dampselskab Svendborg *v.* London, Midland and Scottish Railway Company 27
Dampskibsselskabet Botnia A/S *v.* C. P. Bell and Company 307
Dampskibsselskabet Heimdal *v.* Russian Wood Agency Limited 362, 482
Danneberg *v.* White Sea Timber Trust Limited 538, 542
Dawson Line Limited *v.* Aktiengesellschaft Adler fur Chemische Industrie of Berlin 273
Dixon *v.* *Ayresome* (Owners of the) 115
Edison, The 276, 380
Edison, The (*No.* 2) 486
Erik Boye, The 66
Eskbridge, The 207
Essex Envoy, The 54
Eurana (Steamship) *v.* Burrard Inlet Tunnel and Bridge Company 202
Fitzgerald *v.* *Lona* (Owners of the) 364
Fiumana Societa Di Navigazione *v.* Bunge and Company Limited 147
Foscolo Mango and Another *v.* Stag Line Limited .. 210
Foscolo Mango and Company and another *v.* Stag Line Limited 266
Furness, Withy and Co. Limited *v.* Duder 623
Gastein, The 480
Goodwin Ferreira and Co. Limited *v.* Lamport and Holt Limited 38
Grain Union Company, S/A Antwerp *v.* A/S Hans Larsen Aalborg 449
Great Western Railway Company *v.* Kassos Steam Navigation Company 174
Greenstar Shipping Company Limited *v.* London Assurance and others 225
Gulf and Southern Steamship Company (Incorporated) *v.* British Traders Insurance Company Limited 94
Hain Steamship Company Limited *v.* Sociedad Anonima Comercial de Exportacion e Importacion 504
Hayle, The 50
Owners of Steamship *Istros* *v.* F. W. Dahlstroem and Co. 177
St. Joseph, The 375

01787 50/33-K-G1

NAMES OF CASES.

PAGE

Kaituna, The ... 429
Kate, The ... 562
Kite, The ... 413
Lady Belle, The ... 451
Lalandia, The ... 351
Leon and others *v.* Casey ... 300
London The ... 180
London Corporation, The ... 535
Louis Dreyfus and Co. *v.* Tempus Shipping Company Limited ... 243
Lykiardopulo *v.* Bunge y Born Limited ... 399
Mabel Vera, The ; Humourous, The ... 373
Manchester Ship Canal Company *v.* Director of Public Prosecutions ... 140
Marcelino Gonzalez y Compania *v.* Nourse (James) Limited ... 590
Maritime National Fish Limited *v.* Ocean Trawlers Limited ... 551
Marte, The ... 402
Minerva, The ... 426
Mons, The ... 311
Motor Union Insurance Company Limited *v.* Mannheimer Verischerungs Gesellschaft ... 345
Napier Star, The ... 400
Nautilus Steam Shipping Company Limited, *Re* ... 554
New Liverpool Eastham Ferry and Hotel Company Limited *v.* Ocean Accident and Guarantee Corporation Limited ... 68
Nippon Yusen Kaisha *v.* The China Navigation Company Limited ... 533
Njegos, The ... 609
Normanstar, The ... 53
Otranto, The ... 99, 193
Palembang, The ... 45
Paterson Steamships Limited *v.* Canadian Co-Operative Wheat Producers Limited ... 524
Patterson *v.* Robinson and others ... 35
Phœnix Insurance Company of Hartford and another *v.* De Monchy and others ... 7
Piracy *jure gentium*. In the matter of ... 528
Portvale Steamship Company *v.* Corporation of the Royal Exchange Assurance ... 309
Princess, The ... 56
Prinses Juliana, The ... 614
Rainbow, H.M. Submarine ... 368

PAGE

Rehearo, The ... 422
Renton and Co. Limited *v.* Cornhill Insurance Company Limited ... 407
Ring, The ... 238
Robey *v.* Vladinier ... 560
Ruapehu (No. 2), The ... 64
Ruby Steamship Corporation Limited *v.* Commercial Union Assurance Company ... 445
Sandgate, The ... 83
Seapool, The ... 477
Silver and another *v.* Ocean Steamship Company Limited ... 74
Skarp, The ... 576
Societe Anonyme Comercial de Exportacion e Importacion (Louis Dreyfus et Cia) Limitada *v.* National Steamship Company Limited ... 549
Stentor, The ... 490
Sturley and others *v.* Powell ... 97
Sutherland *v.* Administrator of German Property ... 397
Symington and Co. *v.* Union Insurance Society of Canton Limited ... 19
Tate and Lyle Limited *v.* Hain Steamship Company Limited ... 493
Tempus Shipping Company Limited *v.* Louis Dreyfus and Co. ... 152
Torni, The ... 315
Tovarisch, The ... 58, 87, 182
Tower Bridge, The ... 594
Treherbert, The ... 460
Tynedale Steam Shipping Company Limited *v.* Anglo-Soviet Shipping Company Limited ... 558
United States Shipping Board *v.* The Ship St. Albans ... 196
Uranienborg, The ... 591
Varing, The ... 231
West Wales, The ... 349
Wetherall and Co. Limited *v.* The London Assurance 205
White Sea Timber Trust Limited *v.* W. W. North Limited ... 367
Wilh. Svenssons Travaruaktiebolag *v.* Cliffe Steamship Company ... 284
Williams *v.* Atlantic Assurance Company ... 334
Young *v.* Merchants' Marine Insurance Company Limited ... 341
Young Sid, The ... 22
Zigurds, The ... 324, 332, 475

SUBJECTS OF CASES.

PAGE

ACCIDENT.

Charter-party—Construction—Ship "prevented from working"—Accident putting out of action winches in forepart of ship. (Tynedale Steam Shipping Company Limited v. Anglo-Soviet Shipping Company Limited. Goddard, J.) 558

See *Workmen's Compensation.*

ACTION *IN REM.*

See *Carriage of Goods*, No. 8; *Collision*, No. 17; *Conflict of Law*, Nos. 2, 4; *Freight*, No. 1; *Jurisdiction*, No. 1; *Practice*, No. 9.

ADJUSTERS' CHARGES.

See *Practice*, No. 1.

ADMIRALTY JURISDICTION.

See *Practice*, No. 9.

ADMIRALTY, LIABILITY OF.

See *Collision*, No. 1.

AGENT.

See *Practice*, No. 5.

ALIEN.

See *Jurisdiction*, No. 3.

ANCHOR, VESSEL AT.

See *Collision*, No. 4.

APPRAISEMENT.

See *Salvage*, No. 1.

APPROPRIATION, NOTICE OF.

See *Sale of Goods*, No. 2.

ARBITRATION.

Charter-party—Clause providing that the captain shall prosecute all voyages with the utmost despatch—Exception clause—Construction—Claim for hire—Counter-claim for loss caused by delay in prosecuting a voyage—Arbitration. (Istros (Owners of) v. F. W. Dahlstoem and Co.) Wright, J.) 177

ARREST.

See *Practice*, No. 9.

ASSESSOR.

See *Collision*, No. 15.

ASSIGNMENT.

See *Freight*, Nos. 1, 2, 3; *Marine Insurance*, No. 15.

ARMED GUARDS.

See *Crown Protection*, No. 1.

AWARD.

See *Salvage*, No. 2.

BAIL.

See *Conflict of Laws*, No. 2.

PAGE

BAILMENT.

Steam trawler—Repairs being carried out in public dock—Bailment—Liability of repairer for safety of trawler during repairs—Custom at Grimsby. (Rehearo, The. Langton, J.) 422

BARGE UNATTENDED.

See *Collision*, No. 6.

BELGIAN CODE DE COMMERCE, ART. 91.

See *Conflict of Laws*, No. 1.

BERTH.

See *Carriage of Goods*, No. 25; *Limitation of Liability*, No. 1; *Negligence*, No. 2.

BILL OF LADING.

See *Carriage of Goods*, Nos. 2, 3, 4, 6, 9, 13, 14, 17, 34, 35 36; *Conflict of Laws*, No. 1; *General Average*, No. 7.

BLAME, APPORTIONMENT OF.

See *Carriage of Goods*, No. 1; *Collision*, No. 2; *General Average*, No. 4; *Marine Insurance*, No. 10; *Practice*, No. 8.

BOILERS.

See *Freight*, No. 1.

BUNKERS.

See *General Average*, No. 1.

BUYERS' RIGHT TO REJECT.

See *Sale of Goods*, No. 1.

CANADA.

See *Carriage of Goods*, No. 30; *Collision*, No. 14; *Conflict of Laws*, No. 3; *Constitutional Law.*

CARGO.

See *Carriage of Goods*, Nos. 1, 30, 31, 35; *Conflict of Laws*, No. 1; *General Average*, No. 1; *Negligence*, No. 1.

CARRIAGE OF GOODS.

1. *Charter-party—Discharge of cargo—Docks owned by railway company who act as stevedores—Railway company requested to discharge cargo—Apportionment of cost of discharge—" Work done by the vessel at the port of discharge." (Dampselskab Svendborg v. London Midland and Scottish Railway Company.* App. Ct.) 27

2. *Bills of lading—Discharge into lighters—Lighterage to be at risk of owners of goods—Damage to goods by reason of defective packing of other goods—Whether sea-transit completed—Liability of owners of ship—Carriage of Goods by Sea Act* 1924 *(14 & 15 Geo. 5, c. 22), Sched., Art. IV., 2, (c), (n), (q). (Goodwin, Ferreira, and Co. Limited v. Lamport and Holt Limited.* (Roche, J.) 38

3. *Bill of lading—Cargo of flour—Unseaworthiness—Steamer unfit to carry flour cargo—Implied warranty that steamer fit to carry cargo—Harter Act. (The Erik Boye.* Hill, J.) 66

SUBJECTS OF CASES.

PAGE

4. *Bill of lading—Carriage of goods by sea—Damage during transit and discharging—Acknowledgment by shipowners that goods received in apparent good order and condition—Estoppel—Goods delivered in a damaged condition—Exceptions—Liability of shipowners—Carriage of Goods by Sea Act* 1924 (14 & 15 *Geo.* 5, *c.* 22), *Sched., Art. III., rr.* 3, 4, *Art. IV., r.* 2 (m), (n). (*Silver and another* v. *Ocean Steamship Company Limited.* App. Ct.) .. 74

5. *Charter-party—Dispatch money—Cargo to be taken from alongside "at the average rate of* 125 *tons per working hatch per day"—Marginal clause—Consignees not obliged to take cargo from alongside at a higher rate than* 500 *tons per day—Construction—Chamber of Shipping Welsh Coal Charter* 1896 (*Form A*). (*The Sandgate.* App. Ct.) 83

6. *Bill of lading—Freight payable—Ship or goods lost or not lost—Loss of ship and goods at sea—Goods never delivered—Claim for balance of freight—Warranty of seaworthiness—Exceptions clause in bill of lading—Shipowners not liable.* (*Cosmopolitan Shipping Company* (*Inc.*) v. *Hatton and Cookson Limited* (*Liverpool*). App. Ct.) 130

7. *Deck cargo—Measurement of space occupied—Appropriate method of measuring—Measurement made by another method—Memorandum by Customs officer—Effect—Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *s.* 77, *sub-ss.* (1), (2), *s.* 85, *sub-ss.* (1), (3). (*Great Western Railway Company* v. *Kassor Steam Navigation Company.* (Div. Ct.) .. 174

8. *Action* in rem*—Claim for freight—Owner of the ship domiciled in England—Judicature* (*Consolidation*) *Act* 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 22—*Administration of Justice Act* 1928 (18 & 19 *Geo.* 5, *c.* 26), *s.* 6. (*The Eskbridge.* Lord Merrivale, P.) 207

9. *Charter-party—Bill of lading—Liberty to call at any ports in any order for "bunkering or other purposes"—"Trial trip"—Whether deviation—"Any reasonable deviation"—Rule that deviation excludes right to rely upon exceptions—Whether still exists after Act of* 1924*—Loss of c.i.f. cargo at sea, before property has passed—Measure of damages—Carriage of Goods by Sea Act* 1924 (14 & 15 *Geo.* 5, *c.* 22), *Schedule, Rules Relating to Bills of Lading, Art. IV., rr.* 2 *and* 4. (*Foscolo Mango and another* v. *Stag Line Limited.* App. Ct.) 210

10. *Charter-party—"Scanfin" charter-party—Mode of discharge—Consignee entitled to select any one or more of alternative modes "if customary and available"—Alternative mode selected not available—Delay—Damages.* (*The Varing.* App. Ct.) ... 231

11. *Conflict of laws—Claim for distance freight—Freight engagement notes made in Egypt—Charter of Swedish vessel—English charter-party—English bills of lading—Law of flag—*Lex loci contractus. (*The Adriatic.* Langton, J.) 259

12. *Discharge of grain cargo—Wheat in bags—Bag "starting" to bulk before discharge—Discharge by bucket grain elevator—Rate applicable—Schedule of rates of Stevedores' Association of Bristol, Avonmouth, and Portishead,* 1927. (*The Aldington Court.* Adm. Div. Ct.) 264

13. *Charter-party—Bill of lading—Liberty to call at any ports in any order for "bunkering or other purposes"—"Trial trip"—Whether deviation—"Any reasonable deviation"—Rule that deviation excludes right to rely upon exceptions—Whether still exists, after Act of* 1924*—Loss of c.i.f. cargo at sea, before property has passed—Measure of damages—Carriage of Goods by Sea Act* 1924 (14 & 15 *Geo.* 5, *c.* 22), *Schedule, Rules Relating to Bills of Lading, Art. IV., rr.* 2 *and* 4. (*Foscolo Mango and Co. and another* v. *Stag Line Limited.* (H. of L.) 266

14. *Charter-party—Freight—Shipper's weight in—Bill of lading presented by shipper—Shipper agent of charterer—Bill of lading signed by master on loading as required by charter-party—Understatement of weight of cargo—Indemnity by charterer against consequent loss.* (*Dawson Line Limited* v. *Aktiengesellschaft Adler fur Chemische Industrie of Berlin.* App. Ct.) 273

PAGE

15. *Charter-party—Exception clause including "accident to hull"—Deck-load of timber "at charterer's risk"—Loss of deck cargo while loading—Negligence of master—Seaworthiness—Accident to hull—Whether shipowners protected—Claim for short delivery.* (*C. Wilh. Svenssons Travaruaktiebolag* v. *Cliffe Steamship Company.* Wright, J.) 284

16. *Charter-party—"Weather working day"—Loading prevented by ice—Claim by owners for dead freight.* (*Dampskibsselskabet Botania A/S.* v. *C. P. Bell and Co.* Bateson, J.) 107

17. *Bill of lading issued in Palestine—Bill of lading illegal by law of Palestine—Failure to incorporate the "Hague Rules"—Bill of lading "wherever signed to be construed in accordance with English law"—Whether "Hague Rules" incorporated—Government of Palestine Carriage of Goods by Sea Ordinance No.* 43 *of* 1926. (*The Torni.* App. Ct.) 315

18. *Charter-party—Provision of ice-breakers—Duty of charterers—Ice-breakers provided and subsequently withdrawn—Claim for demurrage—Onus of proof.* (*Owners of Steamship Anastasia* v. *Ugleexport Charkow.* Roche, J.) 360

19. *Charter-party—"Enabling ship to leave port"—Ship detained in ice beyond geographical limits of port—Provision of ice-breakers—Claim by owners for damages for delay and for injury to ship.* (*Dampskibsselskabet Heimdal* v. *Russian Wood Agency Limited.* Roche, J.) 362

20. *Charter-party—Discharge of cargo—Consignees to select method of discharge—Selected method frustrated by strike—Duty to select alternative method—Provision of lighters without crew—Discharge by ship by only available method.* (*Fitzgerald* v. *Owners of Steamship Lona.* Roche, J.) 364

21. *Charter-party—Construction—Expenses of discharging cargo—Carriage of wheat, maize, or rye—Optional cargo—No importation of rye at port of discharge—Expenses exceeding those of discharging heavy grain.* (*Lykiardopulo* v. *Bunge y Born Limited.* Acton, J.) 399

22. *Charter-party—Construction—Provision of ice-breakers—Duty of charterers—Ice-breakers provided and subsequently withdrawn—Claim for demurrage—Onus of proof.* (*Owners of Steamship Anastasia* v. *Ugleexport Charkow. Dampskibsselskabet Heimdal* v. *Russian Wood Agency Limited.* App. Ct.) 404

23. *Charter-party—Construction—"Enabling ship to leave port"—Ship detained in ice beyond geographical limits of port—Provision of ice-breakers—Claim by owners for damages for delay and for injury to ship.* (*Dampskibsselskabet Heimdal* v. *Russian Wood Agency Limited.* App. Ct.) 404

24. *Charter-party—Construction—Ice clause—Duty of ship to notify port of need of ice-breaker assistance—Claim for dead freight—Timber coated with snow and ice—Carrying capacity of ship reduced.* (*Akties. Steam* v. *Arcos Limited.* Branson, J.) .. 409

25. *Charter-party—Berth contract—Construction—Lay days—Demurrage—"Time lost whilst steamer is in loading berth"—"Owing to work being impossible"—"Through rain"—"Amount of actual time so lost"—Work rendered impossible through rain—In fact, no cargo alongside to load—No lost time in loading.* (*Burnett Steamship Company Limited* v. *Joint Danube and Black Sea Shipping Agencies.* App. Ct.) 443

26. *Charter-party—Construction of ice clause—Duty of charterers—Ship travelling in convoy.* (*Andrea Sanguineti fu Davide* v. *Ugleexport, Moscow.* Branson, J.) 470

27. *Charter-party—Construction—Ice-bound ports—Icebreaker assistance—Obligation of charterers—Scope of the obligation.* (*Ugleexport Charkow* v. *Owners of Steamship Anatasia Russian Wood Agency Limited* v. *Dampskibsselskabet Heimdal.* H. of L.) 482

SUBJECTS OF CASES.

PAGE

28. *Charter-party—Construction—Duration of lay days—" Sundays and holidays excepted "—Local law forbidding loading of ships after 1 p.m. on Saturday—Saturday afternoon not a " holiday."* (*Hain Steamship Company Limited* v. *Sociedad Anonima Comercial de Exportacion e Importacion.* Mackinnon, J.) 504

29. *Damage to cargo—Measure of damage—Cargo of wheat—Non-delivery—Breach of contract—Tort—Conversion—No market price—Payment before delivery.* (*The Arpad.* App. Ct.) 510

30. *Canada—Quebec—Ship—Cargo—Loss by stranding—Unseaworthiness of ship—Fault or privity of owners—Canadian Water Carriage of Goods Act,* 1910 (9 & 10 *Edw.* 7, c. 61, *R. S. C.*). (*Paterson Steamships Limited* v. *Canadian Co-operative Wheat Producers Limited.* Priv. Co.) 529

31. *Charter-party—Ice-breaking clause—Charterers to arrange for provision of ice-breaking assistance—Operation of exceptions clause.* (*Danneberg* v. *White Sea Timber Trust Limited.* Branson, J.) .. 538

32. *Charter-party—Ice-breaking clause—Charterers to arrange for provision of ice-breaking assistance—Liability of charterers where assistance intermittent and inadequate—Operation of exceptions clause.* (Danneberg *v.* White Sea Timber Trust Limited. App. Ct.) 542

33. *Charter-party—Carriage of passengers by shipowners—Ship chartered for carriage of grain—Charter not a demise.* (*Société Annonyme Comercial de Exportacion e Importacion (Louis Dreyfus et Cia) Limitada* v. *National Steamship Company Limited.* Branson, J.) 549

34. *Damage to cargo—Charter-party (Chamber of Shipping British North American (Atlantic) Wood Charter-party,* 1914) *prescribing the form of the bills of lading to be signed by master—Bills of lading—" Shipped in good order and condition "—Cargo " to be delivered in like good order and condition "—" Condition " inserted by master before " quality, description, and measurement unknown "—Log entry by master that " cargo was in a very bad state "—Contract—Estoppel—Admissibility of evidence as to contents of contract (c.i.f.) between plaintiffs, consignees (buyers) and shippers (sellers)—Short delivery of part of cargo—Clause in charter-party that " bills of lading shall be conclusive evidence as against the owners as establishing the aggregate number of pieces delivered to the steamer "—Apportionment of costs.* (*Skarp, The.* Langton, J.) 576

35. *Bill of lading—Undertaking to deliver cargo at wharf—Liberty to tranship—Discharge into lighters—Cargo lost through sinking of lighters.* (*Marcelino Gonzalez y Compania* v. *Nourse (James) Limited.* Branson, J.) 590

36. *Bill of lading—Form prescribed by Chamber of Shipping River Plate " Centrocon " Charter-party, 1914—Charter-party made in London—Goods shipped at Argentine ports for delivery at Scandinavian ports—Claim against ship by indorsees of bills of lading for short delivery of cargo—Unseaworthiness—Incorporation in bills of lading of charter-party exceptions clause—Whether law of flag or law governing charter-party applicable to bills of lading—Intention of parties—Business efficacy.* (*Njegos, The.* Sir Boyd Merriman, P.) 609

" CENTROCON " CHARTER-PARTY.

See *General Averages,* No. 1

CESSER CLAUSE.

See *Collision,* No. 5.

CHARTER-PARTY.

See *Accident,* No. 1; *Arbitration*; *Carriage of Goods,* Nos. 1, 5, 9, 10, 11, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 32, 33, 34, 36; *Contract,* No. 1; *General Average,* No. 2; *Marine Insurance,* No. 14.

PAGE

CHARTER-PARTY T99.

See *Collision,* No. 1; *Marine Insurance,* No. 1.

CHAMBER OF SHIPPING WELSH COAL CHARTER, 1896 (FORM A).

See *Carriage of Goods,* No. 5.

CHILE.

See *Conflict of Laws,* No. 2.

C.I.F. CARGO.

See *Carriage of Goods,* Nos. 9, 13.

COAL TRIMMER.

See *Workmen's Compensation.*

COLLISION.

1. *Requisitioned ship—Charter-party T.99—Collision—Negligence of both ships—War risk—Marine risk—Warlike operation—Liability of Admiralty.* (*Board of Trade* v. *Hain Steamship Company Limited.* H. of L.) 15

2. *Costs—Apportionment of blame in unequal degrees—Appeal—Proportion of blame varied—Apportionment of blame in equal degrees—Costs of appeal—Discretion—R. S. C., Order LXV., r.* 1. (*The Young Sid.* App. Ct.) 22

3. *Dumb hopper—Lighter—Lights—Hopper moored alongside dredger—After moorings cast off—Hopper held by forward moorings and swinging with the tide—Whether under way—Two riding lights being exhibited—Obligation to exhibit navigating lights—Port of London River By-laws,* 1922, *by-laws* 5, 6—*Port of London River By-laws,* 1914-1926, *by-law* 14 (*The Dagmar.* Hill, J.) 41

4. *River Thames—Vessel at anchor—Swinging—Whether turning signal required—Port of London River By-Laws* 1914-1926, *by-laws* 5 *and* 28 (e) (*The Palemberg.* Lord Merrivale, P.) 45

5. *Damages—Detention—Time charter-party—Cesser clause—Payment of hire to cease if time lost owing to collision or damage preventing the steamer from working for more than twelve hours—Loss of time whilst carrying out permanent repairs of damage sustained in collision before the making of the charter-party—Application of cesser clause—Whether hire properly decucted.* (*The Essex Envoy.* Bateson, J.) 54

6. *Negligence—Dumb barge moored alongside steamer during night—Barge unattended—No riding light—Port of London River By-Laws* 1914–1926, *by-law* 14. (*The Princess.* Hill, J.) 56

7. *Lights—" Flare-up "—light—May be shown if necessary to attract attention—Green pyrotechnic light shown—Whether " flare-up " light authorised by regulations—Regulations for Preventing Collisions at Sea* 1910, *art.* 12. (*The Tovarisch.* Hill, J.) [*Reversed.* See *No.* 8] 58

8. *Sailing vessel—Lights—Green pyrotechnic light shown to a steamship—" Flare-up " light—Whether green pyrotechnic light authorised by the regulations—Regulations for preventing Collisions at Sea* 1910, *arts.* 1, 12. (*The Tovarisch.* App. Ct.) (*Affirmed.* See *No.* 11] 87

9. *Vessels on crossing courses—Failure of " give way " ship to take action—Action taken by the " stand on " ship—Starboarding without taking off way—Negligence—Regulations for Preventing Collisions at Sea, Arts.* 18, 21 (*note*). (*The Otranto.* App. Ct.) 99

10. *River Scheldt—Vessels meeting in the vicinity of swinging or turning vessel—Duty of vessel navigating against the tide to stop her way over the ground—Obligation to take off way when vessel is aware of other vessels—Delay in taking off way until turning vessel is reached—Regulations relating to the navigation of the River Scheldt,* 1926, *art.* 40, *r.* 3. (*The Chatwood.* App. Ct.) 165

SUBJECTS OF CASES.

PAGE

11. *Sailing vessel—Lights—Green pyrotechnic light shown to a steamship—"Flare-up" light—Whether green pyrotechnic light authorised by the regulations—Regulations for Preventing Collisions at Sea*, 1910, *arts*. 1, 12. (*The Tovarisch*. H. of L.) 182

12. *Vessels on crossing courses—Failure of "give-way" ship to take action—Action taken by the "stand-on" ship—Starboarding without taking off way—Negligence—Regulations for Preventing Collisions at Sea* 1910, *Arts*. 19, 21 (*note*). (*The Otranto*. H. of L.) 193

13. *Evidence—Photographs taken from passing ship—Calculations made therefrom—Locality of collision*. (*United States Shipping Board* v. *The ship St. Albans*. Priv. Co.) 196

14. *Canada—Railway bridge over navigable channel—Obstruction to navigation—Damage caused to ship—Statutory authority—Interference amounting to public nuisance—Railway Act* (*R. S. Can*., 1927, c. 170), *ss*. 3, 245, 248. (*Steamship Eurana* v. *Burrard Inlet Tunnel and Bridge Co*. Priv. Co.) .. 202

15. *Fog—Whistle of steamship heard a little abaft the beam—Whistle heard again on the same bearing—Failure to stop—Regulations for Preventing Collisions at Sea, art*. 16—*Nautical Assessors—Disqualification of an assessor*. (*The Bremen*. App. Ct.) 252

16. *Damages—Loss of use—Dredger totally lost—Dredger engaged at time of loss in connection with the performance by her owners of contract to execute harbour works—Loss and expense incurred by owners owing to their inability through lack of financial resources to replace dredger—Loss of profits and incidental losses on contract—Natural consequence of collision—Measure of damages*. (*The Edison*. App. Ct.) [*Varied*. *See No*. 20] 276

17. *Barge sunk in dock—Expenses of raising and disposing of the wreck—Action* in rem *by harbour authority—"Damage done by a ship"—Jurisdiction—Judicature (Consolidation) Act* 1925 (15 & 16 *Geo*. 5, *c*. 49, *s*. 22, *sub-s*. (1) (a) (*iv*.). (*The Chr. Knudsen*. Bateson, J.) 347

18. *Detention of warship—Repairs in naval dockyard—Measure of damages*. (*The West Wales*. Bateson, J.) 349

19. *Portland Harbour — Dockyard Regulations — Vessel "about to enter" from seaward one of the channels between the breakwaters—Order in Council as to the Dockyard Port of Portland, Sched. II., reg*. 5 (1931, *No*. 176). (*H.M. Submarine Rainbow*). Langton, J.) 368

20. *Damages—Loss of use—Dredger totally lost—Dredger engaged at time of loss in connection with performance by her owners of contract to execute harbour works—Loss and expense incurred by owners owing to their inability through lack of financial resources to replace dredger—Loss of profits and incidental losses on contract—Natural consequence of collision—Measure of damages*. (*The Edison*. H. of L.) 380

21. *Damages — Interest — Repairs — Interest on estimated sums for repairs not actually carried out and on demurrage—"Slip order"—R.S.C., Order XXVIII., r*. 11. (*The Napier Star*. Langton, J.) 400

22. *Steam vessels approaching at night so as to involve risk of collision—Alterations of heading and to "yawing"—Both side-lights sometimes visible—"End on" Rule—Crossing Rule—Regulations for Preventing Collisions at Sea, arts*. 18, 19, 21. (*The Kaituna*. App. Ct.) 429

23. *"Crossing" rule—Failure of "give-way" vessel to keep out of way—Failure of "stand-on" vessel to take any action—Regulations for Preventing Collisions at Sea, art*. 21, *note*. (*The Lady Belle*. Langton, J.) 451

24. *Thames estuary—Navigation round N.E. Spit Buoy—Practice of pilots—"Narrow Channel" rule—"Crossing" rule—Duty of "stand-on" vessel to act where collision cannot be avoided by action of "give-way" vessel alone—Regulations for Preventing Collisions at Sea, Arts*. 19, 21, *and* 25. (*The Treherbert*. App. Ct.) 460

25. *Fog—Action of vessel hearing another vessel sounding signal of two prolonged blasts—Regulations for Preventing Collisions at Sea*, 1910, *arts*. 15 (*b*), 16. (*The Gastelu*. Bateson, J.) 480

26. *Fog—Fog signal heard forward of beam—Position of other vessel not "ascertained"—Engines not stopped—Regulations for Preventing Collisions at Sea, art*. 16. *By art*. 16 *of the Regulations for Preventing Collisions at Sea*: *"A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over*." (*Nippon Yusen Kaisha* v. *The China Navigation Company Limited*. Priv. Co.) 533

27. *Damages — Vessels damaged whilst laid up — Amount of repair damages agreed—Vessel sold for breaking up—Repairs not carried out—Whether owners entitled to recover agreed amount of repair damages*. (*The London Corporation*. App. Ct.) .. 535

28. *Suez Canal Regulations—Breach—Lights—Test as to whether lights displayed misleading or not—Burden of proof—Costs*. (*The Æneas*. Sir Boyd Merriman, P.) 571

29. *Collision outside entrance to Harwich Harbour—Negligence—One vessel outward bound approaching sharp bend in fairway and navigating against the tide—Other vessel rounding Beach End Buoy to enter harbour—By-law* 8 *of the Harwich Harbour Conservancy Board By-laws* (1929)—*Regulations for Preventing Collisions at Sea* (1910), *art*. 25—*Evidence—Whether pilot's report to Trinity House admissible*. (*The Prinses Juliana*. Bucknill, J.) 614

See *Conflict of Laws*, No. 2, 4; *Jurisdiction*, No. 2; *Marine Insurance*, No. 10; *Negligence*, No. 1; *Practice*, Nos. 3, 6; *Towage*, No. 2; *Wages*, No. 3.

CONDITION.

See *Marine Insurance*, No. 3; *Sale of Goods*, No. 1.

CONFLICT OF LAWS.

1. *Bill of lading—Damage to cargo—Conflict of laws—Hague Rules—Belgian Code de Commerce, art*. 91. (*The St. Joseph*. Bateson, J.) 375

2. *Chilean vessel—Collision—Repairs carried out in Chile—Action* in rem—*Bail—Admission of liability subject to reference to assess damages—Tender in Chile of sum in Chilean pesos exceeding amount of plaintiffs' claim in pesos—Depreciation of Chilean peso—Tender rejected—Deposit of sum tendered in Chile in satisfaction of debt in accordance with Chilean law—To what extent satisfaction of claim in action*. (*The Baarn*. App. Ct.) 434

3. *Insurance (marine)—Conflict of laws—Canadian assured—American broker—Instructed in United States—To effect insurance in England—Right of American broker to cancel policy—On ground of non-payment of premiums—Without assent of assured—Law applicable*. (*Ruby Steamship Corporation Limited* v. *Commercial Union Assurance Company*. App. Ct.) 445

4. *Collision—Chilean vessel—Repairs carried out in Chile—Action* in rem—*Admission of liability subject to reference to assess damages—Tender in Chile of sum in Chilean pesos exceeding amount of plaintiffs' claim in pesos—Depreciation of Chilean peso—Tender rejected—Deposit of sum tendered in Chile in satisfaction of debt in accordance with Chilean law—No satisfaction of claim in action*. (*The Baarn* (*No*. 2). App. Ct.) ....

See *Carriage of Goods*, No. 11; *Marine Insurance*, No. 12.

SUBJECTS OF CASES.

PAGE

CONSTITUTIONAL LAW.

Canada — Shipping — Customs — Seizure of vessel hovering within twelve marine miles of coast of Canada—Customs Act (R. S. Can. 1927, c. 42, as amended by 18 & 19 Geo. 5, c. 16), ss. 151, 207—British North America Act 1867 (30 & 31 Vict. c. 3), s. 91. (*Croft* v. *Dumphy.* Priv. Co.)...... 370

CONSTRUCTIVE NOTICE.

See *Freight*, No. 1.

CONTINUITY OF VOYAGE.

See *Marine Insurance*, No. 8.

CONTRACT.

Nova Scotia—Charter-party—Trawler—Number of trawlers limited by Government—Failure to apply for licence to fish—Frustration of contract—Claim for hire. (*Maritime National Fish Limited* v. *Ocean Trawlers Limited.* Priv. Co.)............ 551

See *Carriage of Goods*, No. 34; *Negligence*, No. 1; *Towage*, No. 1.

CONTRIBUTION.

See *General Average*, Nos. 1, 7.

COVENANT.

See *Negligence*, No. 2.

CONVOY.

See *Carriage of Goods*, No. 26.

COSTS.

See *Carriage of Goods*, No. 34; *Collision*, Nos. 2, 28; *Practice*, Nos. 7, 8.

COUNTY COURT.

See *Jurisdiction*, No. 2; *Practice*, No. 9.

CROSSING RULE.

See *Collision*, Nos. 22, 23, 24.

CROWN.

Piracy in Chinese waters—Protection for British ships—Armed guards supplied by Government—Payment claimed by Crown — Liability of shipowners. (*The China Navigation Company Limited* v. *Attorney-General.* App. Ct.) 288

CUSTOMS.

See *Bailment*, No. 1; *Carriage of Goods*, No. 7; *Constitutional Law.*

DAMAGES.

See *Carriage of Goods*, Nos. 9, 10, 13, 29; *Collision*, Nos. 5, 16, 18, 20, 21; *Practice*, No. 6.

DEAD FREIGHT.

See *Carriage of Goods*, Nos. 16, 24.

DECK CARGO.

See *Carriage of Goods*, Nos. 7, 15; *Marine Insurance*, No. 13; *Sale of Goods*, No. 1.

DELAY.

See *Arbitration*, No. 1; *Carriage of Goods*, No. 10; *Practice*, No. 4.

DEMURRAGE.

See *Carriage of Goods*, Nos. 18, 22, 25.

DERRICK, BROKEN.

See *Jurisdiction*, No. 1.

DETENTION.

See *Collision*, Nos. 5, 18.

PAGE

DEVIATION.

See *Carriage of Goods*, Nos. 9, 13. *General Average*, No. 7.

DISCOVERY.

See *Marine Insurance*, No. 6.

DISPATCH MONEY.

See *Carriage of Goods*, No. 5.

DISTANCE FREIGHT.

See *Carriage of Goods*, No. 11.

DOCK.

See *Fencing of Hatches*; *Bailment.*

DOCKOWNER.

See *Limitation of Liability*, No. 2.

DOCKYARD REGULATIONS.

See *Collision*, No. 19.

DREDGER.

See *Collision*, Nos. 16, 20.

ENEMY PROPERTY.

See *Marine Insurance*, No. 12.

"END ON" RULE.

See *Collision*, No. 22.

EQUITABLE ASSIGNMENT OF FREIGHT.

See *Freight*, No. 2.

ESTOPPEL.

See *Carriage of Goods*, Nos. 4, 34.

EVIDENCE.

See *Carriage of Goods*, No. 34; *Collision*, Nos. 13, 29.

EXCEPTION CLAUSE.

See *Arbitration*; *Carriage of Goods*, Nos. 6, 9, 13, 31, 32, 36.

FENCING OF HATCHES.

1. *Factory—Docks—Process of unloading a ship—Fencing or covering of hatches that are not in use—Hatches that have been used—On whom duty lies—Stevedore or ship—Whether process of unloading includes fencing or covering of such hatches—Factory and Workshop Act* 1901 (1 *Edw.* 7, *c.* 22), *ss.* 79, 85—*Docks Regulations*, 1925 (*S.R. & O.* 1925, *No.* 231), *reg.* 34. (*Manchester Ship Canal Company* v. *Director of Public Prosecutions.* Div. Ct.).. 140

FIRE.

See *General Average*, Nos. 1, 2, 5, 6.

FISHERMAN.

See *Practice*, No. 2.

FIUME.

See *International Law*, No. 1 *Prize.*

"FLARE-UP" LIGHT.

See *Collision*, Nos. 7, 8, 11.

FOG.

See *Collision*, Nos. 15, 25, 26.

FOREIGN CORPORATION.

See *Practice*, No. 5.

FOREIGN-GOING SHIP.

See *Light Dues*, No. 1.

SUBJECTS OF CASES.

PAGE

FOUL BERTH.

See *Negligence*, No. 2.

FREIGHT.

1. *Freight—Authority to collect given by master to ship's agents—Intention to assign—Whether legal or equitable assignment—Law of Property Act* 1925 (15 *Geo.* 5, *c.* 20), *s.* 136—*Right to sue* in rem *without making assignor party.—Mortgage—Assignment of freight—Notice of assignment—Constructive notice—Action by mortgagee—Whether necessary to make mortgagor party—Necessaries—Bunker coals supplied in Germany—German law—Rights of priority analogous to maritime lien—Whether priorities determined by German or English law—Necessaries—Repairs to boilers—Value of vessel enhanced — Priorities—Necessaries — Stevedores' charges—Priorities as between stevedores and equitable assignees of freight—Whether equitable assignee of freight entitled to priority as against stevedores' charges incurred in earning freight.* (*The Zigurds.* Langton, J.). [*Reversed.* See infra, No. 2.] 324
2. *Shipping—Freight—Authority to collect freight given by master to ship's agent—Equitable assignment of freight—Notice—Letter to receivers of cargo informing them of authority to collect freight "against which we have made payments"—Sufficiency of notice—Priorities.* (*The Zigurds.* App. Ct.) [*Affirmed.* See infra, No. 3] 332
3. *Authority to collect freight given by master to ships agent—Equitable assignment of freight—Notice—Letter to receivers of cargo informing them of authority to collect freight "against which we have made payments"—Sufficiency of notice—Priorities.* (*Smith* v. *E. A. Casper, Edgar and Co. Limited ; The Zigurds.* H. of L.) 475

See *Carriage of Goods*, Nos. 6, 8, 11, 14; *Marine Insurance*, No. 5.

GENERAL AVERAGE.

1. *General average—Centrocon charter-party—Fire—Spontaneous combustion in bunkers—Cargo loaded while fire in progress—Claim by shipowners for contribution — Unseaworthiness — York-Antwerp Rules* 1924. (*Fiumana Societa Di Navigazione* v. *Bunge and Co. Limited.* Wright, J.) 147
2. *Charter-party—General average—Fire in bunkers —Expenditure at port of refuge—Claim for general average contribution—Unseaworthiness—York and Antwerp Rules* 1924, *r. D—Exceptions—Fault—Privity—Merchant Shipping Act* 1894 (57 *&* 58 *Vict.* c. 60), *s.* 502. (*Tempus Shipping Company Limited* v. *Louis Dreyfus and Co.* App. Ct.) 152
3. *General average—Time charter—Voyage charter—Damage to vessel in avoiding collision—Repairs carried out after termination of voyage—Claim by shipowners to be indemnified for loss of time hire—York-Antwerp Rules, rr. C., X.* (d), *XI., XVIII.—Marine Insurance Act* 1906 (6 *Edw.* 7, *c.* 41), *s.* 66. (*Wetherall and Co. Limited* v. *The London Assurance.* Rowlatt, J.) 205
4. *General average expenditure—Fire while loading—Subsequent collision—Total loss of ship—Voyage abandoned—Policy on hull and machinery—Policy on cargo's proportion of general average and right to indemnity from club for cargo's proportion of general average not otherwise recoverable—Apportionment between the various risks—York-Antwerp Rules* 1890—*Marine Insurance Act* 1906 (6 *Edw.* 7, c. 41), *s.* 66, *sub-s.* 4. (*Greenstar Shipping Company Limited* v. *London Assurance and others.* Roche, J.) 225
5. *Charter-party—General average—Fire in bunkers —Expenditure at port of refuge—Claim for general average contribution—Unseaworthiness—York and Antwerp Rules* 1924, *r. D—Exceptions—Fault—Privity—Merchant Shipping Act* 1894 (57 *&* 58 *Vict.* c. 60), *s.* 502. (*Louis Dreyfus and Co.* v. *Tempus Shipping Company.* H. of L.) 243
6. *General average—" Extraordinary sacrifice . . . intentionally and reasonably made "—Vessel manœuvred against pier in order to avoid going aground — " Stranding " — York/Antwerp Rules* 1924, *Rules A, E, and Rule* 5. (*Seapool, The.* Langton, J.) 477
7. *Conribution in general average—On part of cargo owners — Deviation — Stranding of vessel — Endorsees of bills of lading—General average bond —Contribution made under compulsion.* (*Tate and Lyle Limited* v. *Hain Steamship Company Limited.* App. Ct.) 492

GERMAN LAW.

See *Freight*, No. 1.

" GIVEWAY " VESSEL.

See *Collision*, No. 23.

GREEN PYROTECHNIC LIGHT.

See *Collision*, Nos. 7, 8, 11.

HAGUE RULES.

See *Carriage of Goods*, No. 17 ; *Conflict of Laws*, No. 1.

HARBOUR-MASTER.

See *Limitation of Liability*, No. 1.

HARTER ACT.

See *Carriage of Goods*, No. 3

HARWICH HARBOUR CONSERVANCY BOARD BY-LAWS (1929).

See *Collision*, No. 29.

HATCHES.

See *Fencing of Hatches*, No. 1.

" HOME TRADE " SHIP.

See *Light Dues*, No. 1.

HONG KONG.

See *Collision*, No. 26.

HULL.

See *Carriage of Goods*, No. 15 ; *General Average*, No. 4.

ICE, PREVENTING LOADING.

See *Carriage of Goods*, No. 16.

ICE-BREAKING CLAUSE.

See *Carriage of Goods*, Nos. 24, 26, 31, 32.

INDEMNITY.

See *Carriage of Goods*, No. 14 ; *Marine Insurance*, No. 11; *Towage*, No. 1.

INSTITUTE TIME CLAUSES.

See *Marine Insurance*, No. 8.

INSURANCE.

Insurance—Third-party insurance—Liquidation of company after and accident before Third Parties Act, 1930—*Payment of amount to liquidator—Claim by third party—Rights of general creditors—Third Parties (Rights against Insurers) Act* 1930 (20 *&* 21 *Geo.* 5, *c.* 25), *s.* 1, *sub-s.* (1). (*Re Nautilus Steam Shipping Company Limited. App. Ct.*) 554

INSURANCE, MARINE.

See *Marine Insurance.*

INTEREST.

See *Collision*, No. 21.

INTERNATIONAL LAW.

International law—Piracy jure gentium—*Question referred to Judicial Committee—Whether actual robbery necessary to support a conviction of piracy —Whether frustrated attempt not equally piracy.* (*In the matter of Piracy* jure gentium. Priv. Co.) 528

SUBJECTS OF CASES.

PAGE

JURISDICTION.

1. *Action* in rem—*Jurisdiction*—"*Damage done by a ship*"—"*Damage received by a ship*"—*Grain elevator—Part of elevator being hoisted by ship's derrick—Broken derrick—Damage to elevator—Supreme Court of Judicature (Consolidation) Act* 1925 (15 & 16 *Geo.* 5, c. 49), *s.* 22, *sub-s.* (1) (a) (*iii.*) (*iv.*), *s.* 33, *sub-s.* (2). (*The Minerva.* Bateson, J.) 426

2. *County court—Jurisdiction—Collision between ship and a canal barge in tow of a tug*—"*Ship*" *or* "*vessel*"—*County Courts Admiralty Jurisdiction Act,* 1868 (31 & 32 *Vict.* c. 71), *s.* 3—*County Courts Admiralty Jurisdiction Amendment Act* 1869 (32 & 33 *Vict.* c. 51), *s.* 4; *Admiralty Court Act* 1861 (24 *Vict.* c. 10), *s.* 2. (*The Champion.* Sir Boyd Merriman, P., and Bateson, J.) 453

3. *Alien—Stowaway on British ship in foreign harbour—Arrest in England—Jurisdiction of magistrate to deal with offence—Merchant Shipping Act,* 1894 (57 & 58 *Vict.* c. 60), *s.* 237, *sub-s.* (1), *s.* 684, *s.* 686. (*Robey* v. *Vladinier.* App. Ct.) 560

See *Collision,* No. 17; *Practice,* No. 2.

LAW OF FLAG.

See *Carriage of Goods,* Nos. 11, 36.

LAY DAYS.

See *Carriage of Goods,* Nos. 25, 28.

LEAKAGE.

See *Marine Insurance,* No. 2.

LEX LOCI CONTRACTUS.

See *Carriage of Goods,* No. 11.

LIEN.

Ship—Priorities—Master's disbursements—Master's wages—Crew's wages—Necessaries. (*The Mons.* Langton, J.) 311

LIGHT DUES.

Light dues—Foreign-going ship—Picks up cargo at one home port for another home port—Both ports lading stations for foreign venture—Action for light dues as "*home trade*" *ship—Nature of voyage not changed—Merchant Shipping (Mercantile Marine Fund) Act* 1898 (61 & 62 *Vict.* c. 44), *s.* 5 *and Sched. II.* (*Corporation of Trinity House* v. *Owners of the Steamship Cedar Branch.* Rowlatt, J.) 151

LIGHTER.

See *Carriage of Goods,* Nos. 2, 20; *Collision,* No. 3.

LIGHTERAGE.

See *Carriage of Goods,* No. 2.

LIGHTS.

See *Collision,* Nos. 3, 7, 11, 27.

LIMITATION OF LIABILITY.

1. *Damage at berth—Liability of owners of berth—Harbour-master acting as ship's agent—Notice limiting liability of the owners of the berth for damage—Knowledge of the harbour-master that the berth was unsafe—Whether knowledge of the owners.* (*The Hayle.* Bateson, J.) 50

2. *Limitation of liability—Dock-owner—Damage to vessel in docks at Blackwall—Dock-owner also in control of docks at Falmouth—Whether limitation calculated upon tonnage of largest vessel within the dock at Blackwall or dock at Falmouth*—"*Within the area over which such dock . . . authority performs any duty or exercises any power*"—*Merchant Shipping (Liability of Shipowners and others) Act* 1900 (63 & 64 *Vict.* c. 32). (*The Ruapehu* (*No.* 2). Hill, J.) 64

See *Practice,* No. 1.

PAGE

"*LIS ALIBI PENDENS.*"

See *Practice,* No. 3.

LOG BOOK.

See *Carriage of Goods,* No. 34; *Seamen,* No. 1.

LONDON LIGHTERAGE CLAUSE.

See *Negligence,* No. 1.

MARGINAL CLAUSE.

See *Carriage of Goods,* No. 5.

MARKET PRICE.

See *Carriage of Goods,* No. 29.

MARINE INSURANCE.

1. *Requisitioned ship—Charter-party T.99—Loss due to warlike operation taken by Government—Marine risks by owners—Collision due to breakdown of steering gear—Not a consequence of warlike operation—Marine risk.* (*Clan Line Steamers Limited* v. *Board of Trade.* H. of L.) 1

2. *Shipment of turpentine—Loss caused by leakage—American certificate of insurance—Limitation of time for recovery of claim—Meaning of leakage.* (*Phœnix Insurance Company of Hartford and another* v. *De Monchy and others.* H. of L.) 7

3. *Policy—Slip—Goods insured from warehouse to warehouse—Warranted free from restraint—Free from particular average—Fire at port of shipment—Goods destroyed by order of port authorities—Marginal note in policy that goods not covered if otherwise insured against fire—Condition not in slip.* (*Symington and Co.* v. *Union Insurance Society of Canton Limited* (*No.* 2). App. Ct.) 19

4. *Insurance of barge—Barge lying moored*—"*Body tackle, apparel, ordnance . . . boat and other furniture*"—*Moored barge or coal hulk—Damage to moorings—Claim under policy—Whether moorings covered by policy—Marine Insurance Act* 1906 (6 *Edw.* 7, c. 41), *Sched. I., r.* 15. (*New Liverpool Eastham Ferry and Hotel Company Limited* v. *Ocean Accident and Guarantee Corporation Limited.* App. Ct.) 68

5. *Insurance by shipowners on cargo and* "*upon any charges of assured upon said cargo*"—*Total loss of vessel and cargo—Claim by shipowners against underwriters for loss of freight—Whether* "*freight*" *included in term* "*charges upon cargo.*" (*Gulf and Southern Steamship Company (Incorporated)* v. *British Traders Insurance Company Limited.* Roche, J.) 94

6. *Practice—Discovery—Risk insured covering sea and land transit—Warehouse to warehouse clause included—Loss by fire on land transit—Whether risk a marine insurance—Order for discovery of ship's papers.* (*Leon and others* v. *Casey.* App. Ct.) 300

7. *Transit and marine form—Transit risks with fire risk included by indorsement—Fire excluded from company's business—Loss thereby—Proof in liquidation rejected—Assurance Companies Act* 1909 (9 *Edw.* 7, c. 49), *s.* 28, *sub-s.* (3). (*Re Argonaut Marine Insurance Company Limited.* Ch. Div.) 306

8. *Institute Time Clauses—Continuity of voyage—Particular average.* (*Portvale Steamship Company* v. *Corp. of the Royal Exchange Assurance.* MacKinnon, J.) 309

9. *Open policy on goods—Assignment—Value of goods*—"*Prime cost*"—*Beneficial interest in goods insured—Marine Insurance Act* 1906 (6 *Edw.* 7, c. 41), *ss.* 14, 16, 50, *sub-s.* (2)—*Law of Property Act* 1925 (15 & 16 *Geo.* 5, c. 49), *s.* 136, *sub-s.* (1). (*Williams* v. *Atlantic Assurance Company.* App. Ct.) 334

SUBJECTS OF CASES.

PAGE

10. *Against total loss—Running down clause with cross liabilities principle included in policy—Reinsurance against total loss only—Collision—Payment by insurers and reinsurer as for total loss—Both vessels equally to blame—Payment by owner of insured ship on basis of single liabiltiy—Payment by insurers under running down clause on basis of cross liabilities, as agreed—Claim by reinsurer from insurers on account of notional sum received by insurers—Alleged subrogation.* (*Young* v. *Merchants' Marine Insurance Company Limited.* App. Ct.) 341
11. *Principal and agent—Claim for indemnity—Contract of reinsurance—No policy issued to reinsurers—Stamp Act* 1891 (54 *&* 55 *Vict.*, c. 39), *s.* 93, *sub-ss.* (1) *and* (3)—*Marine Insurance Act* 1906 (6 *Edw.* 7, *c.* 41), *ss.* 22 *and* 23. *Motor Union Insurance Company Limited* v. *Mannheimer Versicherungs Gessellschaft.* Goddard, J.) 345
12. *Conflict of laws—Local situation of debt—Enemy property—Marine insurance—Doctrine of subrogation—Insurer's rights vested in Alien Property Custodian of United States—Claim to fund within jurisdiction of English court—Marine Insurance Act* 1906 (6 *Edw.* 7, *c.* 41), *s.* 79, *sub-s.* (1)—*Treaty of Peace Orders* 1919-1921, *s.* 1, *sub-s.* (*xvi.*). (*Sutherland* v. *Administrator of German Property.* Clauson, J.) 397
13. *Construction of policy — Goods intended for carriage on deck—Injury before loading—Deckload warranted free from particular average.* (*G. H. Renton and Company Limited* v. *Cornhill Insurance Company Limited.* Roche, J.) 407
14. *Charter-party—Ship chartered to go to Valparaiso and carry a cargo thence to Europe—Insurance of freight to be earned by carriage of the cargo—Stranding of ship on way to Valparaiso—Contemplated voyage abandoned—Claim under policy for loss of anticipated freight.* (*Carras* v. *London and Scottish Assurance Corporation Limited.* App. Ct.) 581
15. *Indemnity against liability to pay damages arising from collision—Collision with Admiralty tug through tug's negligence—Payment under contract for repairs to tug—No liability in tort—Policy not applicable.* (*Furness, Withy, and Co. Limited* v, *Duder.* Branson, J.) 623

See *General Average*, Nos. 4, 5.

16. "*Arranged total loss*"—*No actual claim—Settlement by agreement.* (*Bergens Dampskibs Assurance Forening* v. *Sun Insurance Office Limited.* Rowlatt, J) 172

MASTER'S DISBURSEMENTS AND WAGES.
See *Lien*, No. 1.

MISTAKE.
See *Sale of Goods*, No. 2.

MOORINGS.
See *Marine Insurance*, No. 4.

MORTGAGE.

Fishing vessel—Nets and fishing gear—Whether appropriated to the vessel at the date of mortgage so as to form part of mortgage security. (*The Mabel Vera ; The Humourous.* Bateson, J.) .. 373

See *Freight*, No. 1.

NARROW CHANNEL RULE.
See *Collision*, No. 24.

NAUTICAL ASSESSORS.
See *Collision*, No. 15.

NAVIGABLE CHANNEL.
See *Collision*, No. 14.

PAGE

NECESSARIES.
See *Freight*, No. 1 ; *Lien*, No. 1.

NEGLIGENCE.

1. *Collision—River Thames—Barge in tow of tug—Collision between barge and abutment of Cannon-street Railway Bridge—Damage to cargo—Action against owners of tug—Negligence by servants of owners of barge alleged by defendants—Onus of proof — Contract — Not liable for negligence — "Persons supplying tugs or barges to the company to enable it to fulfil its contracts shall incur no greater liability to company's customers than that of the company hereunder"—Negligence of a sub-contractor—Authority to contract upon terms that negligence shall be excepted—Action of tort against sub-contractor — Construction — London Lighterage Clause.* (*The Kite.* Langton, J.) 413
2. *Damage to ship lying alongside quay—Foul berth — Negligence — Respective duties of harbour authority having control of adjacent river bed and of occupiers of quay—Lease by harbour authority to wharfinger of premises abutting as to part only on to quayside—Right "to berth and moor vessels for the purpose of loading and discharging and taking in cargoes and goods on the said premises, and to use the mooring posts and the said quay for the like purposes"—Whether constituted "occupation" of quay—Breach by lessors of covenant to keep berth in good order and condition—Effect on shipowners' rights of master's knowledge of condition of berth—Indemnity against lessors for damage incurred by lessees—Remoteness of damage—Whether necessary to plead reliance on covenant—Damages to include solicitor and client costs. The Kate.* Sir Boyd Merriman, P.) 562

NETS, FISHING.
See *Mortgage*, No. 1.

NOVA SCOTIA.
See *Contract*, No. 1.

NUISANCE.
See *Collision*, No. 14.

OPEN POLICY ON GOODS.
See *Marine Insurance*, No. 9.

OPTIONAL CARGO.
See *Carriage of Goods*, No. 21.

PACKING, DEFECTIVE.
See *Carriage of Goods*, No. 2.

PARTICULAR AVERAGE.
See *Marine Insurance*, Nos. 3, 8, 13.

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

PHOTOGRAPHS.
See *Collision*, No. 13.

PILOTS.
See *Collision*, No. 24.

PIRACY.
See *Crown*, No. 1.

PORTLAND HARBOUR.
See *Collision*, No. 19.

PORT OF LONDON AUTHORITY.
See *Towage*, No. 1.

SUBJECTS OF CASES.

PAGE

PORT OF LONDON RIVER BYE-LAWS, 1914/1926.

BYE-LAWS 5, 6, see *Collision*, Nos. 3, 4; BYE-LAW 14, see *Collison*, Nos. 3, 6; BYE-LAW 28 (e), see *Collision*, No. 4.

PRACTICE.

1. *Taxation of costs—Limitation of liability—Reference—Average statement and adjusters' evidence used at reference as evidence of the claim of each cargo owner—Whether adjuster's charges recoverable on taxation.* (*The Normanstar.* Hill, J.) ... 53

2. *Fisherman—Agreement for share of profits of voyage—Extra payments by owners—Wages or money lent—Dispute between owners and fisherman—Jurisdiction of County Court to try action—Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *s.* 387. (*Sturley and others* v. *Powell.* Div. Ct.) 97

3. *Collision*—Lis alibi pendens—*Action in Scotland—Subsequent action in England by party who is defendant in action in Scotland in respect of the same subject matter—Application by defendant to stay proceedings in England—Discretion.* (*The London.* Langton, J.) 180

4. *Undertaking by solicitor to appear and put in bail—No writ issued—Vessel subsequently sold in other proceedings—Writ issued by party to whom undertaking given—Delay—Whether undertaking enforceable.* (*The Ring.* Bateson, J.) 238

5. *Service of writ—Foreign corporation—Agents in this country booking freight and selling passenger tickets—Remuneration by commission on bookings—Service on agent—Whether foreign corporation resident in this country—R.S.C., Order IX., r.* 8. (*Lalandia, The.* Langton, J.) 351

6. *Collision — Damages — Reference — Vouchers — Plaintiffs ordered to file vouchers within a limited time "otherwise they be precluded from giving evidence in support thereof"—Failure to file vouchers—No vouchers available—R.S.C., Order LVI., r.* 2. (*The Marte.* Langton, J.) 402

7. *Costs—Reference—Items disallowed—Defendants' costs of resisting items disallowed—No order of court—Discretion of taxing officer to order payment of such costs by the plaintiffs—R.S.C., Order LXV., r.* 27, *sub-rr.* 20, 29. (*The Edison* (*No.* 2) (a). App. Ct.) 486

8. *Costs—Taxation—Appeal and cross-appeal dismissed with costs—No apportionment in absence of special order.* (*The Stentor.* App. Ct.) 490

9. *Action* in rem *based on arbitration award for the refund of overpaid charter hire of one of the defendants' ships—Arrest,* ad fundandam jurisdictionem, *of another ship also belonging to the defendants but unconnected with the matter out of which the cause of action arose—Admiralty jurisdiction of county court—County Courts Admiralty Jurisdiction Amendment Act,* 1869 (32 *and* 33 *Vict. c.* 51), *s.* 2, *sub-s.* (1), *and s.* 3—*Whether claim on an award is a "claim arising out of any agreement made in relation to the use of hire of any ship—Whether action* in rem *maintainable against a* res *other than that to which the cause relates—History and present position of Admiralty jurisdiction generally.* (*The Beldis.* App. Ct.) 598

See *Marine Insurance*, No. 6.

PRINCIPAL AND AGENT.

See *Marine Insurance*, No. 11.

PRIORITIES.

See *Carriage of Goods*, No. 18; *Freight*, Nos. 1, 2, 3; *Lien*, No. 1.

PRIZE.

1. *Prize—International law—Enemy vessel captured and sunk whilst proceeding under safe conduct—Hungarian owners carrying on business at Fiume—Status of Fiume—"Nationals of former Kingdom of Hungary"—Treaty of Trianon, arts.* 53, 232. (*The Bathori.* Lord Merivale, P.) [*Affirmed.* See, infra, No. 2] 355

2. *Prize—International law—Enemy vessel captured and sunk whilst proceeding under safe conduct—Hungarian owners carrying on business at Fiume—Status of Fiume—"Nationals of former Kingdom of Hungary"—Treaty of Trianon, arts.* 53, 232. (*The Bathori. P. C.*) 458

PROOF, ONUS OF

See *Carriage of Goods*, Nos. 18, 22; *Collision*, No. 28; *Negligence*, No. 1.

PROPERTY CUSTODIAN OF UNITED STATES.

See *Marine Insurance*, No. 12.

PUBLIC POLICY.

See *Salvage*, No. 3.

QUEBEC.

See *Carriage of Goods*, No. 30.

REFERENCE.

See *Practice*, Nos. 1, 6, 7.

REGULATIONS FOR PREVENTING COLLISIONS AT SEA.

ART. 1: See *Collision*, Nos. 8, 11; ART. 2: See *Collision*, No. 11; ART. 12: See *Collision*, Nos. 7, 8; ART 15 (b): See *Collision*, No. 25; ART. 16: See *Collision*, Nos. 15, 25, 26; ART. 18: See *Collision*, Nos. 9, 22; ART. 19: See *Collision*, Nos. 12, 22; ART. 21: See *Collision*, Nos. 22, 24; ART. 21 (note): See *Collision*, Nos. 12, 23; ART. 25: See *Collision*, Nos. 24, 29.

REGULATIONS RELATING TO THE NAVIGATION OF THE RIVER SCHELDT 1926, ART. 40, r. 3.

See *Collision*, No. 10.

REINSURANCE—CONTRACT OF,

See *Marine Insurance*, No. 11.

REJECTION OF GOODS.

See *Sale of Goods*, No. 1.

REMOTENESS OF DAMAGE.

See *Negligence*, No. 2.

REPAIRS.

See *Bailment*, No. 1; *Collision*, Nos. 21, 27; *General Average*, No. 3.

REQUISITIONED SHIP.

See *Collision*, No. 1; *Marine Insurance*, No. 1.

RESTRAINT.

See *Marine Insurance*, No. 3.

RIDING LIGHTS.

See *Collision*, Nos. 3, 6.

RIVER SCHELDT.

See *Collision*, No. 10.

RIVER THAMES.

See *Collision*, No. 4; *Negligence*, No. 1.

RULES OF SUPREME COURT.

ORDER IX., R. 8: See *Practice*, No. 5; ORDER XXVIII., R. 11: See *Collision*, No. 1; ORDER LXV., R. 1: See *Collision*, No. 2; R. 27, SUB-RR. 20, 29: See *Practice*, No. 7; ORDER LVI., R. 2: See *Practice*, No. 6.

RUNNING DOWN CLAUSE.

See *Marine Insurance*, No. 10.

SUBJECTS OF CASES.

PAGE

SAFE CONDUCT.

See *International Law*, Nos. 1, 2.

SALE OF GOODS.

1. *Conditions in contract—Provision against rejection of goods specified—Goods to be carried "under deck"—Portion carried as deck cargo—Buyers' right to reject.* (*White Sea Timber Trust Limited* v. *W. W. North Limited.* MacKinnon, J.) 367
2. *Shipment from foreign port—Notice of appropriation—Mistake.* (*Grain Union Company, S/A Antwerp* v. *A/S Hans Larsen, Aalborg.* Branson, J.) 449

SALVAGE.

1. *Value of salved property—Time charter-party—Appraisement—Whether value of future earnings under charter-party to be included.* (*The Castor.* Lord Merrivale, P.) 312
2. *Vessel going to assistance of other ship in icefield in response S O S—Damaged in so doing—Request to stand by not complied with—Advice given by wireless as to best course to clear icefield—Advice acknowledged and successfully acted upon—Whether services amounted to salvage—Merchant Shipping (Safety and Load Line Conventions) Act, 1932 (22 & 23 Geo. 5, c. 9), s. 26, sub-ss. (1) and (7)—Maritime Conventions Act 1911 (1 & 2 Geo. 5, c. 57), s. 6, sub-s. (2)—Award.* (*The Tower Bridge.* Sir Boyd Merriman, P.) 594
3. *Agreement to pay salvage for services rendered by His Majesty's ships—Public policy—Contracting out of statutory provisions—Validity of agreement—Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), s. 557, sub-s. (1)—Merchant Shipping (Salvage) Act 1916 (6 & 7 Geo. 5, c. 41), s. 1.* (*Admiralty Commissioners* v. *Owners of the M/V Valverda.* Branson, J.) 620

"SCANFIN" CHARTER-PARTY.

See *Carriage of Goods*, No. 10.

SEAMEN.

1. *Complaint—"Combine together to neglect duty"—No entry of alleged offence in official log-book—Whether condition precedent to hearing—Discretion of justices—Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), ss. 225, 228, 239, and 240.* (*Patterson* v. *Robinson and Ords.* K. B. Div. Ct.) 35

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

SEAWORTHINESS.

See *Carriage of Goods*, Nos. 6, 15.

SHIPOWNERS, LIABILITY OF.

See *Carriage of Goods*, No. 4; *Limitation of Liability*.

"SHIP OR GOODS LOST OR NOT LOST."

See *Carriage of Goods*, No. 6.

SHIP'S PAPERS.

See *Marine Insurance*, No. 6.

SHORT DELIVERY, CLAIM FOR.

See *Carriage of Goods*, No. 15.

SIDE LIGHTS.

See *Collision*, No. 22.

SLIP.

See *Marine Insurance*, No. 3.

SOLICITOR AND CLIENT COSTS.

See *Negligence*, No. 2.

SPACE, MEASUREMENT OF.

See *Carriage of Goods*, No. 7.

PAGE

"STAND-ON" SHIP.

See *Collision*, Nos. 9, 12, 23, 24.

STATUTES.

1861.

24 Vict. c. 10 (Admiralty Court).
Sect. 2: See *Jurisdiction*, No. 2.

1867.

30 & 31 Vict. c. 3 (British North America).
Sect. 91: See *Constitutional Law.*

1868.

31 & 32 Vict. c. 71 (County Courts Admiralt Jurisdiction).
Sect. 3: See *Jurisdiction*, No. 2.

1869.

32 & 33 Vict. c. 51 (County Courts Admiralty Jurisdiction Amendment).
Sect. 4: See *Jurisdiction*, No. 2.

1869.

32 & 33 Vict. c. 51 (County Courts Admiralty Jurisdiction Amendment).
Sect. 2, sub-sect. (1); sect. 3: See *Practice*, No. 9.

1891.

54 & 55 Vict. c. 39 (Stamp).
Sect. 93, sub-sects. (1) and (3): See *Marine Insurance*, No. 11.

1894.

57 & 58 Vict. c. 60 (Merchant Shipping).
Sect. 77, sub-sects. (1), (2); sect. 85, sub-sects. (1), (3): See *Carriage of Goods by Sea*, No. 7; Sects. 225, 228, 239, 240: See *Seaman*, No. 1; Sect. 237, Sub-sect. (1): See *Jurisdiction*, No. 3; Sect. 502, See *General Average*, Nos. 2, 5; Sect. 557, Sub-sect. (1): See *Salvage*, No. 3; Sects. 684, 686: See *Jurisdiction*, No. 3.

1898.

61 & 62 Vict. c. 44 (Merchant Shipping (Mercantile Marine Fund).
Sect. 5 and Sched. II: See *Light Dues*, No. 1.

1900.

63 & 64 Vict. c. 32 (Merchant Shipping (Liability of Shipowners and others).
See *Limitation of Liability*, No. 2.

1901.

1 Edw. 7, c. 22 (Factory and Workshops).
Sects. 79, 85: See *Fencing of Hatches*, No. 1.

1906.

6 Edw. 7, c. 41 (Marine Insurance).
Sched. I., r. 15: See *Marine Insurance*, No. 4.

1906.

6 Edw. 7, c. 41 (Marine Insurance).
Sect. 79, Sub-sect. (1): See *Marine Insurance*, No. 12.

1906.

6 Edw. 7, c. 41 (Marine Insurance).
Sect. 66, Sub-sect. (4): See *General Average*, No. 4.

1906.

6 Edw. 7, c. 41 (Marine Insurance).
Sect. 66: See *General Average*, No. 3.

1906.

6 Edw. 7, c. 41 (Marine Insurance).
Sects. 22, 23: See *Marine Insurance*, No. 11.

1906.

6 Edw. 7, c. 41 (Marine Insurance).
Sects. 15, 16, 50, Sub-sect. (2): See *Marine Insurance*, No. 9.

1909.

9 Edw. 7, c. 49 (Assurance Companies).
Sect. 28, Sub-sect. (3): See *Marine Insurance*, No. 7.

1911.

1 & 2 Geo. 5, c. 57 (Maritime Conventions).
Sect. 6, Sub-sect. (2): See *Salvage*, No. 2.

1916.

6 & 7 Geo. 5, c. 41 (Merchant Shipping (Salvage).
Sect. 1: See *Salvage*, No. 3.

SUBJECTS OF CASES.

PAGE

1924.
14 & 15 Geo. 5, c. 22 (Carriage of Goods by Sea).
Sched., Art. IV., 2 (c), (n), (q): See *Carriage of Goods*, No. 2.

1924.
14 & 15 Geo. 5, c. 22 (Carriage of Goods by Sea).
Sched., Art. III., rr. 3, 4, Art. IV., r. 2 (m) (n).: See *Carriage of Goods*, No. 4.

1924.
14 & 15 Geo. 5, c. 22 (Carriage of Goods by Sea).
Sched., Rules relating to Bills of Lading, Art. IV., rr. 2, 4: See *Carriage of Goods*, Nos. 9, 13.

1925.
15 & 16 Geo. 5, c. 84 (Workmen's Compensation).
Sect. 1: See *Workmen's Compensation*, No. 1.

1925.
15 & 16 Geo. 5, c. 49 (Supreme Court of Judicature (Consolidation).
Sect. 22, Sub-s. (1) (a), (iii.), (iv.), ; Sect. 33, Sub-s. (2). See *Jurisdiction*, No. 1.

1925.
15 & 16 Geo., 5, c. 42 (Merchant Shipping (International Labour Conventions).
Sect. 1, Sub-s. (1): See *Wages*, No. 3.

1925.
15 & 16 Geo. 5, c. 42 (Merchant Shipping (International Labour Conventions).
See *Wages*, No. 2.

1925.
15 & 16 Geo. 5, c. 42 (Merchant Shipping (International Labour Conventions).
See *Wages*, No. 1.

1925.
15 Geo. 5, c. 20 (Law of Property).
Sect. 136: See *Freight*, Nos. 1, 2, 3.

1925.
15 & 16 Geo. 5, c. 49 (Law of Property).
Sect. 136, Sub-sect. (1): See *Marine Insurance*, No. 9.

1925.
15 & 16 Geo. 5, c. 49 (Judicature Consolidation).
Sect. 22: See *Carriage of Goods*, No. 8; *Collision*, No. 7.

1928.
18 & 19 Geo. 5, c. 26 (Administration of Justice).
Sect. 6: See *Carriage of Goods*, No. 8.

1930.
20 & 21 Geo. 5, c. 25 (Third Parties (Rights against Insurers).
Sect. 1, Sub-sect. (1): See *Insurance*, No. 1.

1932.
22 & 23 Geo. 5, c. 9 (Merchant Shipping (Safety and Load Line Conventions).
Sect. 6, Sub-sects. (1) and (7): See *Salvage*, No. 2.

DOMINION STATUTES.

Canada.
1910.
9 & 10 Edw. 7, c. 61, R.S.C. (Canadian Water Carriage of Goods).
See *Carriage of Goods*, No. 31.

COLONIAL STATUTES.

1927.
Railway Act (R.S. Can., 1927, c. 170).
Sects. 3, 245, 248; See *Collision*, No. 14.

COLONIAL STATUTES.

1928.
18 & 19 Geo. 5, c. 16 (Customs Act (R.S. Can. 1927, c. 42, as amended).
Sects. 151, 207: See *Constitutional Law*.

PALESTINE.

1926.
Government of Palestine Carriage of Goods by Sea, Ordinance No. 43 of 1926.
See *Carriage of Goods*, No. 17.

PAGE

STATUTORY RULES AND ORDERS.

1925, No. 231.
Reg. 34: See *Fencing of Hatches*, No. 1.
1931, No. 176 (Portland Dockyard).
Reg. 5., Sched. 11: See *Collision*, No. 19.

STATUTORY PROVISIONS, CONTRACTING OUT OF.
See *Salvage*, No. 3.

STEERING GEAR, BREAKDOWN OF.
See *Marine Insurance*, No. 1.

STEVEDORES.
See *Carriage of Goods*, No. 1; *Freight*, No. 1.

STOWAWAY.
See *Jurisdiction*, No. 3.

STRANDING.
See *Carriage of Goods*, No. 30; *General Average*, No. 7 *Marine Insurance*, No. 14.

SUB-CONTRACTOR.
See *Negligence*, No. 1.

SUB-ROGATION.
See *Marine Insurance*, Nos. 10, 12.

SUEZ CANAL REGULATIONS.
See *Collision*, No. 28.

TAXATION.
See *Practice* Nos. 1, 7, 8.

TENDER.
See *Conflict of Laws*, Nos. 2, 4.

THAMES ESTUARY.
See *Collision*, No. 24.

THIRD-PARTY INSURANCE.
See *Insurance*, No. 1.

TIME CHARTER-PARTY.
See *Collision*, No. 5; *Marine Insurance*, No 9; *Salvage*, No. 1.

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

TOTAL LOSS OF SHIP.
See *General Average*, No. 4; *Marine Insurance*, No. 5.

TOWAGE.

1. *Contract—Port of London Authority—Vessel in tow of Authority's tugs—Damage by striking dock walls—Negligence of Authority's signalman—Towage conditions—Indemnity—Damage arising "in the course of and in connection with the towage or transport."* (*The Carlton.* Bateson, J.)........ 240
2. *Collision—Towage contract—United Kingdom Standard Towage Conditions, clauses 1 and 3—"Whilst towing"—Meaning of "tug is in a position to receive orders direct from the hirer's vessel to pick up ropes or lines."* (*The Uranienborg.* Sir Boyd Merriman, P.)..................... 591

TRANSHIP, LIBERTY TO.
See *Carriage of Goods*, No. 35.

TRANSIT.
See *Marine Insurance*, No. 7.

TREATY OF PEACE ORDERS 1919–1921, s. 1 sub-s. (xvi.).
See *Marine Insurance* No. 12.

SUBJECTS OF CASES.

PAGE

TREATY OF TRIANON, ARTS. 53, 232.
See *International Law*, No. 2.

"TRIAL TRIP."
See *Carriage of Goods*, No. 9.

TURPENTINE, SHIPMENT OF.
See *Marine Insurance*, No. 2.

UNDERTAKING, SOLICITORS'.
See *Practice*, No. 4.

UNITED KINGDOM STANDARD TOWAGE CONDITIONS, CLAUSES 1 AND 3.
See *Towage*, No. 2.

UNSEAWORTHINESS.
See *Carriage of Goods*, Nos. 3, 30, 36; *General Average*, Nos. 1, 2–5.

VOUCHERS.
See *Practice*, No. 6.

VOYAGE ABANDONED.
See *General Average*, No. 4.

VOYAGE CHARTER.
See *General Average*, No. 3.

WAGES.

1. *Seamen—Wreck—Right to receive wages during period of two months from the date of the wreck if unemployed—Voyage terminating within the period of two months—Payment of wages whilst unemployed during period subsequent to date when voyage was due to end—Merchant Shipping (International Labour Conventions) Act* 1925 (15 & 16 *Geo.* 5, c. 42). (*The Croxteth Hall; The Celtic.* App. Ct.) [*Affirmed.* See No. 2, infra] 121
2. *Seamen—Wreck—Right to receive wages during period of two months from the date of the wreck if unemployed—Voyage terminating within the period of two months—Payment of wages whilst unemployed during period subsequent to date when voyage was due to end—Merchant Shipping (International Labour Conventions) Act* 1925 (15 & 16 *Geo.* 5, c. 42). (*The Croxteth Hall; The Celtic.* H. of L.) 184
3. *Seamen—Wreck—Trawler disabled by collision—Vessel fourteen days under repair—Seaman engaged on six months' agreement paid off until repairs completed—Claim for wages—Whether service terminated by wreck—Merchant Shipping (International Labour Conventions) Act* 1925 (15 & 16 *Geo.* 5, c. 42), *s.* 1, *sub-s.* (1). (*Barras* v. *Aberdeen Steam Trawling and Fishing Company Limited.* H. of L.) 384

"WAREHOUSE TO WAREHOUSE" CLAUSE.
See *Marine Insurance*, No. 6.

WAR RISK.
See *Collision*, No. 1.

WARLIKE OPERATION.
See *Collision*, No. 1; *Marine Insurance*, No. 1.

WARRANTY.
See *Carriage of Goods*, No. 3.

WEIGHT OF CARGO.
See *Carriage of Goods*, No. 14.

WORDS.

"ABOUT TO ENTER" (Order, 1931, No. 176, reg. 5, Sched. II.).
See *Collision*, No. 19.

"ACCIDENT TO HULL" (Charter-party).
See *Carriage of Goods*, No. 15.

PAGE

"AGAINST WHICH WE HAVE MADE PAYMENTS" (Letter).
See *Freight*, Nos. 1, 2, 3.

"AMOUNT OF ACTUAL TIME SO LOST" (Charter-party).
See *Carriage of Goods*, No. 25.

"ANY REASONABLE DEVIATION" (Bill of Lading).
See *Carriage of Goods*, Nos. 9, 13.

"ARRANGED TOTAL LOSS" (Insurance Policy).
See *Marine Insurance*, No. 16.

"ASCERTAINED" (Regulations for Preventing Collisions at Sea, art. 16).
See *Collision*, No. 26.

"BILLS OF LADING SHALL BE CONCLUSIVE EVIDENCE AS AGAINST THE OWNERS AS ESTABLISHING THE AGGREGATE NUMBER OF PIECES DELIVERED TO THE STEAMER" (Charter-party).
See *Carriage of Goods*, No. 34.

"BODY TACKLE, APPAREL, ORDNANCE . . . BOAT AND OTHER FURNITURE" (Policy of Insurance).
See *Marine Insurance*, No. 4.

"BUNKERING OR OTHER PURPOSES" (Bill of Lading).
See *Carriage of Goods*, Nos. 9, 13.

"TO BE DELIVERED IN LIKE GOOD ORDER AND CONDITION" (Chamber of Shipping British North American (Atlantic) Wood Charter-party, 1914).
See *Carriage of Goods*, No. 34.

"CHARTERER'S RISK" (Charter-party).
See *Carriage of Goods*, No. 15.

"CLAIM ARISING OUT OF ANY AGREEMENT MADE IN RELATION TO THE USE OF HIRE OF ANY SHIP" (County Courts Admiralty Jurisdiction Amendment Act 1869, s. 2, sub-s. (1)).
See *Practice*, No. 9.

"COMBINE TOGETHER TO NEGLECT DUTY" (Merchant Shipping Act 1894, s. 225 (*e*)).
See *Seamen*, No. 1.

"DAMAGE DONE BY A SHIP" (Supreme Court of Judicature Consolidation Act 1925, s. 22, sub-s. (1), (*a*) (iv.)).
See *Collision*, No. 17; *Jurisdiction*, No. 1.

"DAMAGE RECEIVED BY A SHIP" (Supreme Court of Judicature Consolidation Act 1925, s. 22, sub-s. (1) (*a*) (iii.)).
See *Jurisdiction*, No. 1.

"ENABLING SHIP TO LEAVE PORT" (Charter-party).
See *Carriage of Goods*, Nos. 19, 23.

"EXTRAORDINARY SACRIFICE . . . INTENTIONALLY AND REASONABLY MADE" (York/Antwerp Rules 1924, Rule A).
See *General Average*, No. 6.

"HOLIDAY" (Charter-party).
See *Carriage of Goods*, No. 28.

"IF CUSTOMARY AND AVAILABLE" (Charter-party).
See *Carriage of Goods*, No. 10.

"IN THE COURSE OF AND IN CONNECTION WITH THE TOWAGE OR TRANSPORT" (Towage Contract).
See *Towage*, No. 1

"NATIONALS OF FORMER KINGDOM OF HUNGARY" (Treaty of Trianon, art. 232).
See *International Law*, Nos. 1, 2.

"OWING TO WORK BEING IMPOSSIBLE" (Dancon Charter-party).
See *Carriage of Goods*, No. 25.

SUBJECTS OF CASES.

PAGE

"PERSONS SUPPLYING TUGS OR BARGES TO THE COMPANY TO ENABLE IT TO FULFIL ITS CONTRACT SHALL INCUR NO GREATER LIABILITY TO COMPANY'S CUSTOMERS THAN THAT OF THE COMPANY HEREUNDER" (Contract).
See *Negligence*, No. 1.

"STRANDING" (York/Antwerp Rules 1924, r. 5).
See *General Average*, No. 6.

RIGHT "TO BERTH AND MOOR VESSELS FOR THE PURPOSE OF LOADING AND DISCHARGING AND TAKING IN CARGOES AND GOODS ON THE SAID PREMISES AND TO USE THE MOORING POSTS AND THE SAID QUAY FOR THE LIKE PURPOSES" (Lease).
See *Negligence*, No. 2.

"THROUGH RAIN" (Dancon Charter-party).
See *Carriage of Goods*, No. 25.

"TIME LOST WHILST STEAMER IS IN LOADING BERTH" (Dancon Charter-party).
See *Carriage of Goods*, No. 25.

"TRIAL TRIP" (Bill of Lading).
See *Carriage of Goods*, No. 13.

"TUG IS IN A POSITION TO RECEIVE ORDERS DIRECT FROM THE HIRER'S VESSEL TO PICK UP ROPES OR LINES" (Towage Contract).
See *Towage*, No. 2.

"UNDER DECK" (Contract).
See *Sale of Goods*, No. 1.

"UPON ANY CHARGES OF ASSURED UPON SAID CARGO" (Policy).
See *Marine Insurance*, No. 5.

"WEATHER WORKING DAY" (Charter-party).
See *Carriage of Goods*, No. 16.

"WHEREVER SIGNED TO BE CONSTRUED IN ACCORDANCE WITH THE ENGLISH LAW" (Bill of lading).
See *Carriage of Goods*, No. 17.

"WHILST TOWING" (United Kingdom Standard Towage Conditions, clause 1).
See *Towage*, No. 2.

PAGE

"WITHIN THE AREA OVER WHICH SUCH DOCK . . . AUTHORITY PERFORMS ANY DUTY OR EXERCISES ANY POWER" (Merchant Shipping (Liability of Shipowners and others) Act 1900).
See *Limitation of Liability*, No. 2.

"WORK DONE BY THE VESSEL AT THE PORT OF DISCHARGE" (Charter-party).
See *Carriage of Goods*, No. 1.

WORKMEN'S COMPENSATION.

Accident—Arising out of and in the course of the employment—Workman employed on a ship as coal trimmer—Leaving the ship in the wrong way—Not outside employment—Workmen's Compensation Act 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 1. (*Dixon* v. *Steamship Ayresome* (*Owners*). App. Ct.)............ 115

WINCHES.
See *Accident*, No. 1.

WRECK.
See *Collision*, No. 17 ; *Wages*, Nos. 1, 2.

WRIT, SERVICE OF.
See *Practice*, No. 5.

YORK–ANTWERP RULES 1890.
See *General Average*, No. 4.

YORK–ANTWERP RULES, RR. C, X (*d*), XI, XVIII.
See *General Average*, No. 4.

YORK–ANTWERP RULES 1924.
See *General Average*, No. 1.

YORK–ANTWERP RULES, 1924, R. D.
See *General Average*, No. 2.

YORK–ANTWERP RULES, 1924, RR. A, E, AND R. 5.
See *General Average*, No. 6.

YORK AND ANTWERP RULES 1924, R. D.
See *General Average*, No. 5.

Printed in Great Britain by HUDSON & KEARNS LTD., Hatfield Street Works, Stamford Street, S.E. 1, and Published by THE FIELD PRESS (1930) LTD., The Field House, Bream's Buildings, London, E.C.4.

REPORTS

OF

Cases Argued before and Determined by the Superior Courts

RELATING TO

MARITIME LAW.

House of Lords.

Feb. 19, 21, *and April* 16, 1929.

(Before Lords Hailsham, L.C., Sumner, Buckmaster, Blanesburgh and Warrington.)

Clan Line Steamers Limited v. The Board of Trade. (*a*)

On appeal from the Court of Appeal in England.

Requisitioned ship — Charter-party T.99 — Loss due to warlike operation taken by Government —Marine risks by owners—Collision due to breakdown of steering gear—Not a consequence of warlike operation—Marine risk.

The claimants were the owners of the steamship Clan M., *which, during the war, was requisitioned by the Government under the terms of the charter-party T.99. By the terms of this charter-party the Government was responsible for loss or damage due to a warlike operation, and the owners were responsible for ordinary marine risks. While the vessel was proceeding in a convoy from the United States to France she suddenly left her course owing to a defect in her steering gear, which was never explained, came into collision with the* W. F., *another ship in the convoy, and sank. At the time of the collision the* Clan M. *carried a cargo the greater part (amounting to* 84 *per cent. of the whole cargo) of which consisted of cereals intended for the civil population. A small quantity of the cereals was intended for the troops, and there was also in the cargo a quantity of steel billets intended for the manufacture of shells. The* W. F. *was carrying war supplies, and it was admitted that that ship was engaged in a warlike operation at the time of the accident. The owners claimed compensation on the ground that the loss of the ship was due to a warlike operation. The Crown contended that the loss was not due to a warlike operation but to a marine risk. The arbitrator found that the sinking of the* Clan M. *was proximately caused by the impact of the* W. F. *moving in the course of a warlike operation which she was then carrying out, and that the sheering of the ship to port was not the real or proximate cause of her loss within the meaning of the charter-party. He, therefore, awarded in favour of the claimants.*

Held, that the loss was not a consequence of warlike operations. The collision was due solely to the breakdown of the steering gear of the claimant's vessel. From the moment that that breakdown occurred nothing which could be done by those in charge of either vessel could prevent the collision. That breakdown was the real and proximate cause of the loss.

Decision of the Court of Appeal (17 *Asp. Mar. Law Cas.* 533 ; 140 *L. T. Rep.* 33 ; (1928) 2 *K. B.* 557) *affirmed.*

Appeal from a decision of the Court of Appeal (Scrutton and Lawrence, L.JJ., Greer, L.J. dissenting), reported 17 Asp. Mar. Law Cas. 533 ; 140 L. T. Rep. 33 ; (1928) 2 K. B. 557, on an award stated in the form of a special case.

The question raised by the special case and by the appeal was whether the loss of a requisitioned vessel during the war was the consequence of a warlike operation.

The claimants, the Clan Line Steamers Limited, were the owners of the steamship *Clan Matheson*, which was a cargo vessel, built in 1917. The *Clan Matheson* was requisitioned by the British Government on the 28th Sept. 1917, while the war was still in progress, on the terms of the charter-party known as charter-party T.99, under which the shipowners remained liable for loss by ordinary marine risks, under clause 18 of the charter-party, while the Government, under clause 19, undertook liability for loss from all consequences of hostilities or warlike operations.

Clause 18 provided that " The Admiralty shall not be held liable if the steamer shall be lost, wrecked, driven on shore, injured or rendered incapable of service by or in consequence of dangers of the sea or tempest,

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

collision, fire, accident, stress of weather or any other cause arising as a sea risk."

By clause 19 the risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following, or similar, but not more extensive clause. "Warranted free of capture, seizure or detention and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after the declaration of war. Such risks are taken by the Admiralty on the ascertained value of the steamer, if she be totally lost, at the time of such loss."

In May 1918 the *Clan Matheson* sailed in convoy from New York with about forty vessels escorted by cruisers for Europe. The convoy sailed in columns; the *Clan Matheson* was the third ship in the second column from the port hand, and the steamship *Western Front* was in the corresponding position in the port column. The convoy sailed without lights On the night of the 22nd–23rd May, the steering gear of the *Clan Matheson* broke down, and she sheered out of her line across the bows of the *Western Front*, which rammed and sank her. The *Clan Matheson* carried a cargo of which only 16 per cent. was for military purposes, and was bound for Nantes, a war base as well as a commercial port. The *Western Front* was carrying a cargo made up entirely of war supplies for St. Nazaire, a war base. The claimants pleaded that at the time of the collision both vessels were engaged upon and were carrying out a warlike operation within the meaning of clause 19 of the charter-party, and that the loss was a consequence of warlike operations. The respondents admitted that the *Western Front* was engaged upon and carrying out a warlike operation but denied that the *Clan Matheson* was so engaged, or that the loss was in consequence of a warlike operation. The value of the vessel was agreed at the sum of 265,000*l*. Subject to the opinion of the court, the arbitrator held in favour of the claimants upon the ground that there was no negligence on the part of either vessel, and that the loss was a consequence of warlike operations within the meaning of clause 19 of the charter-party T.99. In the Court of Appeal it was held, affirming the decision of Wright, J., by Scrutton, L.J. and Lawrence, L.J., Greer, L.J. dissenting, that the loss was not the consequence of a warlike operation.

The claimants appealed.

W. A. Jowitt, K.C., *G. P. Langton*, K.C., *A. T. James*, K.C., and *J. MacMillan* for the appellants.

Sir *Thomas Inskip*, K.C. (A.-G.), *W. Norman Raeburn*, K.C., and *Russell Davies* for the Crown.

The House took time for consideration.

Lord HAILSHAM, L.C.—This is an appeal from an order of the Court of Appeal affirming the decision of the King's Bench Division upon an award stated in the form of a special case; the question which arises for determination is whether upon the facts as found by the arbitrator the respondents are liable to pay to the appellants a sum of 265,000*l*., representing the value of a steamship known as the *Clan Matheson* at the date of her loss in May 1918. The appellants were at all material dates the owners of the *Clan Matheson*, which was requisitioned by letters dated the 28th Sept. 1917, upon the terms of a charter-party known as "T. 99."

By clause 18 of the charter-party it was provided as follows: "The Admiralty shall not be held liable if the steamer shall be lost, wrecked . . . by, or in consequence of, collision . . . or any other cause arising as a sea risk." Clause 19 of the charter-party provided: "The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary insurance policy of marine insurance by the following but not more extensive clause:—'Warranted free of capture, seizure, or detention and the consequences thereof . . . and also from all consequence of hostilities or warlike operations. . . . '"

On the 17th May 1918, whilst the *Clan Matheson* was still under requisition upon the terms of the charter-party she sailed from New York in convoy. She was bound for Nantes and her cargo consisted as to 84 per cent. of stores intended for the civil commissariat and as to 16 per cent. for the military authorities.

The convoy sailed in columns; the *Clan Matheson* was the third ship in the second column from the port hand; the regulation distance between each ship in the same column was 400yds. and the regulation distance between the columns was 800yds.; the corresponding ship in the port column was a vessel called the *Western Front*, which was under charter to the Government of the United States of America and was bound for St. Nazaire with a cargo made up entirely of war supplies for that Government; St. Nazaire was a war base.

On the night of the 22nd-23rd May 1918 the convoy was proceeding at a speed of from nine to nine-and-a-half knots; there was a rough sea; the convoy was sailing without lights, but it was a moonlight night, visibility was good and every vessel in the convoy could easily be seen. About 1 a.m. the second officer of the *Clan Matheson*, who was then on watch, noticed that the ship ahead of him in his column was on his starboard bow. He ordered the quartermaster to port the helm, but found that the ship did not respond. He repeated the order, and then went to the helm and found the wheel hard a-port. He suspected that something in the steering gear had suddenly given way, and he called the captain and the chief engineer. The engines were put astern and attempts were made to adjust the steering gear, but meanwhile the *Clan Matheson* swung right across the bows of the *Western Front*,

which struck her amidships and approximately at right angles. The *Clan Matheson* sank within two hours and became a total loss; the time which elapsed between the moment when the second officer first noticed that the *Clan Matheson* was out of her course and the moment of the collision was estimated by him at from two-and-a-half minutes to four minutes, and this seems on the data given to be an outside estimate. It was admitted on the pleadings that the *Western Front* was engaged upon a warlike operation; it was contended before the arbitrator that the *Clan Matheson* was also engaged upon a warlike operation; the arbitrator negatived this contention, and though the appellants challenged this finding in the court below, at your Lordships' bar it was conceded that the finding was one of fact and that there was material to support it and the contention was abandoned. There was no express finding upon the question whether there was negligence in the navigation of the *Western Front*; but in the courts below counsel for the appellants admitted that negligence on the part of those in charge of the *Western Front* could not be suggested—that is to say, in the language of the learned judge, "The *Western Front* could not avoid striking the *Clan Matheson* as she did when the *Clan Matheson* swung out of her course and across the bows of the *Western Front*." The arbitrator held that there was no negligence on the part of the appellants or in those in charge of the *Clan Matheson*, and he found "that immediately before the collision the steering gear of the *Clan Matheson* broke down and failed to operate, and that by reason thereof the said vessel sheered to port and across the course of the *Western Front*."

So far as appears, there was no suggestion at the time of the accident that the Admiralty was under any liability in respect thereof; but on the 11th Aug. 1926, encouraged apparently by their reading of certain decisions in your Lordships' House, the appellants by their solicitors wrote a letter to the respondents alleging that at the date of the collision the *Clan Matheson* was upon a warlike operation, and that there was therefore a claim upon those bearing the war risk insurance under the charter-party.

The claim was referred to the sole arbitration of Mr. Claughton Scott, from whose award I have extracted the findings of fact to which I have called your Lordships' attention. The learned arbitrator held upon these findings that the loss of the *Clan Matheson* was a consequence of warlike operations within the meaning of clause 19 of the charter-party, and consequently that the respondents were liable; and he stated his award in the form of a special case. The special case was argued before Wright, J., and he reversed the decision of the arbitrator. From that judgment the appellants appealed to the Court of Appeal, and by a majority (Scrutton, L.J. and Lawrence L.J., Greer, L.J. dissenting) that court upheld the decision of the judge and dismissed the appeal; from this decision the present appeal is brought.

In order to decide the question raised in the appeal it is necessary to refer to certain decisions which have already been given in this House upon the construction to be placed upon these two clauses in the charter-party. In the case of *The Petersham; Britain Steamship Company Limited* v. *The King* (15 Asp. Mar. Law Cas. 58; 123 L. T. Rep. 721; (1921) 1 A. C. 99) it was held that sailing without lights is not a warlike operation. In the case of *The Matiana; Green* v. *British India Steam Navigation Company Limited; British India Steam Navigation Company Limited* v. *Liverpool and London War Risks Insurance Association Limited* (15 Asp. Mar. Law Cas. 58; 123 L. T. Rep. 721; (1921) 1 A. C. 99), which was heard and decided at the same time, it was held that sailing under convoy is not a warlike operation. In the cases of *The Ardgantock; Attorney-General* v. *Ard Coasters Limited* (15 Asp. Mar. Law Cas. 353; 125 L. T. Rep. 548; (1921) 2 A. C. 141) and of *The Richard de Larrinaga; Liverpool and London War Risks Insurance Association Limited* v. *Marine Underwriters of Steamship Richard de Larrinaga* (15 Asp. Mar. Law Cas. 353; 125 L. T. Rep. 548 (1921) 2 A. C. 141) it was held that if a warship carrying out her naval duties in time of war comes into collision with a merchant vessel without any negligence on the part of those in charge of either the warship or the merchant vessel, the resultant damage to the merchant vessel is a consequence of warlike operations. In the case of *Commonwealth Shipping Representative* v. *Peninsular and Oriental Branch Service; The Geelong* (16 Asp. Mar. Law Cas. 33; 128 L. T. Rep. 546; (1923) A. C. 191) it was held that a merchant vessel carrying war stores from one war base to another war base for the British Government in time of war was engaged upon a warlike operation and therefore in the same position as a war vessel. In the case of *The Warilda; Adelaide Steamship Company* v. *The King* (16 Asp. Mar. Law Cas. 178; 129 L. T. Rep. 161; (1923) A. C. 292) it was held that where a ship engaged on a warlike operation comes into collision with another vessel, the damage done to the former ship is none the less a consequence of a warlike operation because those in charge of that vessel have been guilty of negligence which brings about the collision. There is in addition a decision of the Court of Appeal in the case of *The Trevanion; Re Hain Steamship Company Limited* (*Owners of the Steamship Trevanion*) *and The Board of Trade* (17 Asp. Mar. Law Cas. 520; 139 L. T. Rep. 566; (1928) 2 K. B. 534), that if a collision occurs between a vessel engaged in a warlike operation and a merchant vessel owing to negligence in the navigation of both vessels the collision is none the less a consequence of warlike operations within clause 19 of the charter-party. Your Lordships were informed that this last decision is under appeal to your Lordships'

House; it is not necessary to express any opinion as to its correctness in order to determine the present case, and I do not propose to discuss it in this judgment.

Counsel for the appellants contended that these authorities established that a collision between a vessel engaged in a warlike operation and a merchant vessel is the consequence of a warlike operation where neither vessel is to blame; that it is none the less a consequence of a warlike operation if those in charge of the warship are to blame; that if the decision in *The Trevanion* be correct it is none the less the consequence of a warlike operation if those in charge of both vessels are to blame; and they asked your Lordships to say that the true principle was that wherever a collision occurred between a vessel engaged upon a warlike operation and another vessel, the damage resulting from that collision was the consequence of a warlike operation within the meaning of clause 19 of the charter-party. On the other hand, the Attorney-General argued that in the cases cited the warship was, as he expressed it, the aggressor; and he contended that in order to determine whether the loss fell within clause 18 or clause 19 of the charter-party, it was necessary to decide whether the collision was due to the action of the war vessel or to some other cause.

It is a well-settled principle of marine insurance law that *causa proxima non remota spectatur;* and it was expressly determined in the well-known case of *Ionides* v. *Universal Marine Insurance Company* (1 Mar. Law Cas. (O.S.) 353; 14 C. B. N. S. 259) that this maxim is applicable in cases in which the question to be decided is whether the loss is due to a marine risk or to a war risk. There is no doubt, therefore, that it must be applied in the present case. But in my opinion its application does not lead to the result for which the appellants contend. By the express terms of clause 18 of the charter-party, the Admiralty is not liable if the steamer be lost in consequence of a collision; while clause 19 excludes from these losses for which the Admiralty is not liable, collisions which are the consequence of warlike operations. This necessarily imposes upon the tribunal the duty of determining in the case of loss by collision whether or not that collision is the consequence of a warlike operation; and I have no doubt that in determining this question the proximate cause of the collision is the one which has to be looked at. But this does not mean that you must exclude from consideration everything which happened before the actual impact took place; the illustrations given by Erle, C.J. in his judgment in *The Ionides* case (*sup.*) are sufficient to establish that proposition. In the present case the facts found by the arbitrator show that the collision was due, and was due solely, to the breakdown of the steering-gear of the *Clan Matheson*. From the moment when that breakdown occurred nothing which could be done by those in charge of either vessel could prevent the collision, and in my opinion in law as well as in ordinary parlance, the collision was the consequence of that breakdown.

The conclusion which I have reached is supported by the high authority of Lord Sumner in *The Warilda* case (*sup.*), to which I have already referred. Lord Sumner says (16 Asp. Mar. Law Cas., at p. 182; 129 L. T. Rep., at p. 165; (1923) A. C., at p. 305): "When damage is done by two ships coming into collision, one being engaged in a warlike operation, and the other on an ordinary commercial voyage, the collision is a risk falling on the marine policy, unless it is taken out of it by being proved to be caused by warlike operations, and this proof fails, when it is shown to be caused by the action of the officer in charge of the commercial operation, all the more so if his action is negligent and blameworthy; but I think the result would be the same, if his action was only an error of judgment or wrong but excusable in what is called the agony of the moment, so long as it is his action that causes the collision effectively and proximately, for the ship engaged in the warlike operation may play a minor part, since it takes two to make a collision." It was contended that this passage was only an *obiter dictum* and that it should be overruled; but in my opinion it is an essential part of the reasoning upon which the judgment proceeds, and in any event I regard it as a correct statement of the law. I agree with the view taken by Wright, J. in his admirable judgment, and it follows that I am unable to accept the reasoning of Greer, L.J. in the Court of Appeal. It seems to me that the learned Lord Justice fails to give sufficient weight to the fact that from the moment when the steering-gear broke down the collision was inevitable, in view of the situation in which the *Clan Matheson* then found herself in relation to the *Western Front.*

In my opinion the order appealed from is correct, and I move your Lordships accordingly.

Lord Blanesburgh asks me to say that he concurs in this judgment.

Lord Sumner.—In a claim for indemnity made in the shipowner's name on charter-party T.99, the claimants must show that the loss was one (*a*) excluded from an ordinary marine risks policy by the specified F.C.S. clause, and (*b*) caused in the insurance sense of that term by a peril, which in this case is some warlike operation. The *Clan Matheson* foundered after being in collision with the *Western Front.* Foundering and collision are perils insured against under an ordinary marine policy. Before the collision the *Western Front* and the *Clan Matheson* were sailing together in convoy at night, the *Western Front* admittedly being, by reason of her cargo and her employment, herself engaged in the warlike operation of proceeding with munitions of war for the Government of the United States to a war base

in France, while, on the other hand, the *Clan Matheson* in herself admittedly was not so engaged, though it was argued, somewhat faintly, that she became so when she sailed in convoy. Your Lordships have already decided the contrary of this last contention, and any discussion of it is merely academic and in legal proceedings irrelevant. The appellants' case, therefore, is that the *Clan Matheson* was lost because the *Western Front*, in the course of her warlike operation, cut her down amidships in collision. On this it is necessary to examine the facts set out and the conclusions arrived at in the award, which is stated in the form of a special case for the opinion of the court.

Both these vessels were large. The *Clan Matheson's* length was 405ft. and that of the *Western Front* must have been considerable also. In the prescribed order of the convoy the *Western Front* was on the *Clan Matheson's* port hand and was in line with her distant 800yds., while in each case the distance from the ships ahead and astern was 400yds. The speed of the convoy generally was 9 to 9½ knots. The *Clan Matheson's* steering gear fortuitously went wrong and she took and kept a fixed sheer to port. By estimate two-and-a-half to four minutes passed from the time when this sheer was first noticed to the actual collision. As the *Clan Matheson* got across the *Western Front's* bows and the angle of impact was about a right angle, either the *Western Front* was abaft or the *Clan Matheson* was ahead of her due station, or both, at the commencement of and during the sheer, but its duration can only be estimated generally, for the exact positions of the ships are not known. The award finds that, when the breakdown of the *Clan Matheson's* steering gear had been discovered, her engines were put astern and the appropriate signals were made. It does not find whether the *Western Front* used, or could have used, either her engines or her helm to arrest or modify the consequences of the *Clan Matheson's* sheer, but the appellants' counsel disclaimed any charge of negligence in the *Western Front's* navigation, just as the award itself exonerated those in charge of the *Clan Matheson*. There was a moon and the sea was rough with considerable swell, but all the same visibility is said to have been good. In these circumstances it is not to be expected that the change of the *Clan Matheson's* course would be apparent to those on the *Western Front* till after, and probably substantially after, the moment at which it was visible to her own officers, and, in view of the shortness of the time between the change of course and the collision and the difficulties in the way of any manœuvring of the *Western Front* owing to the proximity of other vessels, I think that the effect of these facts and of the absence of any charge of negligent navigation is logically that in the circumstances nothing could have been done to avert the collision.

The award concludes that the proximate cause of the foundering of the *Clan Matheson* was the impact of the *Western Front* and not her own sheer, but this conclusion the arbitrator submits to the court. It appears to me that on the facts found the collision had become inevitable for a material, if not a measurable, time before the impact occurred, and, if so, the character of the other vessel, as well as the direction of her course and of the blow, fail to become material. The *Clan Matheson* had become irretrievably a loss by a marine peril before the collision happened, and the character of the object with which she collided was a pure incident. If it had not been the *Western Front* it would have been some other ship.

There are many cases in the books in which a ship or cargo, though still physically untouched, is held to have been so affected by a peril as to be lost by it, though disappearance or dissolution only come at a substantial interval afterwards. This peril, having "begun to operate," and there being no escape, is held then to be the proximate cause. Such is Erle, C.J.'s illustration in *Ionides* v. *Universal Marine Insurance Company* (*sup.*, at p. 286) of a ship which gets embayed on a lee shore while flying from captors and so is wrecked, the loss here being by capture or a similar consequence of hostilities. Probably this is the best illustration to be found, but reference may also be made to *Bondrett* v. *Hentigg* (Holt's Nisi Prius 149) and *Hahn* v. *Corbett* (2 Bing. 205).

At first sight there may seem to be something paradoxical in saying that a ship is lost when she is still afloat and, apart from the jamming of the steering gear, is still uninjured, but it is not illogical. In the great majority of cases the question may be of no moment, since the ordinary policy covers so many perils, but whenever it is necessary to consider whether a limited insurance applies or not, for example a time policy or a policy against the risks excluded by the F.C. & S. clause, it becomes necessary also to inquire in what exactly the loss consists and when it happens, and in such cases it cannot be predicated of the subject-matter insured that no loss has happened to it, when it has been so affected by perils insured against that nothing can save it from ultimate destruction. The element of uncertainty as to the effect of subsequent events may go to the measure of the loss or to the necessity of giving notice of abandonment, but it cannot prevent an operative peril, which has already taken charge of the ship, from being its cause of loss when its complete operation cannot be arrested.

The appellants' argument took up the incidents of this casualty in the reverse order. They found a sinking of the *Clan Matheson* in consequence of a collision, in which, having fallen athwart the course of the *Western Front*, she was cut into by that vessel's bows, as she proceeded on her course pursuing the warlike operation in which she was engaged. "Here," said they, "is the cause of the loss, and the rule of proximate cause forbids any anterior research for a remoter cause or condition." The validity of this argument depends entirely on

its being established that the impact of the *Western Front* was the proximate cause of the loss, that the collision which thus took place would have been excluded from an ordinary marine policy by the perils specified in clause 19, and that the advance of the *Western Front* through the water was, in the circumstances, in itself a warlike operation. For this purpose the facts must be looked at. When an assured is covered equally by two policies he may be entitled to recover against whichever policy he chooses to rely on, but if he is covered in one event only by one and by another only in another event he has not a free choice to elect what peril he will declare to win on but must be governed by the facts of the casualty. If the true view of the facts is that the *Clan Matheson* was already a lost ship before the impact occurred, the subsequent events only determine the mode and measure of a loss, already caused *aliunde*. On the facts, Wright, J. and, as I read their judgment, the majority of the Court of Appeal, considered that this was so, and I agree with them. If so, the above argument fails *in limine*, and the *Western Front* was not the cause of this loss. I forbear to criticise the other elements involved in that argument. Hostilities only terminated a little over ten years ago, nor were warlike operations necessarily brought to an end even by the Armistice, and in the deliberate gestation of Government law. suits we do not know what further appeals may yet await decision or what arguments founded on the "warlike operations" cases and *Reischer* v. *Borwick* (7 Asp. Mar. Law Cas. 493; 71 L. T. Rep. 238; (1894) 2 Q. B. 548) may need consideration in the course of them. Accordingly, I will only venture to add this. In arguing questions of proximate cause in marine insurance, the temptation is always strong to resort to a minute analysis of the circumstances of a casualty, in order to place the cause as proximately to the conclusion of them as possible. It is a natural way, in which to apply the rule as it is laid down in the books. I think, however, that Lord Bacon's warning against inquiry into the causes of causes applies equally forcibly to a microscopic analysis of the incidents of a casualty as a means of discovering the proximate cause. His phrase appears to me to apply equally to an infinitely intensive analysis as to an infinite historical retrospect.

I think that the appeal fails.

Lord Warrington.—On the night of the 22nd–23rd May 1918, in mid-Atlantic, the *Clan Matheson*, a ship belonging to the appellants, was sunk as the result of a collision with a ship called the *Western Front*, in charter to the American Government, manned by naval ratings and carrying war stores to Nantes, the American base in France.

The *Clan Matheson* was in charter to the British Government under the well-known *pro forma* charter T.99, under which the Government take the risks of war, including particularly all consequences of hostilities or warlike operations.

The appellants contend that the sinking of the *Clan Matheson* was a consequence of warlike operations, and that accordingly the Government, now represented by the respondents, the Board of Trade, is liable for her loss. The respondents, on the other hand, insist that the sinking was an ordinary peril of the seas for which they are not liable.

The question was referred to the late Mr. Claughton Scott as sole arbitrator, and on the 28th March 1928 he made his award in the form of a special case. He found as facts and held in so far as they were questions of law:

(1) That the *Clan Matheson* was not at any material time engaged upon or carrying out a warlike operation.

(2) That there was no negligence on the part of the appellants or any of those in charge of the *Clan Matheson*.

(3) That immediately before the collision the steering gear of the *Clan Matheson* broke down and failed to operate and that by reason thereof the said vessel sheered to port and across the course of the Western Front.

(4) That the sinking of the *Clan Matheson* was proximately caused by the impact of the Western Front moving in the course of a warlike operation which she was then carrying out.

(5) That the sheering of the *Clan Matheson* to port was not the real or proximate cause of her loss within the meaning of the charter-party.

(6) That the sinking of the *Clan Matheson* was a consequence of warlike operations within the meaning of the charter-party, and he accordingly held, subject to the opinion of the court upon the question of law submitted by him, that the sinking of the *Clan Matheson* was a consequence of warlike operations within the meaning of the charter-party, and that the respondents were liable to pay to the appellants the value of the ship at the time of the accident, viz., 265,000*l*.

The special case was heard by Wright, J. on the 9th and 14th May 1928, who, in a very careful and elaborate judgment, held that the loss of the *Clan Matheson* was not a consequence of warlike operations, and that accordingly the respondents were not liable.

On appeal to the Court of Appeal that court, on the 19th July 1928, by a majority (Scrutton and Lawrence, L.JJ.; Greer, L.J. dissenting), affirmed the judgment of Wright, J. and dismissed the appeal. Hence the present appeal.

It is unnecessary to state the facts in detail. It is enough to say that the ships were sailing in convoy under escort of ships of war and without lights, but it is not contended, and in fact could not on the authorities be successfully contended that that in itself was a warlike operation: (*Britain Steamship Company Limited* v. *The King* (*sup.*), and *Green* v. *British India Steam Navigation Company Limited, British India Steam Navigation Company Limited* v. *Liverpool and London War Risks Insurance Association Limited* (*sup.*).

It is admitted on both sides that the *Western Front* was and the *Clan Matheson* was not engaged in a warlike operation.

It is also in my opinion clear that from the moment the breakdown of the steering gear occurred—a matter of from two-and-a-half to four minutes—before the collision, the collision was inevitable.

The question then is: What was the real or proximate cause of the loss? Was it the impact of the *Western Front* against the side of the *Clan Matheson*, and that alone, or was it the breakdown of the steering gear of the *Clan Matheson* rendering the collision inevitable?

In *Ionides* v. *Universal Marine Insurance Company* (*sup.*) the main question was whether the hostile act of the confederate authorities during the civil war in America in extinguishing a light on Cape Hatteras was the proximate cause of the stranding of a ship or whether the fact that the master was out of his reckoning was such proximate cause, and it was held that the latter was the proximate cause, although, if the light had not been extinguished, the stranding would probably not have happened. In giving judgment, Erle, C.J. gives some illustrations on p. 286 which are of value in the present case. A ship driven by an attempt at capture into an inhospitable bay and there driven ashore by the wind and lost. The attempt at capture would be the real and proximate cause, though the loss would not have happened but for the violence of the wind. In the converse case the ship succeeds in getting out of the bay, but encounters a gale which she would not have encountered but for the delay and is lost. Here the proximate cause is the gale, though but for the attempt at capture it might not have been encountered.

So here the collision in a sense occurred, inasmuch as it became then inevitable, as soon as the steering gear of the *Clan Matheson* broke down, and I think this misfortune should be regarded as the real and proximate cause of the loss, though the loss would not have occurred had not the *Western Front* been in the position in which she in fact was. I desire to express agreement with and to adopt the remarks of Lord Sumner in *Adelaide Steamship Company* v. *The King* (16 Asp. Mar. Law Cas. 178; 129 L. T. Rep. 161, at p. 165; (1923) A. C. 292, at p. 305), the case of *The Warilda*: "When damage is done by two ships coming into collision, one being engaged in a warlike operation, and the other on an ordinary commercial voyage, the collision is a risk falling on the marine policy, unless it is taken out of it by being proved to be caused by warlike operations, and this proof fails, when it is shown to be caused by the action of the officer in charge of the commercial operation." In my opinion these remarks apply equally where it is proved, as I think it is in this case, that the collision was caused by the failure of the ship to obey the will of the officer. For these reasons I think that I am justified in coming to the conclusion that the judgments of Wright, J. and Scrutton and Lawrence, L.JJ. are correct, and that this appeal fails and ought to be dismissed, with costs.

Lord BUCKMASTER concurred.

Appeal dismissed.

Solicitors for the appellants, *Ince, Colt, Ince, and Roscoe*.

Solicitor for the respondents: *Solicitor to the Board of Trade.*

April 16, 18, *and June* 14, 1929.

(Before Lords HAILSHAM, DUNEDIN, SUMNER, BUCKMASTER, and ATKIN.)

PHŒNIX INSURANCE COMPANY OF HARTFORD AND ANOTHER v. DE MONCHY AND OTHERS. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Insurance — Shipment of turpentine — Loss caused by leakage — American certificate of insurance—Limitation of time for recovery of claim—Meaning of leakage.

The plaintiffs were interested in a certificate of insurance which was issued under two policies of marine insurance subscribed by the defendants in respect of 100 *barrels of pure gum turpentine shipped from Florida to Rotterdam. The policies provided for payment for " leakages from any cause in excess of* 1 *per cent. on each invoice." It was the practice of the trade, at the port of shipment, to gauge the barrels of turpentine and to express the result in gallons, and at the port of discharge to weigh it and to express the result in kilograms with an allowance for reduction on account of the varying temperature conditions of* 3.25 *kilograms to the gallon. The policies also contained a stipulation providing that no suit or action for the recovery of any claim should be maintainable in any court unless such suit or action be commenced within one year from the happening of the loss out of which the claim arose, but that limitation clause did not occur in the certificate. When the vessel was discharged a shortage in respect of the gallons of turpentine shipped was ascertained to have taken place. The defendants having refused to pay upon the ground that there was no sufficient evidence of the loss and that the claim was not instituted within the year, the present claim was brought by the plaintiffs on the certificate.*

Held, (1) *that the limitation clause was not one which bound the certificate holder. The rights of the original policy holder, which were conveyed to the certificate holder, comprised the rights given by the policy qualified by all the conditions and warranties which affected the nature and extent of the insurance granted,*

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

but did not impose an obligation affecting only a limitation of time within which the rights so given were to be enforced; (2) that an actual physical loss had been proved based upon the calculations, and there was no ground for imputing that loss to any cause other than leakages.

Decision of the Court of Appeal affirmed.

APPEAL from an order of the Court of Appeal (Scrutton, Sankey and Russell, L.JJ.) dated the 5th March 1928, affirming a judgment of MacKinnon, J. By a contract note dated the 27th July 1923 the respondents, who had for many years been established in Rotterdam as dealers in turpentine and other products, bought from the Columbia Naval Stores Company of Savannah 100 barrels of pure gum turpentine for shipment from Jacksonville, Florida, to Rotterdam. They had insured the turpentine with the appellants, two insurance companies, for the voyage. By the certificate of insurance dated the 27th Aug. 1923, which was issued under the two marine insurance policies, the respondents were insured by each of the appellants respectively for 50 per cent. of 14,925 florins against the ordinary marine perils and against leakage by the following clause: "To pay leakage from any cause in excess of 1 per cent. on each invoice, conversion of kilograms into the American gallon shall be made on the basis of 3.25 kilograms to the gallon." After receiving the turpentine on board the *Cape Town Maru* left Jacksonville on the 25th Aug. 1923. Heavy weather was experienced on the voyage, and when the vessel was discharged at Rotterdam a loss within the terms of the leakage clause was ascertained of 206.75 kilograms out of a total of 16,597.75 kilograms, to recover which the present action had been brought. The appellants contended that the loss, if any, was due to the inherent vice of the barrels of turpentine in that the same, being a volatile oil, volatilised or alternatively contracted without any injury to the barrels, and that "leakage" within the meaning of the clause meant a physical loss in transit by an escape of the liquid. They further contended that the policies of insurance, which formed part of the contract sued on, contained a clause that the appellants were not to be liable unless the action was brought within one year from the happening of the alleged loss, and the action was not so brought. The certificate contained no reference to the limitation clause. Mackinnon, J. held that the respondents were entitled to recover on the grounds (1) that leakage in the certificate meant any loss of weight or bulk during the course of the voyage, whichever measure be taken; (2) that the loss was proved by credible evidence of the kind contemplated by the certificate; and (3) that the appellants had failed to make out that the certificate incorporated the limitation clause from the policy. The Court of Appeal affirmed the learned judge's judgment. The defendants appealed.

W. A. Jowitt, K.C. and *Van den Berg* for the appellants.

S. L. Porter, K.C. and *W. Lennox McNair* for the respondents.

The House took time for consideration.

Lord BUCKMASTER.—I have had the opportunity of reading the judgment of my noble friend Lord Dunedin which he has committed to writing and with it I agree.

Lord DUNEDIN.—On the 27th July 1923, the agents in Rotterdam for an American company, the Columbia Naval Stores Company, sold by cable authority to Messrs. De Monchy, the respondents in this appeal, 100 barrels of spirits of turpentine at a certain price. The contract was a c.i.f. contract; it need not be quoted in full. It contained (*inter alia*) the following clauses: under the heading "Reduction of freight" it provided for the rate of exchange between pounds sterling, dollars, gilders, and reichsmarks, and then follows "Reduction of weight," American net weight to be reduced by 1 gallon = 3.25 kilos. It also contained the following clause:—"Insurance documents to include risk of leakage in excess of 1 per cent. upon the basis of the above reduction of weight."

The turpentine was shipped on the 25th Aug. 1923, at Jacksonville, Florida, on board the *Cape Town Maru*. The ship remained on the Florida coast till the 19th Sept. It then left for London, encountering some heavy weather on the passage. It left London on the 9th Oct. and went to Rotterdam, where it discharged the turpentine on the 22nd and 23rd Oct. An invoice and bill of lading were sent to the respondents in ordinary form. There was also sent to them a document entitled certificate of insurance. Cases were cited by learned counsel which show that it has been more than once decided in the courts of this country that such a certificate of insurance is not a good tender of an insurance policy under a c.i.f. contract. No question, however, as to that was raised by the respondents. They were content to hold that the document as it stands was a good fulfilment of the insurance part of their c.i.f. contract. I shall shortly revert to the document, on the construction of which the present case depends, but in the meantime I continue the narrative of facts.

The barrels of turpentine on being discharged had their contents weighed, in the ordinary manner in which such weighing is conducted, at Rotterdam by a sworn weigher. He found the weight of the turpentine to be 16,225 kilos. Now the intake quantity had been gauged at Jacksonville as 5,107 gallons. Converting this at the conversion figure of 1 gallon = 3.25 kilos, we get 16,597.75 kilos. Comparing this with the output quantity there is a deficiency in the output of 372.75 kilos. Deducting 1 per cent. on the total which equals 166, this leaves a deficiency of 206.75 kilos, and the value of that is the claim made in this action. It only amounts to 17*l.* in money,

but we are told that this is a test case, and that large sums of money are really dependent on its decision. The case was brought against the two insurance companies who issued the certificate and depended before MacKinnon, J., who decided in favour of the plaintiffs. On appeal the appeal was dismissed by a unanimous judgment of Scrutton, Sankey and Russell, L.JJ. Appeal is now taken to your Lordships.

I now revert to the certificate of insurance on which the case depends. It is, from the point of view of the practice in this country, a peculiar document. I cannot do better than quote what Scrutton, L.J. says about it : "This document must be seen to be believed. There is, apparently, a blank form of certificate of insurance which the companies issue to persons who have a contract of insurance with them somewhat similar to an open cover. Someone has filled in a blank certificate with the subject matter of the insurance, '100 barrels pure gum turpentine,' the voyage 'per steamer, *Cape Town Maru*, from Jacksonville to Rotterdam,' and the value insured '14,925 florins,' and then someone has stamped on the front of the document a clause which is almost completely illegible, and which is stamped over what can be discovered from other sources to have been originally a warehouse to warehouse clause. Someone has stamped on the back two or three clauses which are again on the original almost completely illegible and which also obliterate the names of the agents to whom claims should be made."

Read by the light of a legible copy of another certificate it is possible to consider its terms. It need not be quoted in full, but the material parts are as follows. First comes the opening :—

William H. McGee & Co., General Agents Marine Department, 15, William Street, New York.
Fl. 14925.00
This is to Certify, that on the Twenty seventh day of August 1923, there was insured under Policies 924 of the Phoenix Insurance Co. of Hartford (50% interest) No. 387 of the Great American Insurance Co. of New York (50% interest) in the name of the Columbia Naval Stores Co. of Delaware the sum of fourteen thousand nine hundred, twenty five and 00/100 Florine on 100 bbls, pure gum turpentine.
Valued at sum insured.
Per Steamer *Cape Town Maru* at and from Jacksonville, Florida, to Rotterdam, Holland.
loss, if any, payable to the order of the Assured Indorsed hereon upon surrender of this Certificate. This Certificate represents and takes the place of the Policy, and conveys all the rights of the Original Policy Holder (for the purpose of collecting any loss or claims) as fully as if the property was covered by a Special Policy, direct to the Holder of this Certificate, and free from any liability for unpaid premiums.

Then follow the signatures of the two companies, and then, "The clauses stamped or written on back hereof are made a part of the certificate." Then comes a set of held covered clauses and clauses dealing with breakage, etc. Then under the heading of conditions :—

It is agreed that this insurance covers also the risk of capture, seizure, destruction, or damage by men of war, by letters of mart, by takings at sea, arrest, restraints, detainments, and acts of kings, princes, and people, authorised by and in prosecution of hostilities between belligerent nations, but excluding claims for delay, deterioration, etc.

Then there is stamped on back "Provisions as to notice of claims," and there are more clauses as to "War risks," and then at last there is the clause on which the first point of this case turns.

"To pay leakage from any cause, in excess of one per cent. (1 per cent.) on each invoice, or whole leakage without deduction if vessel or craft be stranded, sunk, burnt, on fire, or in collision, or there be any forced discharge of cargo at a port of distress.

"Where barrels with contents are weighed at a port of shipment and destination, loss, if any, due to leakage shall be ascertained by a comparison of the gross shipped and gross landed weights. Where barrels with contents are weighed at port of shipment and contents of barrels only weighed at destination, loss, if any due to leakage, shall be ascertained by a comparison of the gross shipped weight, after deducting 80lb. tare for each barrel, and the net landed weight.

"Conversion of pounds or kilograms into the American gallon shall be made on the basis of :
3.25 kilograms to the gallon.
7.2lb. to the gallon."

Now under the claim made up as above mentioned as first put forward the answer of the underwriters was simple. They said that no leakage could be held as proved which did not leave signs of it on the cask. That at once raises the question "What is the meaning of leakage ?" Leakage I take to mean any stealthy escape either through a small hole which might be discernible or through the pores of the material of which the cask is composed. Turpentine has a very great power of penetration. It even penetrates through metal containers, but it evaporates rapidly, and having penetrated it leaves no sign or external mark. It is clear, therefore, that if the underwriters' view were right, there would be no leakage except when an actual hole was shown in the cask. The provision as to an average leakage and the elaborate provision as to comparing the contents of the cask on arrival with what they had been at starting, all point clearly to the inadmissibility of such a construction. It is not, therefore, surprising that when the case came into court little or nothing was heard of this defence. Another line of defence, however, was formulated, and it was as follows. Turpentine is a liquid which under varying conditions of temperature expands or contracts in bulk to a very marked degree. Now the temperature at Jacksonville in August is pretty certain to be higher than the temperature at Rotterdam in October. Therefore, argue the appellants, the shrinkage that was found in Rotterdam as compared with Jacksonville is only due to atmospheric conditions and you have not proved any loss or leakage.

This argument is ingenious and lost nothing in its treatment by learned counsel, but in my view it is straight in the teeth of the conditions of the contract. After all, the problem is simply this. Was all the stuff which was put into the cask at Jacksonville turned out of the cask at Rotterdam, or had some of it escaped *quocunque modo* during the voyage? Now that, if there was found to be less, it must be held to be leakage in terms of the bargain, is perfectly clear. In an expansive liquid you cannot compare gallons, but you can compare weight with weight, for weight is not affected by atmospheric conditions, and that the deficiency in weight was treated as leakage is abundantly plain. Two cases are specifically dealt with in the clauses quoted above: (1) when barrels and contents are weighed together at both ends; (2) when barrels with contents are weighed at port of shipment, but contents only at port of discharge. It suffices to repeat the terms of the first clause where barrels with contents are weighed at a port of shipment and discharge, "Loss, if any, due to leakage shall be ascertained by a comparison of the gross shipping and gross landing weights," and the same is said in the second case, the only difference being an allowance for the tare of the barrel. So far then as weight at each end is concerned the comparison is perfect, but there was one other case to be dealt with, namely, where there was measurement of volume at one end and measurement of weight at the other. These had to be correlated, and that is done by the conversion clause, "Conversion of pounds or kilograms into the American gallon shall be made on the basis of 7.2 pounds to the gallon, 3.25 kilograms to the gallon." Now this is exactly what has been done. The number of gallons taken in at Jacksonville has been converted according to the correct formula into kilograms, and that number of kilograms has been compared with the kilograms found by actual weighing at Rotterdam, the deficiency being leakage. That leakage was expected is perfectly clear from the provision that leakage to the extent of 1 per cent. is not to be paid for, and it is not unworthy of notice that for a lower premium no leakage is paid for unless above 4 per cent., but for the higher premium here paid leakage above 1 per cent. has to be paid for. Now, of course, the absolute accuracy of the conversion figure depends on the temperature. As it happens we have it proved by Dr. Goldsmith that at a temperature of 80 deg. Fahrenheit the correct figure of correlation is 3.25 kilograms to one gallon, and 80 deg. Fahrenheit has all along been said to have been the temperature at Jacksonville, so that in the circumstances of the present case it is obvious that no injustice has been done to the appellants. But this is a test case, and in other cases the turpentine may not have come from Jacksonville in August. We are here dealing with a commercial matter. It would be a practical impossibility to find correctly the temperature at the moment when each parcel had to be shipped and then calculate the proper conversion figure. Therefore the parties to avoid a practically impossible inquiry agreed on a conventional figure, and by that figure they must be bound. No doubt 3.25 was fixed on because it represented the proper figure for a very likely temperature at the places from which turpentine is shipped, and as shown here it is exact. But the appellants lose their case, not because, as it happens, the figure is an exact one, but because the figure of conversion as taken is the conventional figure agreed on between them, and in any such case they will be bound by the conventional figure, no matter whether the actual temperature would make that figure favourable or unfavourable to them. This concludes the first point.

The appellants have raised another and a very formidable point. It will have been noticed in the summary I gave of this certificate that it is deficient in many particulars as a contract of marine insurance. In particular it does not mention the ordinary perils of the sea. Therefore, although in the opening words of the certificate, after mentioning the policy, a copy of which was not sent along with the certificate, it says that it is to represent and go in place of the policy, yet unless the policy be looked at the contract would not be a true contract of marine insurance at all. It would be an insurance against leakage, but not against the ordinary perils of the sea. The policy, when looked at, is, according to experience of such instruments, almost as extraordinary a document as the certificate. It is blank as regards the particular thing assured, blank as to premium, and blank as to duration. It begins with the ordinary sea perils clause and then goes on with pages of various clauses, war risk clauses, addenda, and superaddenda. Then comes a clause in these terms: "A supply of blank certificates will be furnished to the assured to be used only for shipments under this policy and only in accordance with the terms thereof." Among the manifold clauses of the policy is one in these terms: "It is agreed that no suit or action for the recovery of any claim arising under this policy shall be maintainable in any court unless such suit or action shall have been commenced within one year from the date of the happening of the loss out of which the said claim arose." Therefore, say the appellants, you must after all look at the policy, and, if you do, you will find this clause which provides that no suit or action for the recovery of any claim arising under this policy shall be maintained in any court unless such suit or action shall have been commenced within one year from the date of the happening of the loss out of which the said claim arises.

This suit was admittedly not brought till after the expiry of a year from the loss. I think that to a certain extent the appellants are right; it is necessary to look at both the policy and the certificate. You cannot get the full terms of a contract of marine insurance without looking at both, but when you do

look at the policy you find a host of straggling clauses, many of them contradictory, and you also find in the policy a great lacuna, as no premium is mentioned and no particular "risk" is mentioned. Now the certificate is what I may call the determinative of the two instruments. It is the certificate that clinches the bargain as to a particular shipment and gives a premium. That is shown clearly enough by its own terms and by the clause that it represents and takes the place of the policy. It follows, I think, that all clauses of the policy which are essential to the contract of marine insurance must be read into the certificate, but beyond that there is no necessity to go. The condition in question is a collateral stipulation imposing a condition precedent. It has nothing to do with insurance particularly, but might be applied to any contract. Common sense and fairness revolt against the idea of this being enforced against the holder or indorsee of the certificate. Neither the holder, as here, nor a possible indorsee could ever have seen the policy. There is not even expressed in the certificate a right to ask for exhibition of the policy. Against them it may be fair to assume ordinary insurance clauses, but not to assume a collateral agreement of this sort. I therefore think that on this point also learned judges below were right. I move that the appeal be dismissed with costs.

Lord Hailsham desires me to state that he concurs in this judgment.

Lord Sumner.—The respondents in my opinion duly proved their loss, to the amount claimed, under the words "to pay leakage from any cause in excess of 1 per cent. on each invoice," which admittedly formed part of a contract of insurance subsisting between themselves and the appellants. Unless the appellants can establish their affirmative defence that the action was out of time this appeal must fail.

In common speech there is leakage from a barrel if it lets its contents escape, and there was evidence that some of the contents of these barrels did escape. True the word is "leakage" not "wastage" or "shortage," and we are told that turpentine has such a propensity to vaporise and its vapour is so insidious and so penetrating that under favourable circumstances it will even disappear through the material of sound and tight receptacles, and this may not so obviously be a "leakage." Still it would be affectation if I were to profess to know nothing about barrels, and I think that the judgment at the trial may be well supported on the ground that the missing turpentine simply escaped through the ordinary joints between the staves of the barrels, since the contrary is not proved and in a sound wooden barrel that is the readiest way of escape. For this at any rate "leakage" is a perfectly appropriate word. It is not really to the point to say that a sound barrel, as good as they make them, cannot be a leaky barrel; for the word here is "leakage," without imputation upon the barrels. The appellants again argued that they were only liable, when barrels showed signs of transit damage or where stains or other marks proved that turpentine had passed that way. As a defence on the contract this failed, for there are no contractual words to make it a condition of liability for leakage that such signs should be visible, and as mere evidence that the turpentine had not escaped at all the absence of such signs was one for the trial judge, who was justified by the affirmative evidence in holding the contrary.

I think the evidence of gauging at Jacksonville, Florida, and of weighing at Rotterdam was admissible and sufficient. (1) That the mode of gauging was inexact and inconclusive is not a valid criticism. It was the usual mode in the turpentine shipment business, to which this insurance was directed, and was not shown to result in substantial errors. (2) The weighing at Rotterdam was indeed proved by affidavit of information and belief, but it does not appear that the appellants sought to exercise their right to cross-examine or required any formal order for the admission of the affidavit, or appealed against such order, if any was made. There was jurisdiction to admit and act on such evidence and it is too late now to object to it. (3) The conversion of kilograms into American gallons is decided by a formula prescribed by the contract itself, and, as this formula is applicable in its terms not only to turpentine but to other fluids, there can be no doubt that it is adopted because in business exact conversion would be troublesome and expensive and, in spite of some known inaccuracy, this rough and ready conversion is agreed to be good enough for practical purposes. (4) It is said, and no doubt truly, that with turpentine shipped and discharged at different temperatures and atmospheric pressures and at substantial intervals of time, some loss is inevitable, and the insurance is against casualties that may happen, not against loss that must happen. This is all very well, but again the words "in excess of 1 per cent." are clearly used in order to discriminate by rule of thumb between these two kinds of loss, and, rough as it is, when a percentage of normal waste is agreed to, it binds. These words, coupled with the words "from any cause" appear to me to have been carefully and judiciously selected to protect the goods owner from this very kind of loss, arising in such a voyage as this and measured by the processes which are normally adopted at the two ports. The loss insured and proved I take to be an actual escape of turpentine, not a mere change in bulk owing to reduction of temperature.

The affirmative defence that the action was out of time (as it was in fact, if the clause relied on applies) is more difficult. It is hardly necessary to consider whether the certificate could be treated as a policy against leakage by itself. The plaintiffs claimed and recovered judgment for some small percentage additions,

which the certificate itself does not provide for, and this judgment has never been varied or abandoned. It is reasonably certain that the insurance, which was included in the c.i.f. price, was not confined to leakage, and when the plaintiffs accepted this certificate as one of the documents to be tendered, no doubt they took it to be a cover in accordance with their contract. No question as to the certificate being a valid tender arises.

The respondents' substantial case was that although some other parts of the policy were sufficiently incorporated with the certificate by reference, the clause of limitations was not. On the other hand I understood the appellants to contend that the certificate was only a certificate, and was not a contract to be sued on at all, or alternatively that, if it was a contract of insurance, it incorporated the whole of the policy, which was to be read as one with it, or, in the further alternative, that it sufficiently incorporated the clause in question, which was general and explicit in its terms and gave a reasonable time within which to sue for the loss.

The first contention clearly will not do. The certificate is not a certificate in the sense of a document stating that certain facts exist and verifying them but not saying any more. In that case its operation would be by estoppel against any denial of those facts. The certificate is clearly contractual. It is brought into existence in order that "the holders of certificates of insurance issued hereunder" may receive payment of losses, though they are not parties directly liable to pay premiums on the original "policy." Instead of leaving c.i.f. buyers from the original policy-holders to aver interest in themselves and to sue on the original policy, which of course they do not see, the certificate, after naming the policies by serial number, the cargo covered, the carrying ship, and the sum insured, says: "This certificate represents and takes the place of the policy and conveys all the rights of the original policy-holder (for the purpose of collecting any loss or claims) as fully as if the property was covered by a special policy direct to the holder of this certificate and free from any liability as to premiums," and later on it speaks of "claims under this certificate" and of "loss under this certificate" and it concludes with this "Notice.—To conform with the revenue laws of Great Britain, in order to collect the claims under this certificate it must be stamped within ten days after its receipt in the United Kingdom." Now our laws require that such an action should be launched upon a stamped policy and the object of stamping the certificate is to make it such a policy.

To contend that the certificate is not any part of the bargain, which has arisen between the appellants and the respondents, is untenable and it really amounts to saying that, when a claim comes to be collected, whatever the certificate may have been used for previously, the policy represents and takes the place of the certificate. Nor is it true that the whole of the policy is incorporated in the certificate or that both instruments in their entirety are to be read together. The language of the certificate is against this. Though it "conveys all the rights" of the original policy-holder, it expressly states that his liability as to premiums is not transferred, and there are two passages which expressly specify conditions of the policy that are incorporated and so by implication negative the incorporation at any rate of all others, if not of any others, viz., claims are "to be adjusted according to the usuage of Lloyds, but subject to the conditions of the policy and contract of insurance" and "this certificate is subject to the full terms of the policy in respect of being warranted free of capture, seizure and detention. . . ." On the other hand there is much in the policy, with its addenda, that is clearly personal to the original policy-holder, such as the agreement and payment of premiums, the option to have leakage covered on either of two alternative sets of terms, the option to have war risks included in the cover, and the warranty, in that event, to place with the appellant companies the corresponding marine insurance as well, the right to report other risks to the insurers with a view to their inclusion in the insurance, the right to give notice cancelling the policy, the right to issue certificates of insurance and the warranties as to the expression and limitation of their terms, and the limitation upon the total amount to be accepted under the policy at any one time. It is worth remark that, while the original assured warrant that they will not issue certificates which "vary from" the conditions of the policy, they are not called on to warrant that the certificates issued shall incorporate all or any of these conditions. These citations, which may not be exhaustive, show that any tacit incorporation into the certificate of terms contained in the policy is a selective incorporation only. The question then arises: what is the test of the selective process, bearing in mind that it is the appellants who frame and put forward these documents, and the respondents who, as a matter of business, must accept them blindly or refuse to accept them at all? One test would be to say, affirmatively, that only so much is incorporated as is necessary to give business efficacy to the transaction, for which purpose this clause of limitations is certainly not necessary. Another is to say, negatively, that the incorporation only extends to such clauses as a reasonable c.i.f. buyer would assent to as part of the terms of his purchase. If such a buyer were told, when the document was tendered to him, that notwithstanding prolongation of voyage or delay in examining and establishing the condition of cargo beyond his control, notwithstanding the necessity for taking advice as to Unites States law and procuring documents for that purpose from distant parts of the world, notwithstanding his own ill-health or disablement, he must issue his process in some tribunal, to whose jurisdiction these companies are amenable, within twelve months of the loss, or drop his undefended claim, I am sure that he would have none

of it, and under these circumstances I think the courts below rightly refused to countenance for the assured's sole benefit an incorporation so ambiguous and so one-sided.

When the documents, the aggregate of which forms the policy, come to be examined in the facsimile which has been supplied to your Lordships, it will be seen that they begin with a regular form of policy, which is supplemented by separate memoranda of various additional sets of terms, one to give an option to cover war risks from which the policy form is warranted free; another to cover turpentine and some other merchandise against leakage, which the form of policy did not cover; a third, which for the first time introduces and makes special provision for certificates of insurance to be issued by the original assured; and a fourth, called an "addendum," which provides for the terms as to leakage and conversion of volume into weight which are actually embodied in the certificate in question. This is the order in which these documents are printed in the record, but they are pinned together in a different order in the facsimile of the whole fasciculus, which is annexed to it. The original policy is dated the 21st Sept. 1921, but there is nothing to show how long ago the form was first adopted. The first addition as to war risks is not dated, nor is the second which relates to the issue of certificates, though this is followed by an "addendum," ancillary to and possibly part of it, which is dated the 10th Oct. 1921. The last document, also called an "addendum," is dated the 15th June 1923. It is, at any rate, clear that the first document —the parent policy—is the oldest and the others have come into existence to enlarge or supplement it, but while the limitation of time clause occurs in the parent policy and nowhere else, either by repetition or by reference, the document which introduces the certificate system into this insurance is a separate one, which contains a full code for that system, and the parent policy contains no reference to it. This document, however, does not enumerate the usual perils insured against or mention any sue and labour clause, but no doubt an insurance under the terms and liberties which the third document gives would be subject to perils insured against and to suing and labouring, as set out in the original policy. I infer from this structure that the limitation clause, which is a liability upon, not a right of, the original assured, was no part of the certificate scheme, which is directed to transferring rights *in globo*, but imposes liabilities only when they are mentioned.

The language of this clause bears out this view. It begins thus: "It is agreed that no suit or action for the recovery of any claim arising under this policy . . ." Now the claim here is one for leakage, from which this "policy," in the sense in which it is used in the clause, was free. It was a claim arising only under what I have called the second and fourth documents. Further, the great majority of the provisions of these documents do not use the expression "it is agreed," and in those few which do use it, all, unless I have overlooked something, are provisions where the parties agreeing are the insurance companies and the original assured only. It appears to me that, in the absence of any language calculated to do so expressly, this personal agreement, to which the plaintiffs were not parties, and which, even between the original parties, is so incomplete that it may be doubtful if an action could be brought on it, is not introduced into the document on which their rights arise by any recognisable mode of reference, and I am of opinion that the decision of the Court of Appeal was right and that it should be affirmed.

Both the trial judge and the Lords Justices refer in their judgments to the difficulties produced by the unsystematic accumulation of clauses and provisions in these numerous instruments, and to the difficulty of deciphering the clauses, caused by the mode of printing and also of superimposing extra clauses upon the print. Perhaps I may be permitted to add, lest a use should hereafter be made of their Lordships' words which they of course did not intend, that the questions here are only—what is the contract and what does it mean? Microscopic type and blurred imprints, like crabbed handwriting, present evidentiary difficulties in establishing the text of a contract, but they do not prejudice its construction. Similarly emphasis was laid on the fact that the plaintiffs, traders in Holland, had no access to the original policy, which remained in the United States, and no notice of the limitation clause in question. Notice, however, of the contents of a contract is not necessary, when the contract is proved, apart from fraud and mistake or things of that kind. If a party has contracted, he is bound, whether or not he has read or understood his contract or has pursued any references to their ultimate hiding place. If the respondents had had notice that, in issuing the certificate, their vendors had exceeded the authority given them by their policy and had broken its warranties, they would have been affected and restrained by such notice, but if they take a contract, whose terms they do not or cannot make out, they must abide by them as truly construed by a court.

Lord ATKIN.—It is a popular belief, especially prevalent amongst lawyers, that the efficient business man requires that obligations incurred in business should be expressed in writing in simple, intelligible and unambiguous language. It is a belief encouraged by the sayings of business men themselves. But in practice nothing appears to be further from the truth. Business men habitually adventure large sums of money on contracts which, for the purpose of defining legal obligations, are a mere jumble of words. They trust to luck or the good faith of the opposite party, with the comfortable assurance that any adverse result of litigation may be attributed to the hairsplitting of lawyers

and the uncertainty of the law. Some day the ideal business man will appear, on whose advent the legal advisers of many contracting parties, including in particular shipowners and underwriters, will get busy. I do not make any further reflection on the documents in this case, except to say that they offer an excellent illustration of the proposition advanced above. To ascertain the legal effect of them is difficult, but in the result I think that the contract of insurance to which the assignee becomes a party is expressed in the certificate of insurance, which becomes in his hands a policy. But the terms of the contract so expressed are to be ascertained partly from the certificate and partly from the original policy, some of whose terms are incorporated by reference in the certificate. The so-called policy is in fact misnamed. It does not insure anything, it neither defines the subject-matter insured, except that it is to be merchandise, principally rosin turpentines and other naval stores, nor the voyage insured, nor the sum insured. It is a promise during a certain time to issue policies to the named assured against named risks, but the completed policies expressed in the certificates are to be capable of varying the conditions of the policy in accordance with written instructions given from time to time by the insurers. One of the questions in the case is whether the holder of the certificate is bound by a clause in the policy which begins: "It is agreed that no suit or action for the recovery of any claims arising under this policy shall be maintained" except within one year from the happening of the loss." I myself have considerable doubt whether any claim could arise under the policy, and in any case whether a claim made under the certificate is a claim made under the policy. The parties are different and the insurance terms are varied. But without deciding the case on this ground I am of opinion that the clause is not one which binds the certificate holder. In my opinion "the rights of the original policy holder," which are conveyed to the certificate holder, comprise the rights given by the policy, *i.e.*, the rights to the promised indemnity, qualified by all the conditions and warranties which affect the nature and extent of the insurance granted. The words are not apt to impose upon the certificate holder, not a right, but an obligation affecting only a limitation of time within which the rights so given are to be enforced. A useful analogy is found in the decisions dealing with claims on bills of lading purporting to incorporate all the conditions of the charter-party as the result of which it is clear that an arbitration clause in the charter is not incorporated: (*Thomas and Co.* v. *Portsea Steamship Company*, 12 Asp. Mar. Law Cas. 23; 105 L. T. Rep. 257; (1912) A. C. 1). It deserves attention that the certificate expressly repeats with variations the clauses in the policy dealing with notices of claims, and this in itself leads me to suppose that the insurers intended that the certificate contained the full provisions of the contract as to requirements when once a loss had been incurred. Certainly I think a certificate holder would reasonably so suppose. For these reasons, therefore, I think that the defendants cannot avail themselves of this defence.

The main point on the case is whether the plaintiffs proved a loss under the certificate. They have under the claim "to pay leakage from any cause in excess of 1 per cent. on each invoice, or whole leakage without deduction" if vessel stranded, &c. The clause proceeds, "where barrels with contents are weighed at a port of shipment and destination, loss, if any, due to leakage, shall be ascertained by a comparison of the gross shipped and gross landed weights."

The defendants' contention originally was that they were not liable to pay unless the cask or other receptacle in which the turpentine insured was carried showed signs of leakage having taken place. This seems to me quite untenable. Turpentine is very volatile, and substantial leakage may take place without any external sign. I think, upon the true construction of the clause, the parties intended that if there were any gradual escape of the turpentine from the receptacle from any other cause than wilful damage the insurers were to pay. This seems to me to be the meaning of the words in this clause, which appear to lay down that if there is an actual weighing at port of shipment and at port of discharge, the difference in weight, *i.e.*, the actual physical loss, should determine the amount of leakage. Loss "if any" due to leakage meets the possible case of loss by pilfering or other wilful damage. In this case, however, the turpentine was not weighed at the port of shipment. The express words of the clause, therefore, do not apply. There is a table of conversion of weight into gallons which is necessary if only for the purpose of valuing the loss in weight where there has been a weighing on shipment and discharge. I do not think that the effect of the table is to make a gauging of the contents at the port of shipment equivalent upon the application of the reduction table to a weighing at port of shipment. The reason for the distinction is obvious. Volume varies with the temperature, and a difference of 20 degrees in the temperature will make a difference in bulk of about 1 per cent. It was suggested by the assured that the 1 per cent. deduction was intended to provide for this contingency. I cannot accept this. Leakage in excess of 1 per cent. means in excess of 1 per cent. leakage; and loss which is merely notional, arising from a conventional table of reduction, cannot in my opinion be described as leakage. Nor do I believe that the American insurers ever intended in this 1 per cent. deduction to include anything which was not physically lost at all. They were insuring against casualties, but not of arithmetic. This seems borne out by the clause, for even where there has been an actual weighing at both ends and an

ascertained physical loss, yet it is only the physical loss over 1 per cent. which is covered.

I think, therefore, that it is open to the insurers to meet a claim for loss based upon a calculation founded on the reduction table to point out the difference in volume caused by temperature, and to require this element to be taken into account by the assured before they can be said to prove their loss. If, however, the effect of temperature or volume is duly taken into account, and there still appears to be a physical loss upon comparison of weights now accurately adjusted, it appears to me that such physical loss is, on a proper construction of the policy, to be taken to be the result of leakage, and for any amount over 1 per cent. the assured will recover. In the present case it appears from the evidence that the scale adopted of 3.25 kilograms to the gallon was the appropriate scale for turpentine at the temperature at the port of shipment, and did give the actual weight of shipment comparable with the actual weight of discharge. There was, therefore, proved an actual physical loss, and the plaintiffs in the action have recovered the excess over 1 per cent. of that actual physical loss. There is no ground for imputing that loss to any cause other than leakage, and I think, therefore, that the judgment in favour of the plaintiffs is correct, and that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants, *Windybank, Samuell, and Lawrence.*

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

April 25 and June 14, 1929.

(Before Lords Buckmaster, Dunedin, Sumner, Atkin, and Warrington.)

Board of Trade v. Hain Steamship Company Limited. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Requisitioned ship — Charter-party T.99 — Collision—Negligence of both ships—War risk —Marine risk—Warlike operation—Liability of Admiralty.

In 1917 the steamship T., *belonging to the claimants, was requisitioned by the Shipping Controller, under charter-party T.99, which provided that the Crown would undertake to indemnify the owners in respect of all consequences of warlike operations while the owners would continue to bear the marine risks. In Dec. 1918, after the Armistice had been signed, the* T. *was on a voyage from the United States with a cargo of oats, and a steamer, the* R., *which had been requisitioned by the United States Government, was on a voyage from England to the United States with a cargo of mines which, as the Armistice had been signed, were no longer required for carrying on hostilities in European waters. On the night of Christmas Day, the steamers came into collision in mid-Atlantic, and the* T. *was so much damaged that she was off hire for ninety-nine days. The collision was due to the fact that both steamers were being negligently navigated at the time.*

The arbitrator considered himself bound by the decisions in the Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service; The Geelong (128 *L. T. Rep.* 546; (1923) *A. C.* 191) *and* Attorney-General v. Adelaide Steamship Company Limited; The Warilda (129 *L. T. Rep.* 161; (1923) *A. C.* 292), *and held that the collision was a consequence of warlike operations, and therefore that the Crown was liable under the war-risks clause in the charter-party to indemnify the owners of the* T.

Held, (1) *that the arbitrator was entitled to find that the collision was a consequence of warlike operations, even although it happened after the declaration of the Armistice; and* (2) *that the claim made against the* R. *which, if it stood alone, would have been covered by the policy, was not the less covered because the* T. *also contributed to the accident.*

Decision of the Court of Appeal (17 *Asp. Mar. Law Cas.* 520; 139 *L. T. Rep.* 566; (1928) 2 *K. B.* 534) *affirmed.*

Appeal from the decision of the Court of Appeal, reported *sub. nom. Re Hain Steamship Company (owners of steamship* Trevanion) *and the Board of Trade* (17 Asp. Mar. Law Cas. 520; 139 L. T. Rep. 566; (1928) 2 K. B. 534) on a special case stated by an arbitrator.

In 1917 the steamship *Trevanion*, of which the claimants were the owners, was requisitioned by the British Admiralty under the terms of charter-party T.99. By clause 18 of that charter-party, "The Admiralty shall not be held liable if the steamer shall be lost, wrecked, driven on shore, injured, or rendered incapable of service by or in consequence of dangers of the sea or tempest, collision, fire, accident, stress of weather, or any other cause arising as a sea risk," and by clause 19: "The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following, or similar, but not more extensive clause: Warranted free of capture, seizure, and detention and the consequences thereof, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war."

On the afternoon of Christmas Day 1918, about six weeks after the Armistice was signed by Germany and the Allies in the Great War, the *Trevanion*, which was then carrying a cargo of oats, the property of the British War Department, from the United States of America,

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

to Portland, for orders, collided in mid-Atlantic with the steamship *Roanoke*, which was then in the possession and under the control of the United States Government, employed by that Government solely for naval purposes as a regularly commissioned mine planter of the United States Navy, operated by the Navy Department, officered by commissioned officers of the United States Navy and manned by a United States naval crew.

The arbitrator found that, at the time of the collision, the *Roanoke* was proceeding "under her aforesaid public employment" from Portland, England, to Hampton Roads, Virginia, having 720 mines on board, but no other cargo and no passengers, and that there was no evidence with regard to the circumstances under or the purposes for which the mines were being carried. He found that both vessels were negligent and both were equally to blame.

The collision occurred on the 25th Dec. 1918, some six weeks after the Armistice. The duration of the Armistice was originally fixed at thirty-six days, but was subsequently extended from time to time. During the Armistice the blockade conditions set up by the Allied and Associated Powers remained unchanged, and German merchant ships at sea and vessels carrying contraband goods remained liable to capture; but the other hostilities had ceased. Up to the time of the Armistice, the *Roanoke* had been employed as a warship engaged in operations of war, and the question was whether she was performing a warlike operation when proceeding, under orders, from England to America during the temporary and qualified suspension of hostilities at sea brought about by the Armistice.

The owners of the *Trevanion* contended that the Armistice did not change the character of the *Roanoke's* employment, and that, as the war had not terminated, the case was simply one of a warship in the employ of one of the belligerent Powers carrying munitions of war from one place to another during a state of war, and consequently that the *Roanoke* was engaged in a warlike operation at the time of the collision.

The Board of Trade, on the other hand, contended that in order to render an operation "warlike" within the meaning of clause 19, it must be one which is performed in furtherance of hostilities, or for combatant purposes, and that an American warship proceeding to America after the cessation of hostilities, with munitions of war which were no longer required, was not engaged in a warlike operation.

The arbitrator, in deciding in favour of the owners of the *Trevanion*, had found as a fact and held as a question of law that the *Roanoke*, at the time of collision, was performing a warlike operation; and he held, further, following the decisions in *Commonwealth Shipping Representative* v. *Peninsular and Oriental Branch Service; The Geelong* (128 L. T. Rep. 546; (1923) A. C. 191); and *Attorney-General* v. *Adelaide Steamship Company; The Warilda* (129 L. T. Rep. 161; (1923) A. C. 292), that the collision was a consequence of warlike operations, and that, therefore, the Crown was liable to indemnify the owners of the steamship *Trevanion* under the war risks clause of the charter-party T. 99.

The Court of Appeal (Scrutton, Lawrence, and Greer, L.JJ.) held, reversing the decision of Rowlatt, J., (1) that at the time of the collision the steamship *Roanoke*, which was carrying the mines, was engaged in a warlike operation, and (2) that as the *Roanoke* was engaged on a warlike operation, though conducted negligently, the Crown was not excused from liability under its war-risks clause, because the loss was equally caused by the negligence of another ship. The Crown was, therefore, liable, and the award of the arbitrator in favour of the shipowners must be restored.

The Board of Trade appealed.

Sir *Thomas Inskip*, K.C., Sir *Boyd Merriman*, K.C. and *Russell Davies* for the appellants.

C. R. Dunlop, K.C. and *R. H. Balloch* for the respondents.

The House took time for consideration.

Lord Buckmaster.—At about 8.20 p.m. on the 25th Dec. 1918, the steamship *Trevanion* collided in the North Atlantic with the steamship *Roanoke*, and suffered damage by which she was disabled for ninety-nine days. The *Trevanion* was at the date of the collision under requisition to His Majesty's Government upon the terms of the charter-party which, under the reference of T.99, has become familiar to the courts. The *Roanoke* was in the possession and control of the United States of America, and was employed by the United States Navy as a mine-planter, officered by officers of the United States Navy, and manned by a United States Navy crew. At the time of the collision the *Trevanion* was on a voyage from New York to Portland laden with a cargo of oats, and the *Roanoke* was proceeding from Portland to Hampton Roads, Virginia, with 720 mines on board belonging to the Navy Department of the United States of America, and she was carrying no other cargo and no passengers. The collision was due to the joint negligence of both vessels and both were equally to blame.

The consequent dispute as to liability was referred to arbitration and the arbitrator found that the steamship *Roanoke* was at the time in question performing a warlike operation and that the collision was a consequence of hostilities or warlike operations. Rowlatt, J., on appeal, disagreed with this view, but his judgment was reversed by the Court of Appeal.

The terms of the charter-party, the rights under which are in issue, need only a brief reference. Clause 18 exempts the Admiralty from liability if the ship be lost, among other things, "by collision . . . or by any other cause arising as a sea risk," but by clause 19 the Admiralty themselves undertake the risks excluded from an ordinary insurance

policy of marine insurance under the following clause :—" Warranted . . . free from all consequences of hostilities or warlike operations whether before or after declaration of war." Upon those clauses it is only necessary to make this comment: that, in my opinion, taken together, they provide a complete insurance against all loss arising as a sea risk, all that is excepted from the general clause being undertaken by the Admiralty. If, therefore, the Admiralty had been the marine insurer the result would have been that the ship would have had the benefit of a complete marine insurance policy without any of the exclusions referred to in clause 19.

The first question that arises, therefore, is whether the collision was a consequence of hostilities or warlike operations; and the second, if this be so, is whether the fact of the negligence of the *Trevanion* prevents her owners from being entitled to recover. The first point appears to me to be one upon which it is possible that different views might reasonably be held. In Dec. 1918 the Armistice had been declared and had been existing for some six weeks, and it provided by art. 20 that there should be an immediate cessation of hostilities at sea, so that loss as a consequence of hostilities, meaning as I think it does, existing hostilities, is negatived. The war, however, had not ended, and however improbable it may have been, it was quite possible that it could at any moment have been revived, and it is certain that the position must be regarded in the light of that possibility. The *Roanoke* was sailing into peaceful waters with a cargo of mines, for what purpose is not stated, and these considerations point, to my mind, to the conclusion that she was not engaged in a warlike operation; but it is clear that there were other matters upon which the learned arbitrator might take the opposite view. It is essentially a question of fact, and I am not prepared to disturb his finding.

The remaining question can be shortly dealt with. This House has decided that if a vessel is engaged on warlike operations and by its negligence collides with another vessel, the negligence does not prevent the collision from being the result of warlike operations (see *Attorney-General* v. *Adelaide Steamship Company Limited; The Warilda* (16 Asp. Mar. Law Cas. 579; 129 L. T. Rep. 161; (1923) A. C. 292). It is neither necessary nor fitting to discuss or examine the grounds of that judgment, for the law upon this point is authoritative and clear. It follows, therefore, that the negligence of the *Roanoke* does not prevent this collision from being the result of warlike operations. Does, then, the negligence of the *Trevanion* produce that result? In my opinion it does not. I think the case of *Reischer* v. *Borwick* (7 Asp. Mar. Law Cas. 493; 71 L. T. Rep. 238; (1894) 2 Q. B. 548), approved by this House in *Leyland Shipping Company Limited* v. *Norwich Union Fire Insurance Society Limited* (13 Asp. Mar. Law Cas. 426; 118 L. T. Rep. 120; (1918) A. C. 350), shows that it is no answer to a claim under a policy which covers one cause of a loss that the loss was also due to another cause that was not so covered. It follows from this that the claim made against the *Roanoke*, which, if it stood alone, would have been covered by the policy, is not the less covered because the *Trevanion* also contributed to the accident.

For these reasons I think the appeal should be dismissed.

Lord Dunedin.—I concur.

Lord Sumner.—In par. 9 of his award the learned arbitrator says: "If and in so far as it is a question of fact, I find, and if and in so far as it is a question of law, I hold (subject to the opinion of the court) that the *Roanoke*, at the time in question, was performing a warlike operation and that the collision was a consequence of hostilities or warlike operations" and your Lordships have to decide in this appeal whether he was right. I think he was.

Though the Armistice had been signed and, having been renewed, was still current, war was not over nor was the renewal of war by any means out of the question. Except in so far as her destination may make the difference, the *Roanoke* was apparently doing what would have been one of her ordinary duties *flagrante bello*, and, if she had been proceeding to her station off the coast of Germany, I do not think it could have been argued, in view of the authorities, that her voyage so made was not a warlike operation. The temporary cessation of hostilities, which is all that an armistice in itself involves, could not deprive the operation of that character.

The appellants' proposition was that it is not enough to prove what the *Roanoke* was, unless it is also shown what she was doing. I recognise the high importance of considering the ship's errand and the purpose of her voyage, but I should have thought that, having proved an animal at large to be a lion, it was not further indispensable to prove that he was not at the moment merely performing as a lamb, unless, of course, some circumstances of ovine behaviour happened to be apparent. In truth the contention that the operation was not warlike, in other words, that under the circumstances, whatever it was like, it was in truth peaceful, is founded mainly on the *Roanoke's* destination, and partly, I think, on what is now knowledge but then was only hope, that hostilities were actually over. Your Lordships were not much troubled with the question whether this matter was one of fact or of law; the point really urged was that there is no presumption here one way or the other as to the purpose of this voyage; that its character depends on its purpose; and that for the purpose nothing short of affirmative proof will do. Had the vessel not been a regularly commissioned ship of war of the United States Navy this might well be so, but

that is what she was in fact, namely, a "mine-planter," with 720 mines on board, ready and, for all we know, waiting, to be "planted." We have no right, in law or in fact, to assume without evidence that such a ship is not engaged on the duty for the service of which she forms part of the Navy to which she belongs, and the mere fact that we do not know why she was sailing away from the ordinary area of hostilities for purposes unknown does not establish such a conclusion, however ample the scope for speculation may be. It is not for us to presume to know all the purposes of the naval authorities of the United States at that time. In the absence of knowledge I think that the arbitrator committed no error of law in presuming that the purpose of her voyage was such as to consist with her general warlike character, and in the like absence I think it would be useless for me to estimate the chance of her mission being of one kind rather than of another. This is a stronger case than that of a man-of-war, returning to her home port still equipped with her permanent armament. Live mines, I hope one may be justified in saying, are not generally supposed to be things either required in time of peace or convenient for storage at home against the next war, nor do they constitute so safe a cargo as to tempt any prudent authority to keep them on hand if they are no longer wanted and, in so far as this was a question of fact, I think that the learned arbitrator was entitled, if he was so minded, to say so.

It was argued, though I do not think that this question was submitted by the special case, that the collision here was not a risk taken by the Admiralty under charter form T. 99, because clause 18 excepts "collision." I think this reasoning is fallacious. Each ship ran into the other and, as the award finds, the collision "was caused by the negligent navigation of both vessels" and "both were equally to blame." For the purposes of an insurer's liability this means that the loss—whichever ship is regarded as the sufferer—was the result of two causes, jointly and simultaneously in operation—for the *Roanoke* ran into the *Trevanion* and the *Trevanion* ran into the *Roanoke*. If the respondents had claimed indemnity for this from Lloyd's underwriters the answer would have been "this loss, which is a collision loss, is one loss, the product of two causes, joint and simultaneous, namely the eccentric courses steered by the two vessels. The whole voyage of the *Roanoke*, and therefore this part of it, was a warlike operation, and from losses so caused this policy is warranted free. Neither in law nor in fact is this collision and its resulting damage apportionable—hence no part of it can fall on this policy." This defence would have succeeded and, under clause 19 of charter-party T. 99, this, coupled with proof that the *Roanoke's* voyage truly was a warlike operation, would have brought the case within the cover given by the Admiralty. Clause 18 must not be read so as to eviscerate clause 19; both stand together. I think clause 18 only excludes such collisions as do not otherwise come under clause 19 as being both excluded by the ordinary f.c. and s. clause and also caused by a warlike operation. Accordingly, I think that the appeal fails.

Lord Warrington.—On the 25th Dec. 1918, the respondents' steamship *Trevanion* came into collision in the North Atlantic with the steamship *Roanoke* and suffered considerable damage.

The *Trevanion* was at the time of the collision under requisition to H.M. Government upon the terms of the *pro forma* charter-party known as T.99.

The question in this appeal is whether the damage sustained by the *Trevanion* was a consequence of warlike operations within the meaning of clause 19 of the charter-party.

The question was in the first instance referred to Mr. Raeburn, K.C., who stated his award in the form of a special case.

He held that on the facts found or admitted the collision was a consequence of warlike operations. This decision was reversed by Rowlatt, J., whose judgment was in turn reversed by the Court of Appeal (Scrutton, Lawrence and Greer, L.JJ.). Hence this appeal.

At the date of the collision the Armistice, concluded on the 11th Nov. 1918, was in force. Under its terms hostilities at sea were suspended, but the existing blockade conditions were to remain unchanged.

It is common ground that the *Trevanion* was not engaged in a warlike operation. She was on a voyage from New York to Portland. At the time of the collision she was exhibiting the regulation lights, but not the optional masthead light.

The following are the findings of the arbitrator on which the question turns:

"5. The steamship *Roanoke* at the time in question was in the possession and control of the United States of America under a bare boat charter. During the period from the 25th June 1918 to the 25th Jan. 1919, she was employed by the United States of America solely for naval purposes as a regularly commissioned mine-planter of the United States Navy, operated by the Naval Department, officered by commissioned officers of the United States Navy, and manned by a United States Navy crew.

"At the time of the collision with the *Trevanion* the *Roanoke*, under her aforesaid public employment, and officered and manned as above stated, was proceeding from Portland, England, to Hampton Roads, Va., with 720 mines on board belonging to the Navy Department of the United States of America and was carrying no other cargo and no passengers. She was exhibiting the regulation lights. There was no evidence before me as to the circumstances under, or the purposes for, which the mines in question were being carried.

"6. Having carefully considered the evidence as to the said collision, I find that it was caused by the negligent navigation of both vessels, and that both were equally to blame. The said negligence consisted in a bad look-out on both, insufficient porting by the *Trevanion*, and failure to keep her course on the part of the *Roanoke*."

The appellants contended: (1) That the fact of the collision occurring during suspension of hostilities of itself prevented it from being caused by a warlike operation; (2) that even if this fact was insufficient, the absence of any evidence as to the circumstances under and the purposes for which the mines were being carried rendered it impossible properly to find that the *Roanoke* was engaged on a warlike operation; (3) that the negligence of those on the *Trevanion* prevented the collision from being a consequence of warlike operations.

As to the first of these contentions, I agree with the arbitrator and the Court of Appeal. Hostilities were suspended but the war was not at an end, and in my opinion it was open to the arbitrator to hold that, notwithstanding the suspension of hostilities, the voyage of the *Roanoke* under the circumstances found by him was a warlike operation.

As to the second, the arbitrator has found that during the period including the day of the collision the *Roanoke* was employed solely for naval purposes as a regularly commissioned mine-planter carrying a large cargo of mines. In a state of war that fact is in my opinion enough to constitute her voyage a warlike operation. It could not be denied that on the voyage out she was engaged in such an operation and, in the absence of evidence to the contrary, the same quality must, in my opinion, attach to the remainder of her voyage. Supposing the impact of the collision had exploded the mines or some of them causing further damage, it would have surely been impossible to contend that this was not a consequence of a warlike operation, yet the mere accident of the explosion would not alter the nature of the voyage.

As to the third contention, I think the point is concluded by the decision of this House in *Attorney-General* v. *Adelaide Steamship Company Limited; The Warilda* (*sup.*). It was there held that the negligence of the warship did not prevent the collision from being a consequence of warlike operations. If this is so, how can the negligence of the other ship contributing, but only contributing, to the collision, have that effect? On the finding of the arbitrator it is impossible to say that the negligence of either ship by itself was the proximate cause of the collision.

This case is clearly distinguishable from that of the *Clan Mathieson* (*Clan Line Steamers Limited* v. *Board of Trade* (45 Times L. Rep. 408) recently decided in your Lordships' House, in which it was held that the proximate cause of the collision was the breaking down of the steering gear of the merchant vessel, rendering the collision inevitable from the moment when it occurred.

I agree that the appeal fails and must be dismissed.

Lord ATKIN.—I agree with the judgment which has been delivered by my noble and learned friend, Lord Sumner, and have nothing to add.

Appeal dismissed.

Solicitor for the appellants, *The Solicitor to the Board of Trade.*

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

Supreme Court of Judicature.

COURT OF APPEAL.

Wednesday, Dec. 19, 1928.

(Before SCRUTTON, GREER, and SANKEY, L.JJ.)

SYMINGTON AND CO. *v.* UNION INSURANCE SOCIETY OF CANTON LIMITED (NO. 2). (*a*)

Insurance (Marine)—Policy—Slip—Goods insured from warehouse to warehouse—Warranted free from restraint—Free from particular average—Fire at port of shipment—Goods destroyed by order of port authorities—Marginal note in policy that goods not covered if otherwise insured against fire—Condition not in slip.

The claimants were cork growers and had a factory and warehouse some miles inland near Algeciras. There was no warehouse at Algeciras, and the cork was accumulated on the jetty at that place. The claimants insured a quantity of cork from a port or place between Bordeaux and Nice to the United Kingdom with the defendants. A fire broke out near the jetty, and the claimants' cork was seriously damaged by the action taken by the port authorities to prevent the fire spreading. The policy had not been issued, but the cork was covered by slips and cover notes. When issued the policy contained a marginal clause that the policy was not to enure to the benefit of any fire insurance company. Loss reasonably attributable to fire was, however, covered by clause 9, and there was also a warehouse-to-warehouse clause. The marginal clause was not included or stipulated for in the slip, and the arbitrator excluded it from the policy for that reason. He also held that the loss was one reasonably attributable to fire while the goods were in the ordinary course of transit. He made an award in favour of the claimants. The Court of Appeal held, on a case stated, varying the order of Roche, J. (1) *that at the time of the loss the goods were in the ordinary course of transit and were covered by the warehouse-to-warehouse clause;* (2) *that the goods while on*

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

the quay at Algeciras were lost by perils insured against ; (3) *that the action of the port authorities was not a matter which was contemplated by the warranty against restraint of princes ; and* (4) *that the question whether the policy issued so far as it contained a fire clause was or was not contrary to the usual form of marine insurance on goods, must be referred back to the arbitrator. In his supplemental award the arbitrator found and awarded* (a) *that the policy issued so far as it contained the fire clause was a not unusual form of marine policy on goods ;* (b) *that it was not the usual form of marine policy on goods ; and* (c) *that it was the usual form of marine policy on goods issued by the appellants.*

Held. that the effect of the marginal clause was partially to limit or contradict clause 9 of the policy. If the underwriters wished to limit that clause and to exclude their liability for loss by fire they must do so by express terms on the slip, and not leave it to be implied that the usual form of policy of the company is to be issued. The defence of the underwriters therefore failed.

Further hearing of this appeal on the question which had been referred back to the arbitrator. The previous hearing is reported 139 L. T. Rep. 386.

The respondents, who were cork growers, had a factory and warehouse at San Roque, in Spain, a few miles inland from Algeciras and connected by railway with that port. There was a jetty at Algeciras but no warehouse, and the respondents were accustomed to send their cork daily in small quantities down to the jetty, where it accumulated until there was a sufficient quantity to be shipped to the United Kingdom.

On the 25th Nov. 1919 the respondents insured their cork with the appellants at and from any port or ports, place or places, between Bordeaux and Nice, to the United Kingdom and until delivered at destinations inland. The policy contained the following clauses :

(1) Warranted free of capture, seizure, arrest, restraint or detainment.

(6) The insured goods are covered subject to the terms of this policy from the time of leaving the shipper's or manufacturer's warehouse during the ordinary course of transit until on board the vessel . . . and from the vessel whilst on quays, wharves, or in sheds during the ordinary course of transit until safely deposited in consignee's or other warehouse at destination named in policy.

(9) Warranted free from particular average. . . . but notwithstanding this warranty the assurers are to pay the insured value of any package or packages which may be totally lost in loading, transhipment, or discharge, also for any loss which may reasonably be attributed to fire.

In the margin of the policy the following clause, which did not appear in the slip, was inserted :

"This policy not to enure to the benefit of any fire insurance company. It is warranted and agreed by the assured that any shore risk against fire granted herein shall not cover when the assured or any carrier or bailee has fire insurance which would attach if this policy had not been issued."

On the 9th Feb. 1920 the respondents had on the jetty awaiting shipment a large quantity of cork, some of which had been lying there since Aug. 1919, and the remainder of which had been sent down from the respondents' warehouse at San Roque in Nov. and Dec. 1919, and Jan. 1920. The respondents expected to ship this cork by a steamer which was expected to sail about the 20th Feb. 1920. On the 9th Feb. 1920 a fire broke out on the jetty at some distance from the respondents' cork, and the port authorities, in order to prevent the fire from spreading, jettisoned some of the cork and threw sea water on the remainder. At the time of the fire occurring no declaration had been made under the insurance ; no policy had been issued. The respondents claimed in arbitration against the appellants in respect of the goods so destroyed and damaged. The appellants contended that at the time of the fire the risk had not attached, as the goods were covered only from a place on the coastline, and the reference to warehouse meant from a warehouse at the port of loading ; that the proximate cause of the loss was not the fire but the action of the authorities, and was excepted by the warranty free from restraint ; and that the marginal note prevented the respondents from recovering as they had insured the goods against fire with other insurers.

The Court of Appeal held, on a case stated, (1) that at the time of the loss the goods were in the ordinary course of transit and were covered by the warehouse-to-warehouse clause ; (2) that the goods while on the quay at Algeciras were lost by perils insured against ; (3) that the action of the port authorities was not a matter which was contemplated by the warranty against restraint of prices ; and (4) that the question whether the policy issued, so far as it contained a fire clause, was or was not contrary to the usual form of marine insurance on goods must be referred back to the arbitrator.

The matter having been referred back to the arbitrator, the latter made a supplemental award in which he found (1) that the policy issued, so far as it contained the fire clause, was a not unusual form of marine policy on goods ; (2) that it was not the usual form of marine policy on goods ; and (3) that it was the usual form of marine policy on goods issued by the appellants.

Le Quesne, K.C. and *Simey* for the appellants.

Porter, K.C. and *Somervell* for the respondents were not called upon.

Scrutton, L.J.—We sent this case on one point back to the arbitrator who had stated the case for some further information because we thought that one aspect of the case might raise matters upon which additional information

was desirable, and we now have to determine the point which we left undetermined when this case came before us.

The dispute was as to some cork which was lying on the pier at Algeciras, between the warehouse and its ultimate destination in England, and which, a fire having broken out on the pier, was, as to part of it, thrown into the water to save it from being burned and to prevent the fire from spreading, and, as to another part of it, had water played on it for the same purpose. A series of points were then raised, three of which were dealt with.

It was said in the first place that the risk did not attach at the time of the loss, which turned upon the position of the goods on the pier awaiting shipment. We decided that the risk did attach. Then it was said that the loss was not due to the peril insured against, and certain considerations were put forward in argument as to whether this was a fire having regard to the fact that the goods were damaged by water and further as to whether the goods were jettisoned or lost by a peril *ejusdem generis*. We decided that the loss was due to a peril insured against. Then it was argued that inasmuch as the captain of the local port and fire brigade had thrown the cargo of cork into the water, the doctrine of restraint of princes applied and we declined to hold that the action of the fire brigade amounted to restraint of princes. There then remained a fourth point, which was this. The slip under which the policy was in the ordinary course of business to be issued and which was signed by the appellant company, insured cargo to be declared on various terms which included the Institute Cargo Clauses (F.P.A.), clause 9 of which runs as follows: "Warranted free from particular average unless the vessel or craft be stranded, sunk, or burnt, but notwithstanding this warranty the assurers are to pay the insured value of any package or packages which may be totally lost in loading, transhipment or discharge, also for any loss . . . which may reasonably be attributed to fire." It is said on behalf of the assured that the claim concerns loss of or damage to the goods assured which is reasonably attributed to fire, to which, the other answers having failed, the company replied: "No. In our ordinary policy, there is also this clause printed in the margin, 'This policy is not to enure to the benefit of any fire insurance company. It is warranted and agreed by the assured that any shore risk against fire granted herein shall not cover where the assured or any carrier or other bailee has fire insurance which would attach if this policy had not been issued.'" It is said: "True, it may be that there was loss or damage to the cargo insured which may reasonably be attributed to fire but you are insured under another fire policy: consequently, we are not liable to pay anything for that damage." The question then arose as to whether there was, and if so, what sort of, an implied term in the slip as to the form of policy to be issued and the suggestion was made that it must involve the usual form of policy of a particular company. On the other hand it was said that it must be only the usual form of insurance on goods without reference to any particular company. We sent the matter back to the arbitrator in order that he might decide whether there was a usual form or not of insurance on goods, and whether it contained the particular clause upon which the company relied in this case. The arbitrator, as one would expect, has carried out his duty with great detail and has furnished a schedule of about 50 insurance companies with particulars as to whether they have or have not this clause or some clause like it. It appears to me that the question may be tested, as I thought and noted at the time, without going into this matter. A contract of insurance originates with the slip, and the obligation in honour though not in law of the company is to reproduce that slip in the policy, and it appears to me that if the company desire to alter the terms on the slip by terms in their usual form of policy they must say so on the slip and not leave it to be implied. One may put it in this way. I put certain supposititious cases to Mr. Le Quésne. I put the case of a slip insuring against mortality in the case of cattle on a voyage, and the policy saying "not liable for mortality in any instance"—a very usual form of policy—and I understood Mr. Le Quesne to agree that in a case like that the slip would prevail and you could not issue a policy saying "not liable for mortality," if you had issued a slip purporting to insure cattle on a voyage against mortality. That was a case in which he said, there was total contradiction between slip and policy. Now one may put a case of partial contradiction which seems to me to arise upon this very form of policy and slip. Clause 9 of the Institute Cargo Clauses commences with these words: "Warranted free from particular average unless the vessel or craft be stranded." The result of which, if it stands, is that if you have a stranding, the underwriter is liable for particular average. But when you look at this company's form you find in a marginal clause that it is agreed that a stranding within the limits of the Suez Canal and other canals shall not be deemed a stranding. So there you have a case where the slip says that clauses are to be included which, if there is a stranding anywhere, including the canals mentioned, make the underwriters liable for particular average, and you have a clause in the policy which says that they will not be liable for particular average if the stranding is in one of the named canals. There again there seems to me to be a partial contradiction or limitation or alteration of the Institute Cargo Clauses and it appears to me in that case that if the underwriter wants to alter the Institute Cargo Clauses which he says on his slip are to be incorporated, he must expressly say so on the slip and not leave it to be implied by some implied term that the ordinary form of policy is to be issued. The question, therefore, is, what is the position in this case? Here clause 9, which begins with the words: "Warranted free from particular average unless

the vessel or craft be stranded, sunk or burnt" which would, in the case of fire, only make the underwriter liable for particular average if the ship were burnt, proceeds thus: "but notwithstanding this warranty the assurers are to pay for any loss of or damage to the interests insured which may reasonably be attributed to fire." That means "We will be liable for any loss or damage which may reasonably be attributed to fire, but only if you are not already insured against fire." That seems to me to be a partial contradiction or limitation of clause 9, which the slip says is to be incorporated in the policy, and it appears to me also, as in the two previous cases, that if the underwriter wishes to limit the Institute Cargo Clause which he agrees on the slip shall be included in the policy he issues he should do so by express terms on the slip. That view of the case renders it unnecessary to decide what I personally consider is rather a difficult question, and that is as to the effect of various companies appearing on the same slip. The question would never have arisen with Lloyd's underwriters, who would all be on the same policy in the same form, and no question of difference would arise between their respective names on slips because of their forms of policy, but I can quite see that a difficult question may arise when a number of companies appear on a slip.

For the reasons I have given it appears to me that the defence raised by the underwriters fails on this point also, and the result is that we affirm the arbitrator's award and the appeal will be dismissed with costs.

GREER, L.J.—I desire to add one or two words. I will assume that Mr. Le Quesne's argument is right. If we have to look at the form of policy which is to be issued in accordance with this slip we must first of all look to the slip so far as it is express, and so far as it does not contain an express term I am willing to accept that we must then look at the ordinary policy issued by this company and that we are not concerned, on the facts as found by the arbitrator, with any form of policy which is usual in the marine insurance market. It is not necessary to decide that, but I have a fairly confident opinion that Mr. Le Quesne's argument on that head is right. But taking it in that way it appears to me quite clear that if you have express clauses inserted in the slip as to what the company's liability is to be, you cannot by means of an implied term that the usual policy of that company is to be issued cut down the express terms which are contained in the slip. The contract is made by the slip, and if there are express terms in the slip as to what the liability is to be, I do not think it is right that those terms should be cut down by an implication that the usual form of policy of the company is to be issued. The express terms in the slip include the Institute Cargo Clauses, which are well-known printed clauses, which any one desiring to insure can obtain and read and one of them (No. 9) is this: "Warranted free from particular average unless the vessel or craft be stranded, sunk, or burnt, but notwithstanding this warranty the assurers are to pay the insured value of any package or packages which may be totally lost in loading transhipment or discharge, also for any loss . . . which may reasonably be attributed to fire." We have been told that the loss in this case was loss reasonably attributed to fire, that there is in this clause contained an express promise that that loss shall be payable by the insurance company. I agree with my Lord that if an insurance company, or a member of Lloyd's, or anyone entering into a contract of insurance with a term that the Institute Cargo Clauses are to apply, wishes to cut them down and limit his insurance in such a was as it is sought to be limited by the fire clause in the margin of this policy, he must say so in express terms. For these reasons, I am of opinion that the appeal should be dismissed with costs.

SANKEY, L.J.—I entirely agree. I do not think that the express terms, the Institute Cargo Clauses, which are made part of the contract by the slip can be cut down in this case by any implied term that the usual form of the company's policy shall form part of the contract. With regard to the second point, I feel very much pressed by the difficulty where you have companies instead of individual names on the slips, but I prefer to say nothing about that, and to reserve my opinion. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants, *Waltons* and *Co.*

Solicitors for respondents, *Parker*, *Garrett*, and *Co.*

Friday, March 22, 1929.

(Before SCRUTTON, GREER, and SANKEY, L.JJ.)

THE YOUNG SID. (*a*)

ON APPEAL FROM THE ADMIRALTY DIVISION.

Costs — Collision — Apportionment of blame in unequal degrees—Appeal—Proportion of blame varied—Apportionment of blame in equal degrees—Costs of appeal—Discretion—R. S. C., Order LXV., r. 1.

The costs of any proceedings without a jury in the Supreme Court are in the sole discretion of the court or judge. The discretion of the court or judge in the matter of costs, if exercised judicially, is not in any way restricted or fettered by rules of practice or decisions in previous cases. Thus, there is no rule in the Admiralty Court that where both parties are held to blame in equal degrees, either in a court of first instance or in an appellate tribunal, each party shall pay his own costs.

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

In an Admiralty collision action in a County Court, two vessels were held to blame in the proportion of one-third and two-thirds. On appeal the Divisional Court held both vessels to blame in equal degrees.

Held, that the costs were in the sole discretion of the Divisional Court, and that the court was not bound to award the appellants their costs or to order that there should be no costs on either side.

The Canton (166 *L. T. Jour.* 88 ; (1928) *W. N.* 214) *considered.*

Donald Campbell and Co. Limited *v.* Pollak (137 *L. T. Rep.* 656 ; (1927) *A. C.* 732) *followed.*

APPEAL by leave from a decision of an Admiralty Divisional Court (Lord Merrivale, P. and Hill, J., assisted by Elder Brethren) (reported 17 Asp. Mar. Law Cas. 548 ; 140 L. T. Rep. 200 ; (1929) P. 109).

The appellants (respondents in the Divisional Court) were the owners of the steam drifter *Young Sid.* In an action in the Lowestoft County Court in which the respondents, owners of the drifter *Ocean Swell,* who were appellants in the Divisional Court, claimed damages sustained in a collision between the *Young Sid* and the *Ocean Swell,* the County Court judge held both vessels to blame in the proportion of two-thirds to the *Ocean Swell* and one-third to the *Young Sid.* On appeal, the Divisional Court varied the proportions of blame, holding the vessels to blame in equal degrees. The Divisional Court held that the appellants in the Divisional Court were entitled to the costs of the appeal. The respondents in the Divisional Court (present appellants) obtained leave to appeal.

Dunlop, K.C. and *Holman* for the appellants. —This court is required to decide whether in the circumstances of this case there should be an order that the appellants should have the costs of the appeal, or whether there should be no order as to costs. It is contended that there is a well-established rule in the Admiralty Court that, where both vessels are held to blame in equal degrees, there should be no costs on either side. The existence of such a rule is recognised in the decision of Lord Phillimore in *The Canton* (166 L. T. Jour. 88 ; (1928) W. N. 214), and extends to a case where two vessels have been held to blame in equal degrees in the court of first instance, and the proportion of blame is subsequently varied by the appellate tribunal so that each vessel is held to blame in equal degrees. In such a case the appellant, not having admitted any liability, and to that extent having failed, is not entitled to any costs.

Langton, K.C. and *Naisby,* for the respondents argued that the question of costs was in the unfettered discretion of the court or judge, and that the court, having exercised its discretion, its decision could not be challenged upon the ground that the court were bound to award costs in accordance with any alleged rule or practice.

Dunlop, K.C. replied.

SCRUTTON, L.J.—I hope that the judgment which we are about to give will not disappoint the crowds of Admiralty practitioners who have been represented to us as waiting for guidance.

The point arises in this way. There was a collision, I think in Lowestoft Harbour, between two small steam drifters, the *Young Sid,* represented by Mr. Dunlop, and the *Ocean Swell,* appropriately represented by Mr. George Langton. The learned County Court judge, sitting with assessors, found that both vessels were to blame, the *Ocean Swell* in the proportion of two-thirds and the *Young Sid* in the proportion of one-third. The owners of the *Ocean Swell* appealed against the County Cour judge's order ; and they asked that the court should determine that the *Young Sid* was alone to blame for the collision. They failed in that appeal, but they succeeded in getting the proportion in which the two drifters were in fault altered from two-thirds and one-third to equal damages, that is to say, both equally to blame.

The question of costs then arose. Apparently the question was raised by those representing the *Young Sid,* that there was a rule of practice binding upon the judge of the Admiralty Court by which once the vessels were found both to blame neither got any costs. The President adjourned the matter for the consideration of the court. He gave judgment after considering the matter, citing a passage of Lord Phillimore's judgment in *The Canton* (166 L. T. Jour. 88 ; (1928) W. N. 214), where both vessels were held to blame, stating that the ancient rule of the court was that where both vessels were held to blame each party should bear his own costs in the court of first instance, and concluding : " I would recommend your Lordships not to interfere with this settled rule of practice, and to hold that there should be no costs either in the Admiralty Division or in the Court of Appeal ; and I think that this should also be the rule in your Lordships' house when the appellant seeks for a total reversal and the result in your Lordships' opinion is that both vessels are to blame." The President seems to have taken the view that the " settled rule of practice " as stated by Lord Phillimore did not agree with " the practice generally followed in this Division," which is the language he uses, and that in his view " the practice generally followed in this Division " was that where the party appealing had succeeded on the appeal, the costs should follow the event of the appeal and that the successful appellant, although successful in part, should have the costs of appeal ; and he mentions a case (*The Ceto* (6 Asp. Mar. Law Cas. 479 ; 62 L. T. Rep. 1 ; 14 App. Cas. 670)) in the House of Lords which fitted in, in his view, with the practice as he understood it, and an earlier case, *The Tyenoord* (Swa. 374). The Divisional Court proposed, therefore, to

give the appellants their costs of the appeal. The exact language is: "That being the case, although it is true, as Mr. Holman pointed out here, that only a small amount was involved, the appellants proved to be right in substance upon their appeal—they had substantial grounds of appeal and they succeeded—it seems to me that so far as the appeal is concerned the appellants ought to have their costs of the appeal."

The representatives of the *Young Sid* thereupon applied for leave to appeal and Mr. Holman, appearing for them, stated: "My point will be that costs in a case of this sort are a matter of principle, and that the principle has been laid down in *The Canton* (*sup.*), and that it is not now open to this court to exercise a discretion on a question of costs in an appeal where a judgment has been varied so that both vessels are held equally to blame. My point will be that in such a case as *The Canton* (*sup.*) the court always lays it down that there shall be no costs." On hearing that this question or principle was supposed to be involved, leave to appeal was given in these terms: "Leave to appeal from the order of the 22nd Nov. 1928, whereby the defendants were condemned in the costs of the appeal herein, but ordered that such appeal be limited to a matter of principle and not of discretion."

Now, in my view, the idea that any court under the Judicature Act is limited by rules in the matter of costs is erroneous. There are rules which have the force of a statute, rules under the Judicature Act, of which Order LXV., r. 1 is as follows: "The costs of and incident to all proceedings in the Supreme Court . . . shall be in the discretion of the court or judge"; and the suggestion that because in previous cases of a particular character the court has exercised its discretion in one and the same way, therefore a later judge, having the same set of facts before him, must exercise his discretion in the same way, appears to me to be quite erroneous. There is no doubt that up till about the year 1927, the courts below the House of Lords were laying down certain rules by which the judge in his discretion should be guided. For instance, a marked case of that will be found in the judgment in *Ritter* v. *Godfrey* (122 L. T. Rep. 396; (1920) 2 K.B. 47), where all the members of the Court of Appeal, particularly Lord Atkin, attempted to codify the matters which would influence a judge in refusing a successful plaintiff his costs; and very elaborate judgments were given by the Court of Appeal in that particular case formulating the sort of rules by which a judge should be guided. But in a case decided by the House of Lords in the year 1927, the case of *Donald Campbell and Co. Limited* v. *Pollak* (137 L. T. Rep. 656; (1927) A. C. 732), the House of Lords pointed out in most emphatic terms that there was a statute which gave the judge trying the case discretion as to what he should do with the costs, and that in those circumstances if he exercised his discretion—unless he dealt with absolutely immaterial matters such as the state of politics, or the weather, or the colour of the plaintiff's hair—his judgment as to costs was unappealable; and that he was not to be fettered by any previous rules of practice or course of practice of other judges sitting in the same tribunal. The House of Lords said that *Ritter* v. *Godfrey* (*sup.*) was wrong and that the Court of Appeal had no business to lay down rules or to formulate rules for the guidance of the judge as to whether or not a successful plaintiff should have his costs; and in the particular case they set aside the judgment of the Court of Appeal, which had altered the decision of Branson, J. as to costs in the case, in which the Court of Appeal thought he had considered matters which he ought not to have considered, namely, matters which he knew because he had tried another case relating to the same parties. The House of Lords said that that was wrong; that there was no appeal from the discretion of the judge who tried the case as to costs, provided that he did not deal with matters which had absolutely no connection whatever with the case.

Now in that general statement of the House of Lords, they seem to me only to be repeating what had been said with regard to the alleged rule of the Court of Admiralty by the Court of Appeal in *The Friedeberg* (5 Asp. Mar. Law Cas. 426; 1885, 52 L. T. Rep. 837; 10 Prob. Div.). Mr. Dunlop says with some contempt that that is an old case; but it was a case which was decided at a very relevant time, shortly after the Judicature Act came into operation, as to the effect of the statutory provision of the Judicature Act. At that time apparently, the impression of Admiralty practitioners was that there was a settled rule of practice that when a reference took place in the Admiralty Court, if the registrar struck off one-fourth each party paid his own costs; if he struck off more than one-third the claimant paid the other party's costs, and that that was the settled rule of practice in the Admiralty Court. Coming before the Court of Appeal to ascertain whether that rule of practice could stand, Lord Esher said this: "The Court of Admiralty always had a discretion in regard to costs; even if it had not, it would have been given by the Judicature Acts; but, in fact, Order LXV., r. 1, has affirmed the already existing discretion. When a court has such a discretion it is intended that it should exercise it in each individual case. The moment, therefore, that a hard-and-fast rule is laid down as to costs, the judge's discretion is fettered. With all deference to that eminent judge, Dr. Lushington, the moment he laid down as a general rule that if, on a reference, the plaintiff did not obtain a certain proportion of his claim, he was to be deprived of, or to pay, costs, he did what was wrong. For he tried to fetter his own discretion and that of his successors, which he had no legal power to do. As to the rule, if it could be made, I doubt if it would be a good rule, and in many cases it must work injustice. But since the judge of the Admiralty Court must exercise his discretion in every case, it is wrong

to say that there is any rule by which he can be bound." Now, as to the supposed rule laid down by Lord Phillimore in *The Canton* (*sup.*), I desire to say, first of all, that I do not think he was laying down more than a suggestion which would be considered by any subsequent court which had a similar set of facts before it. Secondly, if he was intending to lay down such a rule, he was going contrary to the decision in the House of Lords in *Campbell* v. *Pollak* (*sup.*), and I notice that although he sat on the appeal as to the merits in *Campbell* v. *Pollak* (*sup.*) he was not one of the seven law lords who sat to consider the preliminary question of jurisdiction and the question of appeal. It may be, therefore, that he had not in his mind so clearly as he would otherwise have had what the House of Lords in fact decided in the case of *Campbell* v. *Pollak* (*sup.*) as to the unfettered discretion of the judge of first instance.

If, as Mr. Holman said, this case is intended to decide whether there is a rule binding the discretion of the judge that where both vessels are held equally to blame there shall be no costs whatever success the appellant has on the appeal, such a contention is, in my view, erroneous. Similarly, with great respect to the President, if I thought he was saying: "There is a settled rule of this court which we are bound to act upon in the Divisional Court," I think equally he is wrong. But as I read the president's judgment, I think he is not doing more than saying there is not a settled rule, because if Lord Phillimore said so in that case, I refer to another decision (*The Cito* (*sup.*), in the House of Lords, which said the opposite, and I refer to the decision (*The Tyenoord* (*sup.*) in Swabey's Reports, which said the opposite; and we frequently rule in the opposite direction in this court.

In my view, what the President has done, particularly having regard to the last sentence of his judgment, is this. He has said: "In our discretion we think that this is a case in which the appellant, who has partly succeeded in his appeal, should have the costs of that partial success, because he had to come here to get it."

Speaking of my own experience in this court in common law cases (and, I am sorry to say, I have had thirteen years' experience here), the question is constantly arising. An appellant brings a very wide-sweeping appeal, and succeeds in part. It is said on the one side: "See how much the appellant has failed in." It is said on the other side: "Ah, but he succeeded in this and he had to come here to get it"; and the court acts on no settled rule of practice, but considers the circumstances of each case and considers whether the appropriate order would be, in view of the fact that the appellant has failed in a large part of the appeal, to make a special order as to costs, or whether he has succeeded in a sufficiently substantial amount to justify giving him the costs of appeal.

I should like to say, as has been pointed out to me by my brother Sankey—as no doubt he will himself point out—that circumstances have very much altered since the Maritime Conventions Act enabled you to depart from the old rustic rule of equal blame and to give proportions of two-thirds and one-third, one-quarter and three-quarters—I do not know how far at present in the matter of proportions the Admiralty Court has gone. The power of varying proportions obviously raises such a lot of different circumstances that an unfettered discretion is a thing which should be left to the judge of the Admiralty Court, and which, in my view, is left to him by Order LXV., r. 1, which has the force of a statute.

The result is that we decide that the question of the previous practices of the court are immaterial. If in this case the President had purported to say, "I use no discretion and act on the previous practice of the court," we should have sent it back to him in order that he might use his unfettered discretion. But as, in my view, the Divisional Court have used their discretion, it follows that there is no ground for suggesting that they are bound by a previous rule of practice to decide otherwise; and the appeal, therefore, must be dismissed with costs.

GREER, L.J.—I agree. The present respondent, who was appellant in the court below, was complaining of the finding of the learned County Court judge that put upon him two-thirds of the damages caused by a collision. He asked the Court of Appeal to say that he was not responsible for any of the damage, and said he ought to have had judgment with costs. He also asked the court, and it was open to the court, to say that the proportion of the damages put upon him was not the right proportion, and that it ought to be something less. The Divisional Court held that it ought to be something less, and that it ought to be half-and-half. It follows from that that the appeal from the County Court was partially successful and a remedy was obtained by the appellant that he could not have got without bringing the matter before the Divisional Court. For myself, I should have thought, although there is no rule binding the discretion of the court, that that was *primâ facie* a reason why the present respondent, the appellant below, should have the general costs of the appeal. However, it was argued by those who appear for the present appellant that there was a practice of the court that in those circumstances there should be no costs on either side, and that the practice of the court was so strong as to amount to a rule of law that in those circumstances the court must order each party to bear his own costs.

Leave to appeal was asked for by Mr. Holman in these terms: "I do not wish to appeal as to the exercise of discretion, but my point will be that costs in a case of this sort are a matter of principle, and that the principle has been laid down in *The Canton* (*sup.*), and that it is not now open to this court to exercise a discretion on the question of costs in an appeal where a

judgment has been varied so that both vessels are held equally to blame." He was there asking liberty to raise a point of law—the question as to whether there was any discretion still left open to the court, and it is only upon the point of law that he obtained leave to appeal; and that is the only question of law with which we have to deal. The rule dealing with the costs in all proceedings in the Supreme Court, which includes proceedings by way of appeal to the Probate Court, as well as any other proceedings in the Supreme Court, including, of course, proceedings before the Court of Appeal, is Order LXV., r. 1. That rule says this: "Subject to the provisions of the Acts and these rules the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge; provided that nothing herein contained shall deprive an executor, administrator, trustee or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund"—and then it goes on to deal with what is to happen when there is a trial by jury—"provided also that, where any action, cause, matter or issue is tried with a jury, the costs shall follow the event, unless the judge by whom such action, cause, matter, or issue is tried, or the court, shall, for good cause, otherwise order." There is a clear distinction drawn between the discretion which is allowed to a judge who tries a case without a jury, and what his powers are when the case is tried with a jury. When the case is tried with a jury the costs follow the event, unless the learned judge can find good cause for otherwise ordering: and the question as to what is a good cause is quite clearly a matter of law, and there have been a number of decisions on the question as to what is or is not good cause. But no such question can arise where the case is tried without a jury. There you have only to look to the first part of the rule to see what the law is upon the subject; and the law is that the judge is to exercise his discretion.

Now, naturally, but perhaps unfortunately, there grew up the habit of judges who were trying cases alone of stating, when they were dealing with costs, what were the reasons that influenced their judgment in giving the costs to the plaintiff or the defendant, as the case might be; and gradually those decisions appear to have become considered to be decisions on questions of law, whereas they were not decisions on questions of law at all. It came to be almost the fact that there were as many decisions limiting the discretion of the judge in a case which was tried by a judge alone as there were in a case which was tried by a jury where good cause had to be made out. The position so remained until the decision in the House of Lords in *Donald Campbell and Co. Limited* v. *Pollak* (*sup.*), where attention was redirected by the House of Lords to the words of the rule, and it was held that neither the judges of first instance nor the Court of Appeal could lay down limits as to what discretion could, or could not, be exercised by a judge trying a case without a jury, except to the extent to which my Lord has referred where totally irrelevant considerations had admittedly influenced the judge in giving his decision.

The question arises now as to whether or not the judge did exercise his discretion. The practice before the decision was given in this case in the Admiralty Court as to how the discretion should be exercised was apparently not uniform; and the judges below in the Admiralty Court thought apparently that the practice was in favour of the view which they took, namely, that the appellant having succeeded in part should have his costs. But I cannot read the judgment as meaning that they were laying that down as a matter of law. They were entitled to take into consideration the recent practice as they knew it to be, and I read the last paragraph of their judgment as meaning that, taking that into account, and taking everything else into account in the case, there were substantial grounds of appeal, and the appellants succeeded in the appeal on those substantial grounds, and that, therefore, they ought to have their costs of the appeal.

For those reasons I think that this appeal should be dismissed with costs.

SANKEY, L.J.—I agree. As I am not familiar with the Admiralty practice, I have ventured to send for and to look at a well-known treatise on the practice in the English Courts of Admiralty, the third edition of Williams and Bruce on Admiralty Practice, which was edited by the late Mr. Justice Bruce and published in 1902; and I think there must have been some sort of—I will not say rule, because I want to use the vaguest sort of word, but some sort of understanding such as is contended for by Mr. Dunlop. It is stated on p. 97: "Where both ships are to blame, it is the general rule that each party should be left to pay his own costs. . . . The same rule as to costs applies in the Court of Appeal, and in order to enforce care at sea the Court of Appeal will not, when both ships have been to blame, allow, unless in some exceptional case, either ship to gain anything by the litigation. Thus where one of two ships has been held alone to blame in the court below, and her owners have appealed, and in the Court of Appeal both ships have been held to blame, the successful appellant will as a general rule not obtain his costs of the appeal." A great many authorities are cited for that proposition, and on p. 459 there is a long criticism upon the decision in *The Friedeberg* (*sup.*), and it says: "The attention of the Court of Appeal does not appear from the report of the case of *The Friedeberg* (*sup.*) in the Law Reports, to have been called to the numerous cases in the Court of Admiralty and Admiralty Division subsequent to the case of *The Empress Eugenie* Lush. 138), in which the notion that any hard-and-fast rules existed as to the incidence of

costs in the Admiralty Registry was expressly repudiated."

If those are correct statements as to the practice in the Admiralty Court, they do not convey to my mind that there is a hard-and-fast rule upon the subject which can be translated as if there is a rule of practice. If there were I think it would be wrong. Personally, I rather think it is a list of instances in which the court has or has not given costs in the particular case, which may serve as a guide to a court trying subsequent cases, but which is not binding upon such a court. To begin with, if there were such a hard-and-fast rule, I think it would contravene Order LXV., r. 1, as to costs, which has statutory authority, and which expressly provides that the costs shall be in the discretion of the court or judge.

Now it may have been in the old days of Admiralty, where you simply had the issue, both to blame or one only to blame, that the rule was workable. I am not at all sure how far it is workable having regard to the passing of the Maritime Conventions Act 1911, in which rules were established, again statutory rules, as to the apportioning of blame. Therefore, I think that the fact that that Act was passed does, to some extent. throw some doubt upon the earlier decisions being of a binding character and making a hard-and-fast rule, as is contended.

Further, I think that since the decision in *Donald Campbell and Co.* v. *Pollak* (*sup.*) Mr. Dunlop cannot take up the attitude which he would desire to take up. What the Lord Chancellor said in that case was this: "A successful defendant in a non-jury case has no doubt in the absence of special circumstances, a reasonable expectation of obtaining an order for the payment of his costs by the plaintiff; but he has no right to costs unless and until the court awards them to him, and the court has an absolute discretion to award or not to award them. This discretion. like any other discretion, must of course be exercised judicially and the judge ought not to exercise it against the successful party except for some reason connected with the case. Thus if—to put a hypothesis which in our courts would never in fact be realised—a judge were to refuse to give a party his costs on the ground of some misconduct wholly unconnected with the cause of action or of some prejudice due to his race or religion or (to quote a familiar illustration) to the colour of his hair, then a Court of Appeal might well feel itself compelled to intervene. But when a judge, deliberately intending to exercise his discretionary powers, has acted on facts connected with or leading up to the litigation which have been proved before him or which he has himself observed during the progress of the case (and these are strong words), then it seems to me that a Court of Appeal, although it may deem his reasons insufficient and may disagree with his conclusion, is prohibited by the statute from entertaining an appeal from it." The history of that case is well known. For some years previously there had been a tendency in this court to interfere with the discretion of the learned judges of first instance, and an attempt was made by Atkin, L.J. (as he then was) in *Ritter* v. *Godfrey* (*sup.*) to codify the cases as to costs. The effect of that codification was to take away a discretion which the statute had given to judges of first instance, and which by the decision of *Donald Campbell and Co.* v. *Pollak* (*sup.*) was restored to them by the House of Lords.

Therefore, for those reasons the words of the order itself, such considerations as may be derived from remembering the recent passing of the Maritime Conventions Act and the decision in *Donald Campbell and Co.* v. *Pollak* (*sup.*), I have come to the conclusion that the position contended for by the appellant in this case cannot be maintained. In other words, what it was sought to do was this. It was sought by an alleged practice of the Court of Admiralty to fetter the discretion of the judge sitting in Admiralty. As I have said, I have very great doubts whether the rule existed in the sense that Mr. Dunlop would have us think it existed. All I think that took place was this, that a very large number of cases were reported upon costs which no doubt are extremely useful as a guide for future judges as to how to exercise their discretion in particular cases. But I doubt if those cases ever formulated a hard-and-fast rule. If they did formulate a hard-and-fast rule, in my opinion that rule cannot now be maintained.

For those reasons I am of opinion that the court below was correct in its determination, and that the appeal should be dismissed.

Solicitors for the appellants, *Holman, Fenwick,* and *Willan*, agents for *Wiltshire, Sons,* and *Jordan*, Lowestoft.

Solicitors for the respondents *Botterell* and *Roche*, agents for *Chamberlain, Talbot,* and *Bracey*, Great Yarmouth.

June 19 *and* 20; *July* 2, 1929.

(Before Scrutton, Greer, and Russell, L.JJ.)

Dampselskab Svendborg v. London, Midland, and Scottish Railway Company. (*a*)

ON APPEAL FROM THE KING'S BENCH DIVISION.

Charter party — Discharge of cargo — Docks owned by railway company who act as stevedores—Railway company requested to discharge cargo—Apportionment of cost of discharge—"Work done by the vessel at the port of discharge."

By a charter-party for the carriage of a cargo of timber from the Baltic to Garston it was provided, inter alia, *as follows: Clause* 15 *: "For any work done by the vessel at the port of discharge beyond delivering cargo at the*

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

ship's rail if delivered by hand, or within reach of the ship's tackle or of the shore crane tackle if thereby discharged, the consignees shall pay to the shipowner the cost thereof plus 15 per cent."

Held, by Scrutton and Russell, L.JJ. (Greer, L.J. dissenting), that upon the true construction of clause 15 of the charter-party the vessel had not delivered the cargo until it had lowered it into wagons and released the attachment to the crane which lowered it.

Decision of Branson, J. affirmed.

Appeal from a decision of Branson, J.

The plaintiffs, who were a foreign company, were owners of the steamship *Laura Maersk*, which by a charter-party dated the 17th Jan. 1928, was chartered to carry timber from Windau in the Baltic, to Ellesmere Port and Garston. The first-named defendants were the owners of the docks at Garston, at which 180 standards of deals, battens, and boards were discharged from the *Laura Maersk* between the 2nd and 4th Feb. The second defendants were the indorsees of three bills of lading for seventy standards of batten ends. Besides owning the docks, the first defendants had for many years acted as stevedores and master porters at Garston Docks in connection with the discharge of cargoes, and it was their custom to discharge a ship by means of shore cranes, the timber being lifted thereby out of the ships and deposited direct into wagons after the slings had been loosed. Upon the arrival of the *Laura Maersk* at Garston the plaintiffs requested the first defendants to undertake the work of placing the cargo so that delivery of it could be taken by the consignees within reach of the shore crane. In addition, the railway company charged the plaintiffs with the expenses of receiving the timber from within reach of shore crane tackle, unslinging and stowing in wagons.

Accordingly, the plaintiffs claimed against the first defendants the return of 31*l.* 8*s.* 9*d.* as being money wrongly demanded from the plaintiffs and paid under protest in relation to the unloading and delivery of the cargo of timber ex the steamship *Laura Maersk*. In the alternative, they claimed against the second defendants 12*l.* 1*s.* 7*d.* as money paid by the plaintiffs for and on behalf of the second defendants and in relation to services which were performed or which by the charter-party ought to have been performed by and for the second defendants.

The first defendants pleaded that their rates and charges were reasonable, and that they had charged and been paid by the plaintiffs in accordance with the same. The second defendants said that they had paid for all work of delivering the cargo beyond reach of shore crane tackle.

The charter-party, which incorporated the terms of the Baltic Wood Charter 1926 ("Baltwood"), provided by clause 15 as follows: "The shipowner's liability shall cease at the port of discharge when the cargo is discharged at the ship's rail if discharged by hand, or within reach of ship's tackle or shore crane tackle if thereby discharged. . . . For any work done by the vessel at the port of discharge beyond delivering cargo at the ship's rail if discharged by hand, or within reach of the ship's tackle or of the shore crane tackle if thereby discharged, the consignees shall pay to the shipowner the cost thereof plus 15 per cent."

Branson, J. held (1) that the plaintiffs knowing the terms and conditions of discharge, and having requested the railway company to undertake the work of discharging the cargo, became liable to pay to the railway company the sums which they had in fact paid; and (2) that the rates and charges for discharging the cargo were not excessive or unreasonable. As to the second defendants, Branson, J. held, that there was nothing the plaintiffs could claim against them under the charter-party. The plaintiffs appealed against the second defendants, the appeal against the first defendants having been withdrawn.

Le Quesne, K.C. and *R. K. Chappell*, K.C. for the appellants.

Dunlop, K.C. and *Harold Stranger* for the respondents.

Cur. adv. vult.

Scrutton, L.J.—This appeal is another chapter in the prolonged struggle between the Timber Trade Federation and the Chamber of Shipping of the United Kingdom as to the incidence of the expense of discharging timber at the various ports of the United Kingdom. The two contending parties had originally arranged the Scanfin Charter of 1899 in which the relevant clause ran "Cargo to be brought to and taken from alongside the steamer at charterers' risk and expense as customary." Under this clause work was being done under customary arrangements at a number of British ports. These arrangements were upset by the decision of the House of Lords in *The Turid* (127 L. T. Rep. 42; (1922) 1 A. C. 397, 15 Asp. Mar. Law Cas. 538), a case relating to the peculiar circumstances of the port of Yarmouth, that no place could be "alongside" by custom which was not "alongside" in the ordinary sense of the word. In 1924, the contending parties arranged a new version of the Scanfin Charter 1924, which left out the debatable word "alongside" in relation to discharging, and inserted a new clause 13. "The cargo shall be discharged by the vessel in the customary manner as fast as the vessel can deliver, during the ordinary working hours of the port, on to the quay and (or) into lighters and (or) craft and (or) wagons and (or) on to bogies and thereon stowed and (or) stacked as customary at the port of discharge, the consignees having the right to select any one or more of these alternatives if customary and available at the time of discharge. But any work done by the vessel at the port of discharge beyond delivering the cargo within reach of the ship's tackle or of the shore crane tackle (the shipowner having

the option of using the ship's tackle or shore crane where permissible by local regulations) shall be at consignees' risk and expense. The cost of such additional work shall be determined in accordance with a schedule of apportionment to be agreed from time to time between the Chamber of Shipping of the United Kingdom and the Timber Trade Federation of the United Kingdom at ports where the schedule applies." At this stage it was apparently contemplated that the federation and the chamber would be able to agree for each port the amount to be paid by the consignees for work done by the ship after delivery as defined in the clause when the ship was working "in the customary manner."

As appears from the agreed schedule of apportionment the two bodies, the chamber and the federation, were able to agree for a large number of ports, the amount of the consignees' payment. But for some reason not stated to us it was again thought necessary to alter the form of charter, and a new arranged form, the one in question in the present case, known as the Baltwood Charter 1926, was produced. The port of discharge in the present case was the well-known Garston Dock, near Liverpool, owned by the London, Midland, and Scottish Railway. The chamber and the federation had not been able to, or at any rate had not, agreed an apportionment of the charges at this port.

At Garston the only possible method of discharge is by short cranes worked by the railway company on to wagons within reach of the shore cranes. Where there are several consignees the cargo is sorted by the railway company for delivery to them by marks and numbers at a yard to which the wagons are moved and delivery orders are issued to the consignees after this sorting. Clause 15 of the Baltwood Charter makes certain additions to clause 13 of the Scanfin charter 1924. First it adds two sentences about shipowners' liability, (a) the first sentence as to liability for the work up to delivery or discharge provides that the liability is to cease when the cargo is discharged within reach of the shore crane tackle, (b) the last sentence as to liability for the work done by the ship for which the consignee is to pay, namely, work done after discharging within reach of the shore crane tackle provides that the shipowner is to have the liability of a stevedore, subject to a special provision as before. Secondly, as the chamber and the federation have now agreed an apportionment in many ports, it adds a sentence that the cost shall be apportioned under that apportionment which it contemplates shall be filled into the schedule in clause 18. Clause 16 contains a note in small print: "If the port of discharge is not included in the schedule of apportionment, the charges, if any, under clause 15 shall be paid in addition to the freight above mentioned," providing what is to happen if the schedule of apportionment does not contain the port of discharge in the charter, which is the present case, and says the consignee is to pay the charges, if any, under clause 15, that is, the cost of any work done by the vessel beyond delivering cargo within reach of the shore crane tackle. Clause 16 at the beginning speaks of the apportionment of charges under clause 1; the last sentence of clause 1 reads that any additional expense of the mode of delivery selected by the consignee over the cost of delivery on to the quay shall be paid by the consignee. This hardly seems to be the same as the provisions of clause 15 that the consignee is to pay the cost of work done by the ship after delivery within reach of the shore cranes. But neither side before us attempted any explanation of the meaning of clause 1 on this point, or based any argument on it, and I deal with the matter in the words of the footnote to clause 16, as to be determined by the words of clause 15.

The dispute between the two parties was this: counsel for the ship said, I have delivered, and my liability ceases when the timber swung on the shore cranes is within reach of the consignee in the wagon, though it is still in the air and tied up in the sling. The consignee must pay the cost of manœuvring it into and on to the floor of the wagon and, counsel added under pressure, the cost of releasing the sling. Pressed as to the cost of the craneman who lowered the sling from "within reach" to the floor of the wagon, I think counsel admitted that this was ship's work in delivering and that the consignee could not be called upon to pay for it. Counsel for the consignee said that he was entitled to have the timber discharged into wagons, and that this work was not done till the timber was in the wagon, not merely hanging near it, and the timber was released from the sling which tied the pieces together and attached them to the crane. I mention, to show that I have not overlooked it, that it is not ordinarily good delivery to tender goods of two consignees claiming different marks mixed up together and to leave the consignees to sort them, but the consignees seem to have acquiesced, as they do in London, in the form of delivery.

In my view, the fallacy of the argument for the ship lies in this: that it turns the phrase "delivery within reach of shore crane tackle" into "delivery within reach of consignees," and argues that though the ship is bound to deliver into wagons, it does so if it brings the sling of timber hanging on a crane within reach of the consignee standing in a wagon, and leaves the consignee to "manœuvre" the timber into the wagon and release it from the sling. These latter operations are, in my opinion, part of the work of delivery or discharge into wagons which the ship has undertaken to do, and the words "within reach of shore crane tackle" are inserted to limit the area within which the ship can be required to deliver into wagons. There is not a case of delivery at ship's rail where the consignee takes from the rail the cargo which the ship brings to the rail, both parties possibly having hold of the package at the same time. The ship has undertaken to deliver beyond the ship's rail,

that is into wagons, provided the wagons are within the reach of the shore crane tackle. Stowage or stacking in the wagons or on the quay where customarily done by the ship is for expense of the consignee. I cannot think the ship has delivered the cargo into wagons when it is still in the air, or has made delivery of goods which are still fastened or tied to the tackle of the crane the ship is using.

I have come to this conclusion on the wording of the charter, but it is confirmed by the apportionment which the chamber and the federation have agreed to at ports where discharging into wagons by crane is customary. For instance, at the Ship Canal port of Manchester, discharge into wagons by crane, whether ship's or shore, is customary, and it is agreed that the ship pays " for discharge direct from ship to wagon alongside and releasing from ship's tackle or shore crane." At the Hartlepools the customary method is discharge into wagons, the ship pays for discharge into wagons by shore crane and releasing slings only ; any work done beyond release of sling payable by consignees. At a number of ports where delivery by shore crane into wagons is customary the ship pays the expense of delivery and the consignee nothing. Examples of such ports are Cardiff, Glasgow, Swansea, Milford Haven, and Irvine. The Belfast apportionment for ship's tackle mentioned that the ship must release the sling.

The judge below expressed his view as to the point where delivery or discharge, which I think mean the same thing, terminated in the following words : " I think it plain that the discharge or delivery within reach of shore crane intended by this clause is a delivery or discharge overside on to the quay or into craft or wagons as the custom of the port demands, the words 'within reach of shore crane' limiting the distance from the ship's side beyond which the shipowner need not, in his capacity of shipowner, transport the goods and within which he is called upon to deposit them." I agree with this view, and I think it is fatal to the claim of the ship against the consignee under the charter.

There appears to be nothing in the authorities to negative this construction of the charter. Reliance was placed upon *Petersen v. Freebody* (8 Asp. Mar. Law Cas. 55; 73 L. T. Rep. 163; (1895) 2 Q. B. 294). This decision related to a cargo of spars and poles in the Surrey Commercial Docks under a charter which provided that cargo was to be taken from alongside the ship at merchant's risk and expense. The discharge of the poles was into lighters alongside through the ship's bow ports under a clause entitling the consignee to " discharge over side into lighters or otherwise." The custom of the Port of London as to discharge into lighters, which was afterwards proved in *Glasgow Navigation Company Limited v. Howard Brothers and Co.* (11 Asp. M. C. 376; 102 L. T. Rep. 172), was not proved in *Petersen v. Freebody* (*sup.*). The claim was for demurrage occasioned by the consignees having insufficient men in the lighters. The express provision was that the ship was to deliver overside into lighters and no crane was used, a ship's man on a stage hanging outside the ship took hold of the end of the pole as it came out of the bow port, and pulled it till the men in the lighter got hold of it and completed the operation. The court treated the matter as analogous to delivery at the ship's rail, the ship placing the pole where the consignee could reach it, and the consignee then assisting in handling it. There was no question of the poles being in a sling which had to be released, or being lowered by ship's tackle into the lighters. In my opinion the judgment of the court on these special facts has no bearing on the different facts and language of the present charter. Here the ship agrees to deliver into wagons, and does so by lowering the timber attached by rope to a crane. In my view the ship has not delivered till it has lowered it into wagons and released the attachment to the crane. Till this is done the timber is not in the wagon and is still attached to the shipowner's tackle.

In my view Branson, J. came to a correct conclusion, and the appeal must be dismissed with costs.

Greer, L.J.—This is an appeal against the judgment of Branson, J., dismissing a claim made by the appellants against the receivers of a portion of the cargo of the steamship *Laura Maersk* at the port of Garston, for a portion of the expenses incurred in connection with the discharge of the cargo which the shipowner paid, and which he says, under the terms of the bill of lading which incorporated the terms of the Baltic Wood Charter 1926 he was entitled to recover from the defendants.

The cargo shipped under the charter-party was described as deals, and (or) battens, and (or) boards, and (or) scantlings. The bills of lading related to a quantity of batten ends, but this fact is not material to anything we have to consider in this appeal.

The usual practice for the port of Garston is for the work of discharge and receipt of the cargo to be done by the servants of the London Midland and Scottish Railway Company, who are the dock authority. It is a convenient practice which enables the whole of the work to be done continuously by one body of men, and the charges afterwards allocated to the ship and to the receiver of the cargo. The railway company have their own schedule as to the charges which they make against and collect from the ship, and the charges which they make against and collect from the receivers, but, of course, their allocation cannot determine the rights of the parties *inter se*. These fall to be determined by the bill of lading agreement to which the receiver becomes a party by taking an assignment of the bill of lading.

The material provisions of the charter-party are contained in clauses 1 and 15. Clause 1 is as follows : " If the consignees select one of the alternatives mentioned in clause 15, other than discharge on to the quay (which includes

rough stacking thereon if and where customary and not usually done by the consignees), any additional expense (plus 15 per cent. thereon and in addition the charge for workmen's compensation insurance) of such delivery beyond the expense of delivery on to the quay, as aforesaid, shall be paid by the consignees to the shipowner, in addition to the amount(s) above mentioned. If the port of discharge is included in the schedule of apportionment last agreed between the Chamber of Shipping of the United Kingdom and the Timber Trade Federation of the United Kingdom, such additional expense shall be ascertained in accordance there with." The apportionment as to Garston had not been agreed. Clause 15 is as follows: "The shipowner's liability shall cease at the port of discharge when the cargo is discharged at the ship's rail if discharged by hand or within reach of the ship's tackle or shore crane tackle if thereby discharged (the shipowner having the option of using ship's tackle or shore crane where permissible by local regulations). The cargo shall, however, be discharged by the vessel in the customary manner as fast as the vessel can deliver during the ordinary working hours of the port, on to the quay and (or) into lighters and (or) craft and (or) rafts and (or) wagons and (or) on to bogies and thereon stowed and (or) stacked as customary at the port of discharge, the consignees having the right to select any one or more of these alternatives if customary and available at the time of discharge. For any work done by the vessel at the port of discharge beyond delivering cargo at the ship's rail if discharged by hand, or within reach of the ship's tackle or of the shore crane tackle if thereby discharged, the consignees shall pay to the shipowner the cost thereof plus 15 per cent. on the amount thereof and in addition the charge for workmen's compensation insurance. If the port of discharge is included in the schedule of apportionment last agreed between the Chamber of Shipping of the United Kingdom and the Timber Trade Federation of the United Kingdom the charge for such work shall be as settled by the said schedule of apportionment plus 15 per cent. on the amount of such charges, and in addition the charges for workmen's compensation insurance, all of which are agreed at the amount stated in clause 16 hereof. In the execution of any work done beyond discharging cargo at the ship's rail or within reach of the ship's tackle or shore crane tackle, as the case may be, the shipowner shall act as a stevedore with the liabilities only of such and not further or otherwise, but the shipowner shall not be liable for damage by fire, even though caused by the act or neglect of the shipowner or his servants or of any person for whom he is responsible." The railway company collected from the ship 11*s.* per standard for deals and battens and 11*s.* 10*d.* per standard for boards. It was proved, and found by the judge, that this charge included a proportion, which he found to be three-eighths of the remuneration paid to the men who stood in the trucks to receive the timber in the slings, for the work of manœuvring the timber into such a position as would enable them to place it conveniently in the truck or wagon concerned. The plaintiffs say that this proportion of the charge which they had to pay is in respect of work which was done on behalf of the receiver, and work for which they are entitled to be repaid under clause 15 of the charter-party. In order to correctly interpret clause 15 of the charter-party, it seems to me necessary to consider, in the absence of express agreement, what part of the work of discharge and receipt of the cargo is the obligation of the ship, and what part is the obligation of the receiver. In my judgment, it has been accepted for many years that the law on this subject is accurately stated in the judgment of Lord Esher, M.R., in *Petersen* v. *Freebody* (8 Asp. Mar. Law Cas., at p. 56; 73 L. T. Rep. at p. 164); (1895) 2 Q. B. 294, at p. 297).

It is true that that was a claim for demurrage, but the court had to consider who was responsible for the delay to the ship, and for that purpose to decide when the obligation of the ship to deliver had been complied with, and when the obligation of the bill of lading holder to receive the cargo had commenced. In giving judgment Lord Esher used these words: "The operation, therefore, which is to take eight days, is an operation to be performed as between the shipowner and the consignees. Whichever word be used, whether it be called a 'discharging' or a 'delivery,' and whatever be the circumstances of the delivery, one party is to give, and the other is to take, delivery at one and the same time, and by one and the same operation. It follows that both must be present to take their parts in that operation. Those parts are, the ship has to deliver and the consignee to take delivery—where? Each has to act within his own department. The shipowner acts from the deck or some part of his own ship, but always on board his ship. The consignee's place is alongside the ship where the thing is to be delivered to him. If the delivery is to be on to another ship, he must be on that ship; if into barge or lighter, on that barge or lighter; if on to the quay, on the quay. Wherever the delivery is to be, the shipowner, on the one hand, must give delivery. If he merely puts the goods on the rail of his ship, he does not give delivery; that is not enough. If, on the other hand, the consignee merely stands on the other ship, or on the barge or lighter, or on the quay, and does nothing, he does not take delivery. The shipowner has performed the principal part of his obligation when he put the goods over the rail of his ship, but I think he must do something more—he must put the goods in such a position that the consignee can take delivery of them. He must put them so far over the side as that the consignee can begin to act upon them, but the moment the goods are put within reach of the consignee he must take his part in the operation. At one moment of time the shipowner and the consignee are both acting—the

one in giving and the other in taking delivery; at another moment the joint act is finished. Where goods are slung, and lowered gradually over the side of the ship into a lighter, they cannot all be deposited on the same spot in the same lighter. It is obvious, therefore, that those on board must help in the operation of taking delivery by guiding the thing as it is coming down into the lighter. In the present case the delivery was of spars, but it was still a joint operation in which each party had to take his part. The shipowner had to get the spars in such a position as that they could be taken out of the ship. He had not completed his part of the operation by merely getting the spar on to the stage, but, when one end of the spar was tipped over the side of the stage so as to come within the reach of the men in the lighter, they had to take their part in the ordinary operation in the ordinary way; they had to assist in getting the spars into the lighter." There is nothing in the other judgments which show any disagreement with the view expressed by Lord Esher in the words I have quoted. That this has been generally accepted as defining the respective duties of the ship and the receiver of the cargo appears from the judgment of Lord Birkenhead, L.C., in the case of *The Turid* (15 Asp. Mar. Law Cas., at p. 540; 127 L. T. Rep. at p. 45; (1922) 1 A. C., 397, at p. 404), where he says: "The words of the charter-party in this case are: 'Taken from alongside the steamer at charterers' risk and expense.' I am myself of opinion that the word 'alongside,' if it does not suggest actual contact, does at all events suggest close contiguity, and not the less so because the ordinary obligation of the shipowner is admittedly only to deliver to the consignee the cargo his ship carries at ship's rail. A contract which requires delivery elsewhere extends this legal obligation." In *Smith, Hogg and Co. Limited* v. *Louis Bamberger and Son* (17 Asp. M. L. C., at p. 459; 138 L. T. Rep. 615, at p. 618; (1929) 1 K. B. 150, at p. 163), Wright, J. says, after referring to a number of authorities: "I deduce from these authorities the conclusion that the cargo is 'alongside' when it is available for release or is released from the ship's slings if discharged by the ship's tackle, and if discharged, as was the first portion of the deck cargo in this case, by being handed from the vessel, when it is laid with one end on the quay and the other resting against the ship. "I think the learned judge is there accepting the law as laid down in *Petersen* v. *Freebody* (*sup.*). I give the same effect to the words he uses (138 L. T. Rep. at p. 618; (1929) 1 K. B. p. 165: "Apart from custom, the placing into lighters would be a joint operation, requiring the receivers to have their men in the lighter to take the goods as soon as they are within their reach; see the cases of *Petersen* v. *Freebody* (*sup.*), and *Brenda Steamship Company Limited* v. *Green* (9 Asp. M. L. C. 55; 82 L. T. Rep. 66; (1900) 1 Q. B., 518). In *Rederi Aktiebolaget Aeolus* v. *W. N. Hillas and Co. Limited* (30 Com. Cas., 271), which was tried before me and went to the House of Lords, I used these words, at p. 278: "To put the goods over the rail is thus the *primâ facie* limit of the obligation of the ship to discharge and deliver the cargo. If there be nothing in the charter-party about the consignee taking from alongside, it may well be that a custom such as is alleged in this case might impose the further duty of delivery into bogies 18½ft. from the ship's side. It has been decided that the ship's obligations, even where there is an alongside clause, may be extended and the receiver's duties diminished by an established custom of the port so long as the added duties of the ship are being performed while the goods are still alongside. But if the added duties of the ship imposed by the custom extend to taking goods beyond a place that can properly be described as alongside, the custom is inconsistent with the contract made by the express words of the charter-party, and is not binding on the parties to the contract." I see no reason to alter the view as to the law applicable to cases like the present. When the goods in the sling are within the reach of the receiver's men they must begin to act and do what is necessary to guide the goods into position on the quay or in the lighter, though, of course, the ship's men must lower the parcel with the ship's derrick or the shore crane. This, I take it, is the limit of the ship's duty in discharging cargo subject to any extension that may be made by express contract or by custom.

There had been many cases in which the question of the meaning of "alongside" had to be considered for the purpose of determining that local customs were consistent with the provision that the cargo owner should take the goods from alongside, or that the cargo should be taken from alongside at his cost and expense, and it was in this state of the law that the Baltic Wood Charter 1926 was settled as the form of charter to be adopted by steamship owners and shippers of wood goods from the Baltic. In my judgment the effect of clause 15 is as follows: It starts in the first line from what I conceive to have been the accepted rule of law as stated by Lord Esher, M.R. in *Petersen* v. *Freebody* (*sup.*), that the shipowner's liability in relation to the discharge or delivery of the cargo if delivered by hand terminates at the ship's rail, and if delivered by ship's tackle or by the shore crane terminates when the goods in the tackle are within the reach of the receiver's men in the lighter or on the quay subject to the ship doing the necessary lowering of the parcel. This does not, I think, mean as soon as the receiver's men can touch the goods, but as soon as they reach a position in which the receiver's men can effectively deal with them for the purposes of accepting delivery and putting them either on the quay, in a lighter or in a wagon. It is an express provision that at that point the ship's obligations with reference to discharge or delivery are to cease, except as aforesaid, but the clause goes on to provide in the second

sentence that for the convenient discharge of the cargo the ship is to do something which is in addition to that which they do under their liability. I read the second sentence as meaning, "notwithstanding what is hereinbefore provided with regard to the extent of the ship's liability, the ship must continue operations until the goods are on to the quay or into the lighters, or craft, or rafts, or wagons, or bogies, and thereon stowed or stacked, as customary at the port of discharge, the consignees having the right to select any one or more of these alternatives if customary and available at the time of discharge." Then I read the next sentence as meaning that inasmuch as the ship is thereby exceeding that which is their liability as defined in the first sentence, the consignees are to pay to the shipowner the cost of that which is done in excess of such liability and 15 per cent. in addition, and I do not think the obligations put upon the consignee by clause 15 can be deemed to be limited because a less onerous obligation is put upon him by clause 1.

In my opinion the decisive question in this case is what is the correct interpretation of the first sentence in clause 15. The words used are intended to define the extent of the ship's liability in the operation of discharging the cargo. It is clear that the first limb of the sentence provides that where the discharge is by hand, the liability of the ship ceases when the cargo is put on the ship's rail within reach of the consignee's men. So far the clause adopts the ordinary obligation of the ship as laid down in *Petersen* v. *Freebody* (*sup.*); it then goes on to provide that where the discharge is by the ship's tackle the ship's liability shall cease when the cargo is discharged within reach of the ship's tackle. I cannot think that this means that as soon as the cargo is within reach of the ship's tackle the ship's liability ceases. This would mean that it ceased as soon as the cargo was within reach of the ship's tackle in the hold. I think the clause is contemplating a discharge by ship's tackle to a receiver on the quay, or in the lighter, and that it means that the ship's liability shall cease when the cargo is by the tackle placed within the reach of the receiver's men in the lighter or on the quay: and that a similar effect must be given to the words relating to discharge by the shore crane. I think the clause was intended to give effect by express agreement to the obligation of the ship as laid down in *Petersen* v. *Freebody* (*sup.*), and does not have the effect of extending the ship's obligations beyond the point to which they extend in the absence of the clause. The object of clause 15 was, in my judgment, to provide for the doing by one set of hands the work of the ship and the receiver, and to provide that when the ship did what was beyond their common law liability, the work, though done by the ship, should be paid for by the receiver.

For these reasons I think this appeal should be allowed, but as my brethren think differently, the appeal will be dismissed.

Russell, L.J.—The determination of this appeal depends upon what is the true meaning of the third sentence in clause 15 of the Baltwood charter-party, which provides for the payment by the consignees to the shipowner of the cost (plus 15 per cent. on the amount thereof) of certain work done by the vessel at the port of discharge.

In the present case the defendants, Denny, Mott, and Dickson Limited (whom I will refer to as the defendants), were the indorsees of bills of lading for batten ends which were discharged into railway wagons by means of shore cranes at the port of Garston.

Under the charter-party the whole process of discharge down to and including stowing and stacking is to be conducted by the ship. Clause 15 is the clause which relates to discharging. It consists of five sentences. The first sentence provides for the cesser of the ship's liability when the cargo is discharged, and in so doing it refers to the three means of discharging cargo which the charter-party contemplates—namely, by hand, by ship's tackle, and by shore crane tackle. The second sentence places on the ship the obligation to discharge and to stow or stack: it also enumerates various places and apparatus on or into which the cargo shall be discharged, including the quay, lighters, and wagons. The third sentence runs thus: "For any work done by the vessel at the port of discharge beyond delivering cargo at the ship's rail if discharged by hand, or within reach of the ship's tackle or of the shore crane tackle if thereby discharged, the consignees shall pay to the shipowner the cost thereof plus 15 per cent. on the amount thereof and in addition the charge for workmen's compensation insurance." The fourth sentence has no application to the present case, and neither it nor the fifth sentence appears to me to afford assistance on the point of construction.

The ship claims that once the shore crane has swung a load of timber in slings from the ship to a point in mid-air within reach of the hands of the men in a railway wagon, so that they can manœuvre the load into a position suitable for lowering into the wagon, that load is cargo delivered within reach of the shore crane tackle, and that the expense of any work done from that moment by the vessel in discharging is (with the percentage) payable by the defendants.

The defendants concede that they are liable to pay in respect of all work done by the ship after the load has been discharged into the wagon, that is, after the sling has been released. It is in respect of the work done in between these two points of time that the dispute arises.

As a result of close discussion, the point resolved itself into this: do the words in the third sentence "within reach of the ship's tackle" operate to describe a particular kind of delivery to the consignee, from and after the occurrence of which all expenses (plus a percentage) are to fall on the consignees, or do they merely describe the area within which the ship has to fulfil her obligation to discharge

the cargo? In other words, does the third sentence mean that all work done by the ship in discharging her obligations under the second sentence, beyond putting the cargo within the consignee's reach by means of the shore crane tackle, must be paid for by the consignee; or does it only mean that all such work beyond delivering into wagons within the area of the shore crane's reach must be paid for by the consignee?

In my opinion the latter is the true meaning and the natural meaning of the words used. The ship's argument gives an artificial meaning to the language of the third sentence. The "reach" referred to is not the reach of any individual, but is the sweep of the crane. It would involve redrafting the sentence to read it as though it referred to the cargo being brought by the shore crane to a point within reach of somebody for the purpose of handling.

The more natural reading of the third sentence is that the delivery of the cargo there referred to is the same delivery which is referred to in the second sentence as "discharge into wagons," and that the words "within reach of the shore crane tackle" refer to the area within which delivery is to take place, and do not operate to describe and create some form of constructive delivery which falls short of the delivery contracted to be given by the second sentence.

Numerous authorities were cited in the course of the argument, but I confess that I failed to appreciate the relevance of them to the point of construction which we have to decide. They dealt with the meaning and effect of words imposing obligations to take cargo "from alongside," and the effect thereon of port customs.

The only one on which it occurs to me to offer any remarks is *Petersen* v. *Freebody* (*sup.*)

In that case the ship sued the consignees for demurrage. The charter-party provided that the cargo (spars and poles) was to be taken from alongside the ship at the merchant's expense. It also contained a provision, "The ship to discharge overside in the river or dock into lighters or otherwise if required by consignees." That provision, it was held, imposed no obligation on the ship to complete the whole operation of getting the spars out of the ship and putting them into lighters; it only gave the consignees an option to take delivery by lighters or in some other way. Accordingly delivery under that charter-party was to be a delivery in the ordinary way by a joint operation in which the ship and the consignees were to take their respective parts. The consignees were held liable for demurrage because the delay in the unloading had been caused owing to the insufficient number of men provided by the consignees to discharge their part of the joint operation, namely, taking delivery by guiding the spars, as they were coming down, into the lighter.

The case was relied upon as showing that in the present case there was delivery by the ship at the point of time when men in the wagons were able to guide the sling loads, as they were coming down, into the wagons. The following passages in the judgments were cited in support of this view. Lord Esher, M.R. (8 Asp. Mar. Law Cas., at p. 56; 73 L. T. Rep. at p. 164; (1895) 2 Q. B. at p. 297) says: "Wherever the delivery is to be, the shipowner on the one hand, must give delivery. If he merely puts the goods on the rail of his ship, he does not give delivery; that is not enough. If, on the other hand, the consignee merely stands on the other ship, or on the barge or lighter, or on the quay, and does nothing, he does not take delivery. The shipowner has performed the principal part of his obligation when he has put the goods over the rail of his ship, but I think he must do something more—he must put the goods in such a position that the consignee can take delivery of them. He must put them so far over the side as that the consignee can begin to act upon them, but the moment the goods are put within the reach of the consignee he must take his part in the operation." Kay, L.J. (8 Asp. Mar. Law Cas., at p. 57; 73 L. T. Rep. at p. 165; (1895) 2 Q. B. at p. 299) says: "I think that his (the shipowner's) duty is completed when he has discharged over side and put the spar under the dominion and control of the men in the lighter." Smith, L.J. (8 Asp. Mar. Law Cas., at p. 57; 73 L. T. Rep. at p. 165; (1895) 2 Q. B. at p. 300) says: "As has been pointed out by the Master of the Rolls, the giving and taking delivery is a joint operation. It is contended here that because the cargo was a cargo of spars the consignees had not to receive the spars until the ship's crew had put them into the bottom of the lighter. If that be so, the case forms an exception to the general rule. But what is there to show that there is any duty on the shipowner to do that which he is not bound to do with respect to any other cargo, namely, to put his crew off the ship and on to the lighter?"

The language used by the learned judges, while most appropriate to the facts of that case, appears to me quite inapplicable to the present charter-party, by which in express terms the obligation is put upon the ship to carry out and complete the whole operation of getting the cargo out of the ship, delivering it into wagons, and stowing it there. *Petersen* v. *Freebody* (*sup.*) does not, in my opinion, assist to the conclusion that the word "delivering" in the third sentence of clause 15 of the Baltwood charter-party connotes any delivery earlier in point of time than that which is stipulated for by the second sentence, namely, discharge into the wagons.

I find myself in agreement with the judgment below and with the views of Scrutton, L.J. and would dismiss the appeal.

Appeal dismissed.

Solicitors: for the appellants, *Gregory Rowcliffe* and *Co.*, agents for *Hill, Dickinson*, and *Co.*, Liverpool; for the respondents, *Trinder, Kekewich*, and *Co.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Tuesday, April 9, 1929.

(Before Lord HEWART, C.J., AVORY and SWIFT, JJ.)

PATTERSON v. ROBINSON AND OTHERS. (*a*)

Seamen — Complaint — " Combine together to neglect duty "—No entry of alleged offence in official log-book—Whether condition precedent to hearing—Discretion of justices—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 225, 228, 239, *and* 240.

On a complaint against seamen for an offence against discipline under sect. 225 (1) (e) *of the Merchant Shipping Act* 1894, *for that they on board a British ship then on the High Seas and then being duly engaged to serve on board such vessel, unlawfully did combine together to neglect duty, it is not a condition precedent to the hearing of the complaint, that an entry shall have been made in the official log-book of the vessel in respect of the offence. The justices in such a case have jurisdiction to hear the case; but in the exercise of their discretion, they may refuse to do so.*

CASE stated by justices for the county borough of South Shields. George Edward Patterson preferred a complaint against Joseph Robinson, Patrick Skilling, Walter Cowan, James Curran, and Thomas Bailey, the respondents, for " that they between the 5th July 1928 and the 13th Sept. 1928 on board the British ship *Gretavale* then on the High Seas and then being duly engaged to serve on board such vessel, unlawfully did combine together to neglect duty contrary to sect. 225 (*e*) of the Merchant Shipping Act 1894. The justices on the 9th Oct. 1928 without hearing evidence dismissed the complaint on a preliminary objection on a point of law raised by the respondents, but consented to state and sign the following case.

In opening the facts of the complaint counsel for the appellant—the master—stated that the offence complained of consisted of a continuous combination on the part of the respondents—certain firemen—to neglect duty in that from the 5th July to the 12th Sept. 1928 the respondents as firemen on board the steamship *Gretavale*, on a voyage from Colombo to the United Kingdom, acting in concert, refused and neglected to do a fair and reasonable amount of work during their on-duty periods with the object of compelling the appellant to pay them overtime wages for doing work during their off-duty periods, but that the appellants in view of the long period over which this course of conduct continued had not made any entry in the official log-book of the vessel in respect thereof.

Before any evidence was called on behalf of the appellant an objection was taken by the solicitor acting for and on behalf of the respondents that the entry of the alleged offence was required to be made by the appellant in the official log-book of the said vessel by virtue of the provisions of sect. 239 of the Merchant Shipping Act 1894, which provides :

(1) An official log shall be kept in every ship (except ships employed exclusively in trading between ports on the coasts of Scotland) in the appropriate form for that ship approved by the Board of Trade. . . . (4) An entry required by this Act in an official log-book shall be made as soon as possible after the occurrence to which it relates, and if not made on the same day as that occurrence, shall be made and dated so as to show the date of the occurrence and of the entry respecting it; and if made in respect of an occurrence happening before the arrival of the ship at her final port of discharge, shall not be made more than twenty-four hours after that arrival.

And by sect. 240 of the said Act, which provides :

The master of a ship for which an official log is required, shall enter or cause to be entered in the official log-book the following matters (that is to say). . . . (2) Every offence committed by a member of his crew for which it is intended to prosecute, or to enforce a forfeiture, or to exact a fine, together with such statement concerning the copy or reading over of that entry, and concerning the reply (if any) made to the charge, as is by this Act required.

And by sect. 228 of the said Act, which states :

If any offence, within the meaning of this Act, of desertion or absence without leave or against discipline is committed, or if any act of misconduct is committed for which the offender's agreement imposes a fine and it is intended to enforce the fine, (*a*) an entry of the offence or act shall be made in the official log-book, and signed by the master and also by the mate or one of the crew; and (*b*) the offender, if still in the ship shall before the next subsequent arrival of the ship at any port, or if she is at the time in port before her departure therefrom, either be furnished with a copy of the entry or have the same read over distinctly and audibly to him, and may thereupon make such reply thereto as he thinks fit; and (*c*) a statement of a copy of the entry having been so furnished, or of the entry having been so read over, and, in either case, the reply (if any) made by the offender shall likewise be entered and signed in manner aforesaid and (*d*) in any subsequent legal proceeding the entries by this section required shall, if practicable, be produced or proved, and in default of that production or proof the court hearing the case may, in their discretion, refuse to receive evidence of the offence or act of misconduct.

It was contended on behalf of the appellant :

(*a*) That the entry of the offence in the official log-book of the vessel was not, as contended by the respondents, a condition precedent to proceedings against the respondents under sect. 225 (*e*) of the Merchant Shipping Act 1894.

(*b*) That, even in cases where there is no entry in the official log-book at all, the court hearing the case has, by virtue of sect. 228 of the Merchant Shipping Act 1894, a discretion to receive evidence of the alleged offence; or alternatively,

(*a*) Reported by C. G. MORAN, Esq., Barrister-at-Law.

(c) That, as the nature of the alleged offence consisted of a course of conduct extending over a period of more than two months, which amounted to a continuing combination to neglect duty and did not consist of isolated occurrences on particular days, it was not practicable to enter the alleged offence in the official log-book of the vessel, or to prove or produce any entry relating thereto, and accordingly the court had by virtue of sect. 228 a discretion to receive evidence of the alleged offence.

It was contended on behalf of the respondents:

That as the entry of the alleged offence in the official log-book of the vessel had not been made as required by sects. 228, 239, and 240 of the Merchant Shipping Act 1894, and as this was a condition precedent to any proceedings against the respondents for the alleged offence, the court had no jurisdiction to hear the complaint, and that the complaint should be dismissed.

The justices being of opinion that the contention of the respondents was a good objection, and that they had no jurisdiction to hear the complaint, dismissed the complaint. The question for the High Court was whether on the above-mentioned statement of facts the justices came to a correct determination in point of law.

The Merchant Shipping Act 1894 provides:

Sect. 225: (1) If a seaman lawfully engaged or an apprentice to the sea service commits any of the following offences in this Act referred to as offences against discipline, he shall be liable to be punished summarily as follows (that is to say): . . . (e) If he combines with any of the crew to disobey lawful commands or to neglect duty, or to impede the navigation of the ship or the progress of the voyage, he shall be liable to imprisonment for a period not exceeding twelve weeks:

W. L. McNair for the appellant.—The entry in the official log-book of the offence is not a condition precedent to the hearing by the justices of a complaint for one of the offences against discipline. By sect. 228 (*d*) of the Act, the entry required by the section shall, if practicable, be produced or proved and in default of that production or proof the court hearing the case may, in their discretion, refuse to receive evidence of the offence. They are not bound to refuse to receive such evidence. The point taken in the court below was that this paragraph of sect. 228 had no application to a case where there was no entry in the log-book at all, but only to a case where the production of the entry actually made was not practicable, owing to the ship having left the port or for some other reason. My submission is to the contrary: the offence charged here consisted of a course of conduct alleged to have extended over a period of more than two months and it was not practicable to enter the alleged offence in the log-book or to prove or produce the entry. I submit that where in such a case no entry has been made in the official log-book, it is not practicable to prove or produce the entry. [Lord HEWART, C.J.—Sect. 228 makes the entry obligatory and then provides that in any subsequent legal proceedings the entry shall, if practicable, be produced. Does that not refer to the case where an entry has actually been made? By sect. 241, a fine is imposed for failure to make an entry.] [AVORY, J.—Take the case of a mutiny where the officers are put out of action and unable to make any entry. In that case would an entry in the official log-book be a condition precedent to jurisdiction? One of the offences in sect. 225 is assaulting the master or mate. I am inclined to think that the provision in sect. 228 (*d*) means that in the absence of the best evidence that of the entry in the log-book, made at the time, the court need not proceed to hear the matter.] [SWIFT, J.: The provision requiring entry of the offence may be of value to the person charged. He is to be furnished with a copy of the entry or to have the same read over to him distinctly and audibly. He may then make a reply and that also is to be entered.] I submit that here it was not practicable to prove an entry. Consequently the justices need not have heard the complaint, but they were wrong in holding that they had no jurisdiction to hear it. [Lord HEWART, C.J.: It is thirty-five years since this legislation was passed. Has it ever been argued before that the entry in the log is a condition precedent to this jurisdiction?] I know of no recorded case on the subject. [He was stopped.]

The respondents did not appear and were not represented.

Lord HEWART, C.J.—This is a case stated by justices for the borough of South Shields. A complaint was preferred by the present appellant under the Merchant Shipping Act 1894, against the respondents "for that they the respondents" between certain dates "being duly engaged to serve on board such vessel," a British ship named the *Gretavale*, "unlawfully did combine together to neglect duty contrary to sect. 225 (*e*)" of the Statute. When the case came on the point was taken by the solicitor to the respondents that a condition precedent was not fulfilled, namely, that no entry of the alleged offence had been made in the official log-book of the vessel. The making of such entry, it was said, was a condition precedent to any proceedings against the respondents for the alleged offence. It was argued, accordingly, that the court had no jurisdiction to hear the complaint, and that the complaint should be dismissed. That objection having been taken, the justices considered the matter, and came to the conclusion that the objection was good, and that they had no jurisdiction to hear the complaint. The question raised by this case for us is whether in so holding the justices came to a correct decision in point of law.

Now undoubtedly the provisions in this statute for the making of entries in the official log, and in particular entries as to the commission of offences, are provisions not merely in the interests of shipowners or the employers, but also in the interests of the accused person,

and I should be very sorry to give any decision which might diminish, however slightly, the protection which a statute had given to a person accused of committing an offence. But when one looks at these provisions as a whole, in my opinion it is not correct to say that the production of the entry in the log is a condition precedent. By sect. 225 it is provided: "If a seaman lawfully engaged or an apprentice to the sea service" commits any of a series of offences referred to in the Act as offences against discipline, he shall be liable to be punished summarily. One of those offences is the offence which it was proposed to deal with in this case "if he combines with any of the crew to disobey lawful commands, or to neglect duty, or to impede the navigation of the ship or the progress of the voyage." Then by sect. 228 it is provided: "If any offence, within the meaning of this Act, of desertion or absence without leave or against discipline is committed or if any act of misconduct is committed for which the offender's agreement imposes a fine and it is intended to enforce the fine," then "an entry of the offence" not "may be made," but "shall be made in the official log-book and signed by the master and also the mate or one of the crew; and (*b*) the offender, if still in the ship, shall before the next subsequent arrival of the ship at any port, or if she is at the time in port before her departure therefrom, either be furnished with a copy of the entry or have the same read over distinctly and audibly to him, and may thereupon make such reply thereto as he thinks fit"; and (*c*) "a statement or a copy of the entry having been so furnished, or of the entry having been so read over, and, in either case, the reply (if any) made by the offender, shall likewise be entered and signed in manner aforesaid." Sect. 239 contains a series of stringent provisions as to the keeping of an official log. The section is as strict as it could be. Sub-sect. (4), for example, provides as follows: "An entry required by this Act in an official log-book shall be made as soon as possible after the occurrence to which it relates, and if not made on the same day as that occurrence shall be made and dated so as to show the date of the occurrence and of the entry respecting it; and if made in respect of an occurrence happening before the arrival of the ship at her final port of discharge shall not be made more than twenty-four hours after that arrival." It is not necessary to cite further passages to show the importance which the Act attaches to the making of entries in the official log. But the question whether where an offence is sought to be proved the production of that log is a condition precedent is another question. By sect. 241 it is provided: "If an official log-book is not kept in the manner required by this Act or if an entry directed by this Act to be made therein is not made at the time and in the manner directed by this Act, the master shall for each offence be liable to the specific fine in this Act mentioned." But so far as evidence is concerned, the statute provides, as it has to provide, in sect. 239 (6), that "every entry made in an official log-book in manner provided by this Act shall be admissible in evidence."

Then one comes to par. (*d*), in sect. 228: "In any subsequent legal proceeding the entries by this section required shall, if practicable, be produced or proved, and in default of that production or proof the court hearing the case may, in their discretion, refuse to receive evidence of the offence or act of misconduct." I am bound to say that for a time it did not appear to me that those words were apt words to cover a case where *ex hypothesi* no entry had been made. There seems to be something slightly humorous in saying, for example, that it is not practicable to produce or to prove the entry in the log when in truth and in fact the log contains no entry. But I have come to the conclusion that these words are sufficiently wide to cover the case where it is not practicable to produce or to prove the entry for the reason that it was never made at all, and I am helped in coming to that conclusion by the form of this part of the enactment.

That which the justices are by these words empowered to do is not to receive evidence which otherwise they might have received. They are empowered to refuse to receive evidence. What does that mean? Does it not mean this, that apart from this statutory power to refuse to receive such evidence, they were expected to receive and would naturally receive it; in other words, while the Act goes out of its way, so to say, to make an entry in the official log-book admissible in evidence, it does not make it the only evidence, and it expressly provides that where that evidence, the best evidence, perhaps, is not capable of being produced, the justices if they think fit, may refuse to receive any other evidence. That form and that scheme seem to me to be inconsistent with the proposition that the production of the entry in the log-book, or the making of the entry in the log-book, which is a different thing, is a condition precedent. In my opinion, the proper conclusion for these justices in these circumstances was not to say "we cannot hear other evidence in this case," but they might well in the exercise of their discretion have said "we will not hear other evidence in this case," and that course is still open to them.

Avory, J.—I agree that the justices were wrong in this case in holding that they had no jurisdiction to hear the complaint. The real question in the case is whether an entry of the alleged offence in the official log-book was a condition precedent to any proceedings being taken against the respondents in this case for the alleged offence. In my view, it would require much plainer words to take away from a court, otherwise having jurisdiction over an offence, the jurisdiction to deal with a particular offence because no entry had been made in the log-book. In my view, sect. 228, par. (*d*), means that in the absence of what the

legislature may have conceived to be the best evidence of the alleged offence, the magistrates might, in their discretion, refuse to hear other evidence than that which is ordinarily to be found in the log-book. If this were not so, if this were not the true view, it would, in my opinion, lead to the absurd result which I suggested during the argument, that if a seaman or a number of seamen assaulted the master and the other officers and rendered them incapable of making an entry in the log-book, they would thereby save themselves from ever being proceeded against or punished for the offence: in other words, it would be a premium on their assaulting him so grievously as to make it impossible for him to make an entry in the log-book himself. I cannot believe that that was ever intended by this provision in the Act, but I think that the only intention was that the entry in the log-book should, whenever practicable, be receivable as the best evidence, and that in the absence of it, the magistrates in their discretion may proceed to hear any other evidence that is available. Therefore I agree that the case should be remitted to the justices with that opinion of this court.

Swift, J.—I agree.

Solicitors for the appellant, *Botterell* and *Roche*, for *Botterell*, *Roche*, and *Temperley*, Newcastle.

June 6 *and* 7, 1929.

(Before Roche, J.)

Goodwin Ferreira and Co. Limited *v.* Lamport and Holt Limited (*a*)

Bills of lading — Discharge into lighters — Lighterage to be at risk of owners of goods—Damage to goods by reason of defective packing of other goods—Whether sea-transit completed —Liability of owners of ship — Carriage of goods by Sea Act 1924 (14 *&* 15 *Geo.* 5, *c.* 22), *Sched., Art. IV.*, 2, (c), (n), (q).

Certain cotton goods were carried from Liverpool to Bahia, where they were discharged into a lighter. Certain other iron goods, packed in a wooden case, were being lowered into the same lighter when the case broke and the iron goods fell out into the lighter and holed it. Sea-water entered and damaged the cotton goods. Under the contract of carriage lighterage was to be at the risk of the owners and the provisions of the Carriage of Goods by Sea Act 1924, *were also incorporated. The owners of the cotton goods claimed damages from the owners of the ship.*

Held, that if the sea transit had ended when the goods were placed in the lighter the defendants were protected by the terms of the bill of lading. The sea-transit, however, had not ended: the discharge into the lighter was part of the operation of discharge from the ship and was not complete as long as there were other goods to be discharged into the lighter.

Held, also, that the exception relating to loss due to insufficiency of packing in Art. IV. 2 (n), *was wide enough to cover the case of the packing of other goods though primarily it would apply to the goods themselves that were lost or damaged.*

Held, further, that on the evidence the defendants had shown no negligence on the part of themselves or their servants and were therefore exempt from liability under Art. IV., 2 (q).

In Jan. 1926 the plaintiffs sent twenty-two bales of white cotton yarn from Liverpool to Bahia in the defendants' steamship *Biela*. Discharge at Bahia was into lighters, and under the contract in the bill of lading lighterage was to be at the risk of the owners of the goods. By the contract, also, the provisions of the Carriage of Goods by Sea Act 1924 were incorporated, and where these were at variance with any terms in the bill of lading the former were to prevail. At Bahia the plaintiffs' goods were deposited safely into a lighter, and a case containing heavy iron pipes was raised from the hold by ship's tackle to be put into the same lighter. While being lowered the bottom of the case broke, and the pipes fell out into the lighter and holed it. Sea water entered, and damaged the plaintiffs' goods. The plaintiffs brought the present action claiming 880*l.* odd as damages for alleged breach of contract in the carriage of goods by sea.

For the defendants it was argued that as soon as the plaintiffs' goods had been placed in the lighter, the sea transit had come to an end, and that they were then protected by the terms of the bill of lading under which lighterage was at the risk of the owners of the goods. For the plaintiffs it was contended that the defendants had acknowledged the receipt of the goods in good order and condition and were bound to deliver in the like good order and condition. The defendants could not rely on the exception under Art. IV., 2 (*n*), relating to insufficiency of packing: they could only rely on exception (*q*) of Art IV., 2, and had to show that there had been no negligence on the part of themselves or their servants. The defendants had not discharged this onus.

Miller, K.C. and *Atkins* for the plaintiffs.

Le Quesne, K.C. and *W. Lennox McNair* for the defendants.

Roche, J.—This action is brought by shippers and receivers of certain cargo against the owners of the ship upon which that cargo was laden upon a voyage in the year 1926 from Liverpool to Bahia in the Republic of Brazil. I shall speak of the plaintiffs as cargo owners and the defendants as shipowners. No point is taken in the case by the shipowners, the defendants, as to which of the plaintiffs, the shippers or receivers, has the proper title to recover, if anybody is entitled to recover in the action. The cargo in question consisted of

(*a*) Reported by R. A. Yule, Esq., Barrister-at-Law.

a large parcel of white cotton yarn. It was shipped on board the defendants' steamship *Biela* in the year and on the voyage which I have already mentioned. The action arises because when the cargo, the parcel of yarn, got to Bahia and had been put into a lighter in which it was to be conveyed from the ship's side to the Customs House on the wharf, certain machinery, which also formed part of the cargo of the *Biela*, and which, like the cotton yarn, was destined for Bahia, when being put into the lighter, which also contained the yarn, came out of its case, dropped into the bottom of the lighter, made a hole in it, let in sea water, and damaged the cotton yarn to the extent of some 80 per cent. of its sound value. There is no dispute that if the plaintiffs are entitled to succeed they are entitled to substantially the sum claimed in this action. The real question is whether they are entitled to succeed at all. The matter must be determined in accordance with the terms of the bill of lading under which the goods were carried, which, of necessity, incorporates and makes applicable that which is made applicable to the carriage of the goods by the Act of Parliament itself—the provisions of the Carriage of Goods by Sea Act 1924.

The first point in logical order, though I do not know that it is the point which is most highly esteemed by the plaintiffs, is this: It is said that the goods never ought, under the contract contained in the bill of lading, to have been put into the lighter, and that, accordingly, it was really a case of deviation or departure from the terms of the contract and the defendants were not protected by the terms in the contract, and, accordingly, are liable as carriers of the goods in the lighter for the damages they sustained. That depends upon clause 9 of the bill of lading and upon the facts of the case. The body of the bill of lading having provided that the goods were to be delivered at the port of Bahia, or as near thereto as the ship could safely get, clause 9 provided: "The goods to be discharged from the ship as soon as she is ready to unload at the wharf, or into hulk, lazaretto, or hired lighters if necessary, and be lightered by the master or agent at ship's expense, in the case of Bahia in accordance with the custom of the port . . . but at the risk of the owners of the goods in every case."

It is said by the plaintiffs that it was not necessary to put these goods into a lighter, that there were wharves to which the ship could have got having regard to her draught, which was some 20ft., the wharves providing 24ft. of water. It is, therefore, said that the lightering was unauthorised by the contract, and the consequences follow which I have indicated. The first observation is there is evidence that no berth was available; they were occupied. But I do not rely upon that or decide the case on that, although I think it would be a sufficient fact upon which to decide it. The evidence is that these large steamers of the defendant shipowners do not proceed to these wharves. Their usual discharging place and method is that which was followed in this case. The body of the bill of lading would authorise discharge at Bahia in any usual manner and at any usual place providing it was the usual discharging place in the port, as I find this place was. Clause 9, in providing for discharge into lighters, if necessary, did not in my judgment provide merely as an indispensable condition that it should be physically impossible to discharge otherwise than by lighters. It provided that if it were necessary, which in my judgment meant in the ordinary business sense necessary, that that method of discharge should be followed, and that certain provisions should be made with regard to the lighterage at the ship's expense and ship's risk. Now I cannot doubt that if the business is done always in this way by these steamers of the defendants, and that course of business is acquiesced in, as it seems to be (there is no evidence of any objection or anything of that sort), by all the consignees of the goods on the defendants' steamers, that there is the business necessity which is requisite under the clause in question. For that reason I hold that that point on which the plaintiffs seek to build their case fails.

I can conveniently, I think, at this stage deal with what I may call a parallel contention raised on behalf of the defendants regarding the lighterage, because that contention also goes to the root of the action if it is well founded. The contention of the defendants with regard to the lighterage is this, that lighterage was not merely permissible and proper, but that when the goods in question—the yarn—was put into the lighter, the sea transit was over and the whole transit was over which was made the subject of the Carriage of Goods by Sea Act 1924, and that, therefore, the defendants were not bound at that stage by the provisions of that Act, and that with regard to the risks of perils of the sea, even if there was a negligence of their servants, those were all provided for at that stage, and in respect of that stage, by the provisions of the bill of lading itself unaffected by and not rendered more onerous by the provisions of the Carriage of Goods by Sea Act 1924. I think it would follow, if the contention were well founded, that the Act did not apply, that the exceptions of the bill of lading itself would be sufficient to protect the defendants upon any view of the facts of this case. But in my judgment the contention itself is erroneous. The discharge of these goods was part of the operations which are covered and affected by the Carriage of Goods by Sea Act 1924. In my judgment the discharge of these goods was not finished when they were put into a lighter when other goods were being discharged into the same lighter to make up the lighter load which was to start for the shore. When it is contemplated that these goods are to form the lighter load with other goods, the discharge of the goods themselves within the meaning of the Act of Parliament is, in my judgment, going on so long as other goods are being raised into the

lighter and stowed into the lighter alongside or on top of them. For that reason I put out of sight and dismiss that contention, although it is open to the defendants to rely upon it if this judgment, which for other reasons will be in their favour, is impeached before any other court.

Having dealt with those contentions, I now pass to the questions of fact as to how the accident happened. The real dispute between the parties has been and is this. The plaintiffs say, by certain affidavits of lightermen, that the accident happened because the case which contained the machinery was bumped into the bottom of the lighter and that the end of the case which contained the machinery was broken and that when the case was lighted up again to make more orderly stowage, it was found that the bottom of the case was smashed, and then the machinery, which consisted of columns of pillars, fell out into the lighter. The evidence is very indecisive, and I think variable from time to time, when it appears in different forms, letters, and so forth, whether the holing of the lighter is supposed to have been done when the case was bumped or dropped into the barge in the first instance, or when the columns forming the contents fell out of the case. But I dismiss, and do not believe, that case for various reasons which I need not further define. It is eminently improbable; it was put forward very late; and I definitely prefer and accept the version of the defendants, which was set out in correspondence and various documents at the time, which is this: That when the case was in the air the bottom fell out of it and so did the columns, and the columns so falling out holed the lighter and caused the accident. That is the basis of fact upon which I proceed to determine this case. The argument upon that state of facts may be put as follows. It is said by Mr. Le Quesne, for the defendants, that the letting in of the water by the holing, caused by the fall of the machinery, brought into operation the perils of the sea, namely, the ingress of water, and there is considerable authority for saying such an incident or damage is a peril of the sea; and he continues that on the basis of the principle stated in Mr. Carver's work, sect. 78, for which the authority is *The Glendarroch* (70 L. T. Rep. 344; (1894) P. 226), which is there cited, the onus of proving negligence in those circumstances is upon the person who seeks to avoid the operation of the exception of perils of the sea, that is to say, in this case the onus is on the plaintiff. He says that the position is unaffected by the existence and operation of the Carriage of Goods by Sea Act 1924. It is unnecessary for me to decide whether that contention is well founded or not. In my judgment I am going to proceed on the basis that the onus in this matter is upon Mr. Le Quesne, and that he has discharged it. I am not deciding whether that is so, but I am going to proceed on that basis, and for this reason, that I do know, or think I know, what brought into operation the perils of the sea, namely, the fall of the machinery, and I do know, or think I know, and am going to find I know, why the machinery fell. Therefore, I have to deal with causes more material, more really the causes of the accident and the damage than the entrance of the sea water. I think that those causes are causes which are specifically dealt with by Art. IV., 2, of the Carriage of Goods by Sea Act 1924. I incline to the view that with regard to those causes and their operation and effect, the Act of Parliament has put the onus upon the person who asserts them, the shipowner, and, accordingly, I am going to deal with this case on the basis that the onus is there and has been discharged. In Art. III. one finds in sub-art. 2 the following: "Subject to the provisions of Art. IV., the carrier shall properly and carefully . . . care for and discharge the goods carried." I read the words material to the present case. When one looks at Art. IV., which contains the obligations to which Art. III. is subject, one reads the following in sub-art. 2: "Neither the carrier nor the ship shall be responsible for the loss or damage resulting from . . . (*c*) perils, dangers, and accident of the sea"—that is one matter—"(*n*) insufficiency of packing . . . (*q*) any other cause arising without the actual fault or privity of the carrier or"—which is now said to mean "and"—"without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage." The contention of Mr. Miller for the plaintiffs was that he called a gentleman from the engineers who had packed or superintended the packing of this case of machinery, and that I ought to find that the packing was good when it left the works of the engineers, and that, even if I thought that the bottom fell out, the defendants had not proved that it did not fall out because they bumped the case either at the time when the accident happened or that they had not damaged it at some previous stage in the transit and the handling of the case. What I find about the case itself is this. I was satisfied that the engineers are very competent people and had a very competent gentleman superintending the packing, and that the case, a model of which has been made and shown to me, is a common form of package used by these engineers to hold these columns, which are part of sugar-pressing machinery which they are making very commonly, shipping very commonly, and send invariably, as I gather, in this kind of case, which is like a large coffin or sarcophagus of a rectangular shape.

On the evidence I am quite satisfied that this case had, and must have had, initial defects. No knocking about, I think, would have accounted for what happened. I am satisfied that the case was received in the apparent good order and condition which the bill of lading says it was. I am satisfied, since no

one said anything or suggested anything to the contrary, that when the case left the hold it was in similar apparent good order and condition, and that what was wrong with it was not that some positive injury had been done to it which would never have been visible, but that it was not properly nailed up or fastened at the beginning. There was an odd circumstance, and that was the specimen case submitted to me, it appeared, had no nails at all at one part of the lower end of the bottom which was the vulnerable part in the accident of 1926. If the same nailing had been used on that side of the bottom, where there would have been six nails there were none. Had there been a similar absence of nails in the case in question I think very likely the columns, which are heavy things of 25cwt., would have dropped out when they were slung over the barge with the weight of the columns upon this bottom part of the case. At all events, I am satisfied that it was initial want of fastening or securing of the case which was the cause of the trouble and not injury done during the voyage. Of course, if part of the battens which surround the bottom had been knocked off that would have been visible. Knocking about would not have knocked out these long French nails which are used for fastening. For those reasons I am satisfied that insufficiency of securing the bottom of the case was the cause of the trouble, due to the escape of the columns contained in the case, which escaped through the bottom. That being so, the question is, has the defendant brought himself within (*n*) or (*q*) of Art. IV., 2, of the Act of 1924? It is said and argued by Mr. Miller that, as regards (*n*), insufficiency of packing has reference to the packing of the particular goods in respect of which or to which loss or damage arises. I have no doubt that (*n*) is intended chiefly and mainly to apply to such a case, but I am not satisfied and I do not decide that insufficiency of packing of another parcel which is to be shipped with the damaged cargo cannot be prayed in aid or used under (*n*). I decided two days ago a case where the packing of other articles in the same ownership as the damaged articles was dealt with and held to be a protection under (*n*) of that article, and I am not prepared to hold, and I do not hold without further considering the matter, that if the packing which was insufficient was the packing of some article which was not the property of the person complaining in the action, that (*n*) of the article could not be invoked or used in aid. But I do not decide it on that point for this reason, that clearly on the view I have expressed of the facts, the accident happened through another cause which arose without the actual fault or privity of the carriers or without fault or neglect of the agents or servants of the carriers, and I have held that there was nothing in the appearance of this case which ought to have roused or did rouse the suspicions of either the carrier or any of his agents or servants, and that the defendants, the shipowners, have discharged the onus of satisfying me that there was no negligence or fault of the shipowners or their agents or servants. I think that covers all the matters in the case. If there are other contentions which have been raised by either party in support of their view, I have no doubt there is a sufficient note or record of those of them I have not mentioned in my judgment, and those points and contentions will be open to them in order to attack or defend this judgment if the matter goes elsewhere.

I give judgment for the defendants with the costs of the action.

Judgment for the defendants.

Solicitors for the plaintiffs, *Denton, Hall,* and *Burgin.*

Solicitors for the defendants, *Stokes* and *Stokes,* for *Cameron, MacIver,* and *Davie,* Liverpool.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Feb. 21 *and* 22, 1929.

(Before HILL, J. and Elder Brethren.)

THE DAGMAR. (*a*)

Collision — Dumb hopper — Lighter — Lights— Hopper moored alongside dredger—After moorings cast off—Hopper held by forward moorings and swinging with the tide—Whether under way—Two riding lights being exhibited —Obligation to exhibit navigating lights—Port of London River By-laws 1922, *by-laws* 5, 6— *Port of London River By-laws* 1914-1926, *by-law* 14.

A dumb hopper made fast by forward moorings to a moored vessel, and swinging with the tide is herself a moored vessel, and not a vessel under way within the Port of London River By-laws.

The M., *a dumb hopper loaded with spoil, had been moored alongside a dredger in Blackwall Reach, River Thames. Her after moorings were cast off, and she commenced to swing with the tide, being still made fast forward by her forward moorings. She was exhibiting one white riding light forward and one white riding light aft. In these circumstances the* D., *a steamship bound up-river, came into collision with the* M.

Held, (*i*) *that the* M. *was not a vessel under way:* (*ii*) *that in any case the* M. *was probably a "lighter" within the meaning of the Port of London River By-laws* 1914-26, *and was not required to carry side lights when under way, and no lights were laid down by the by-laws for her to carry;* (*iii*) *that the* M., *being*

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

moored to the dredger which was moored to buoys, was herself moored and bound to exhibit two white riding lights in accordance with by-law 14; (iv) that the D. was alone to blame for the collision.

DAMAGE ACTION.

The plaintiffs claimed damages for injuries sustained by their dumb hopper *Medlock* in a collision with the defendants' steamship *Dagmar*, which took place in Blackwall Reach, River Thames, on the 15th Oct. 1928.

The Medlock, a dumb hopper 180ft. in length, had been lying moored fore and aft alongside the dredger *No. 7*, heading up-river. She was loaded with spoil and was about to be towed out to sea by the tug *Mark Lane*. Her after moorings were accordingly cast off, and she commenced to swing with the tide on to a down-river heading. When the *Medlock* was about half athwart the *Dagmar* came into collision with her. At the time of the collision the *Medlock* was exhibiting a white riding light forward and a stern light.

The Port of London River By-laws 1914-26 provide as follows:

14. . . . A vessel of one hundred and fifty feet or upwards in length when at anchor or moored shall, by night, exhibit in the forward part of the vessel at a height of not less than twenty and not exceeding fifty feet above the hull one such light, and at or near the stern of the vessel and at such a height that it shall be not less than fifteen feet lower than the forward light, another such light.

The Port of London River By-laws 1922 provide:

5. A sailing vessel under way and any vessel not under steam being towed shall exhibit the same lights as are prescribed by By-Law 7 of the Port of London River By-Laws 1914 for a steam vessel under way with the exception of the bright white lights mentioned therein which they shall never exhibit. This by-law shall not apply to: (*a*) a lighter . . .

[By-law 7 of the Port of London River By-laws 1914 now by-law 7 of the Port of London River By-laws 1914–1926, provides (*inter alia*) that a steam vessel under way shall exhibit one or two white masthead lights and green and red side lights.]

6. A lighter and any other vessel specified in sub-clause (*a*) or by-law 5 (of 1922) when under way and not in tow shall by night have a white light in a lantern of a pattern approved by the Port Authority always ready and the person in charge thereof shall exhibit the same on the approach of any vessel. . . .

Langton, K.C. and *Willmer* for the plaintiffs. The *Medlock* was moored, being properly made fast aft to a vessel which was herself moored. *The Medlock* was, therefore, obliged to show two white riding lights in accordance with by-law 14. These lights she was showing. *The Dagmar* was solely to blame.

Digby, K.C. and *Hayward.*—*The Medlock* was not at anchor, but was in fact under way. *The Esk; The Gitana* (3 Mar. Law Cas. (O. S.) 242; 1869, 20 L. T. Rep. 587; L. Rep. 2, A. & E. 350). She ought, therefore, to have been exhibiting side lights in accordance with the by-laws for a vessel under way. Her failure to exhibit proper lights was misleading for *The Dagmar*, and was a cause of the collision: (see *The Devonian*, 9 Asp. Mar. Law Cas. 179; 84 L. T. Rep. 675; (1901) P. 221).

Langton, K.C., replied.

HILL, J.—In this case the *Medlock*, a dumb hopper, 180ft. long, 36½ft. beam, laden with mud, was lying alongside the dredger *No. 7*, 240ft. long, in Blackwall Reach on the night of the 15th Oct. 1928. They were both heading up-stream. The loading of the *Medlock* was completed and she was preparing to proceed to sea. The intention was that she should be towed to sea by the tug *Mark Lane*, as she had no means of propulsion of her own. The tug was waiting to take her in tow. The dredger was in about mid-channel at a point marked on the plan. The *Medlock* was on the starboard side of the dredger, and the tug was waiting on Harrison's Wharf until the *Medlock* had swung head to tide.

The *Medlock* was in the course of swinging, having cast off her stern ropes, and had swung about half way athwart the channel when the steamship *Dagmar* was seen coming up river. The *Medlock* continued her swing and the *Dagmar* came into collision with her when she was heading about athwart, and it is agreed on both sides that it was about a right angle blow.

The *Dagmar*, a steamship of 2471 tons gross and 290ft. long, was on her way up from Gravesend to Hay's Wharf. The dredger was exhibiting her riding lights and also the triangle of lights belonging to a dredger and also her working lights. The barge had a sufficient stern light and she said also, which is a matter in dispute, that she had a forward white light. If it was there it was of such a character as to be a proper riding light, and it was in relation to the after light at a proper height. She said she had it exhibited and defendants say that there was no forward light. If they were both exhibited and burning they were proper lights and properly placed.

Now, the plaintiffs' case is that before casting off aft, those in charge of the hopper made sure that nothing was coming up the reach. They waited for a short time before casting off for a tug that was passing, and when it had passed and there was nothing in sight they cast off. The hopper was already far swung when the *Dagmar* was seen coming up, showing her masthead and red lights about abreast of the Blackwall entrance to West India Dock; and their case is that the *Dagmar* came on opening her green light as well as the red as if trying to squeeze through between the dredger and the *Medlock*, and that the forward rope attached to the *Medlock* was let go and that the dredger herself hove on her chains to try to pull herself clear, but

that nothing else could have been done and that the collision followed. Shortly before the collision three blasts were sounded from the *Dagmar*.

Now, except as to the lights exhibited by the *Medlock* this story and the *Dagmar's* story are in substantial agreement. The *Dagmar's* story is that she was coming up at a speed of about seven knots under a steady, easy helm. After nearly completing the Blackwall bend she saw, about half a mile distant, the lights of the dredger. Recognising that they were the lights of a dredger, they kept their speed with an easy starboard helm, and at about a quarter of a mile after this they saw a single white light on their port bow, which they say was the aft light of the *Medlock*. It was taken for the stern light of a vessel proceeding up river. The speed of the *Dagmar* was maintained until at about a length from the dredger they became aware that the light which they had observed was on the aft end of a vessel the loom of which they saw forward. They went full speed astern but could not avoid the collision.

The master of the defendants' vessel spoke of a starboarding after the white light was seen, and at a preliminary inquiry it was stated that just before the collision the helm was put hard-a-port. It does not very much matter. The speed of the *Dagmar*, as they all say, was seven knots. It is almost impossible to test that in any satisfactory manner. It is quite impossible to reconcile the speeds as the engineer's various orders were recorded in the scrap log and as given in the evidence of the master and pilot. It is quite impossible to reconcile those speeds with the time it is said the *Dagmar* took to travel from Gravesend to the point of the collision. You cannot do it; and the result is that you cannot draw any definite conclusion as to the speed that the *Dagmar* was travelling when she came in sight of the dredger.

But take it as they said, half speed, and I will assume that she was half speed and no more, that would mean that she entered the reach at a speed over the ground of something like eight and a half to nine knots, for the tide was one and a half to two knots. If she continued at that speed until a very short time before the collision, which must be measured almost by seconds, it follows that she cannot have reduced her speed from seven knots to anything like one or two knots, and that she must have had very considerable way on her.

The position then is this, that the *Medlock* is swung across the river still fast forward to the dredger, and at the time of the collision has got athwart the river. The *Dagmar* is coming up at a speed of seven knots, which in relation to any fixed object is a rate of eight and a half to nine knots. Now, what are the obligations in that position?

First of all, the most important matter of controversy is as to whether the *Medlock* was showing two riding lights or only one. The pilot of the *Dagmar* admitted that if she was showing two lights he ought to have seen them. I think that there may have been some difficulty at first at any rate in separating the forward riding light from the many lights on the dredger, and that may account for some of the people on the *Dagmar* not being able to distinguish the two lights. If they were there they must have distinguished the two lights. If they were there they must have distinguished them if they were really attending before they came into contact, and I have to determine where the truth is in this matter.

Taking the evidence and having seen the witnesses from the *Medlock* with the master of the dredger and the master of the *Mark Lane*, I am unable to say that it is not true that the *Medlock* had a forward riding light. It is highly unlikely that people like this, doing this work every day—and they seem to be very responsible kind of people—should have neglected to have the two riding lights exhibited. It is quite clear that they were under a duty when moored to a dredger to have riding lights forward and aft, and I find as a fact that they had them, and that they were burning.

Then the next question that arises is whether those were the proper lights for the *Medlock* to be exhibiting, and in my view they were. It has been argued that the *Medlock* was at the time a vessel under way. I do not think there is any authority which would lead me to the conclusion that a vessel which is still fast by a rope forward to a dredger and controlled by that rope is to be regarded as a vessel under way within the rules. But if I were to consider that this vessel was under way, I should find it quite impossible to say that she ought to have had her side lights exhibited.

The rules to which I have been referred are the Thames Rules of 1922. Rule 5 deals with side lights and stern lights, that is to say, the same lights as prescribed for a steam vessel under way. With the exception of the bright white lights, that rule applies to a sailing vessel under way and to any vessel not under steam being towed. Now this was neither "a sailing vessel under way" nor a "vessel not under steam being towed." There is an exception to the rule which deals with lighters, dredgers, and other vessels which may include the *Medlock*. I think the word "lighter" may include her, but the rule only applies to these vessels when they are being towed. Rule 5 seems to have no application to the *Medlock*, but rule 6 of 1922 applies to lighters "and every other vessel specified in sub-clause (a) of by-law 5 (of 1922) when under way and not in tow." Now, a lighter is defined in the definition clause as "any dumb barge or other like craft for carrying goods . . ."; and the only reason why it could be said that the phrase about lighters does not include this hopper barge is that it might be said that it is not a craft for carrying goods. But I should accept the word "goods" in its widest possible sense, as including spoil from dredging. If it

is not a lighter then there is no provision for it, and it must be governed by some such general rule as that. No vessel at all which is moving in the river must be without any light, and it is certainly a vessel within the definition clause.

What I have said, therefore, so far comes to this. Firstly, I do not think this vessel was under way. Secondly, if she was under way I can find no rule which requires her to carry side lights. I find at most a rule which required her to have a white light in a lantern. I cannot carry that further. She certainly had a white light in a lantern, which was fixed aft.

My own idea is that she is governed by a rule. She was moored, and by-law 14 (Port of London River By-laws 1914-26), I think, provides for the light she is to carry. It is in two parts. It deals, first, with a vessel under 150ft. in length, with a special proviso as to lighters. That, I conclude, means lighters less than 150ft. in length. The second part deals with vessels over 150ft. in length. The circumstances in which a vessel must be to make rule 14 apply are that she must be at anchor or moored. In the case of a U-boat, *The Deutschland* (1920, 3 Le. L. L. Rep. 96), I dealt with a matter similar to this, and expressed an inclination of opinion which would lead me to say that the *Medlock*, being moored to a dredger which was at anchor was herself at anchor. But I passed by that troublesome point on the previous occasion, and I can pass it by now, because I am clearly of opinion that the dredger being there at anchor or fixed to a buoy, and the *Medlock* being attached to her by a rope controlling the *Medlock's* movements, the *Medlock* was moored. That being so, I think she comes within the obligation to exhibit two riding lights to comply with the second part of rule 14, and, further, she did not come within any of the exceptions which are dealt with in the provisions in the rule. In my view she was carrying the right lights.

In order that I may not be discourteous to Mr. Digby's excellent argument, I shall add that, in my view, she was none the less moored because she had cast off part of her moorings. Her aft moorings were gone. Her forward moorings still remained, and in my view she was none the less moored, because in consequence of loosening some of her moorings the tide had begun to operate on her. A vessel at anchor is none the less at anchor because she is swinging, and a vessel moored to anything is none the less moored because she is swinging.

It is obvious that if a vessel which is moored or at anchor, instead of remaining head to the tide or straight with the tide, so acts that she begins to swing with the tide, though she continues to be moored, she comes under quite a fresh duty. It is a duty which applies to any ordinary ship at anchor swinging to her anchor. She cannot treat herself as if she was remaining rigid. A moored vessel, as soon as she begins to swing, comes under a duty of special care to vessels navigating the river up and down. and the question here I have to consider, as far as the *Medlock* is concerned, is whether she neglected any duty which she owed to vessels navigating the river. I think it may well be—the Elder Brethren think it may well be—that it would be wiser if long vessels like this, instead of swinging without any assistance, were to make fast to a tug first and get the tug to help them. It is said to be more troublesome; perhaps it may be, I do not know; but there would certainly be more control, and I understand that some instruction since this occurrence has been given to that effect.

But to say it would be wiser in the light of experience to employ a tug on these occasions is a very different thing from saying it is negligent not to employ a tug. The evidence is that it is quite a common thing for hoppers waiting on these dredgers to swing in this way—in fact the evidence is that it is always done in this way. With the hopper heading downstream there is some evidence that a tug makes fast on the starboard side, but if the hopper is heading up stream and has to make a complete turn down stream it has been the practice to cast off the aft moorings and let the tide carry the hopper round. There is no rule of law which forbids a vessel to swing in a navigable river, and the Elder Brethren are unable to advise me of any provision that such a craft as this should not do so. The utmost they can say is that in the light of experience it would be better if it were not done in future; but I am quite unable to say that it was negligent on the part of the *Medlock* to swing in the way they did, provided they took proper precautions to see they had time in which to do it. It was clearly their duty in my view to see that nothing was coming up which they were likely to interfere with. I accept their evidence that before they cast off they looked out and nothing was in sight. Having regard to the speed at which the *Dagmar* was coming up, I think it highly probable, in the almost certain conditions, that the *Dagmar* could not have been in sight, and, that being so, those in charge of the hopper, in my view, were entitled to assume: "Now is the time when we can swing in safety. We shall get round before anybody will come up who will be affected by our swinging, and we will do it." In my view, that is all they did.

Therefore, I am quite unable to say that there was anything which they did which was negligent. They had not any power to make whistle or sound signal, and they had exhibited what in my view were the proper and prescribed lights. As to the suggestion of side lights, I can imagine nothing more dangerous or more likely to produce confusion than that a hopper swinging in this way, still fast to a vessel alongside, should be showing a navigation light to a ship approaching—nothing more misleading could be imagined. I am

unable to find the *Medlock* has been guilty of negligence.

As to the *Dagmar*, to my mind the matter is quite clear. The pilot knew that the dredger was there. It was a matter of public notice by the Port of London Authority, and as soon as he came within range of it he saw it. The working lights were all exhibited and burning. He saw them, and he ought to have known that, not certainly but very likely, the dredger might have a hopper alongside. He said that he did not hear the buckets working to show that she was dredging at the moment, but it must have been in his knowledge that a hopper might be alongside: and the Thames Rule 19 (*b*) required him to keep well clear of the dredger, and sect. 278 of the Port of London (Consolidation) Act 1920, to which special attention had been drawn in the notice about dredging, required that special care and caution should be used by vessels in passing vessels employed in dredging.

The pilot chose to enter the reach at a speed of at least seven knots, and to continue that speed although he saw the dredger there. In my view he made no adequate attempt to keep well clear of the dredger. He says he was going to pass at 100ft. and he somehow got within 20ft. of the dredger. Something no doubt must be allowed for the effect of the tide, but whether he was passing the dredger at a safe distance or not, he was, at any rate, as the Elder Brethren advise me and as I certainly think, approaching the dredger and passing rather near, at any rate on the starboard side of the dredger, at a very excessive speed. He never saw, nor did anyone on board the *Dagmar* see, the *Medlock's* forward light, or if anyone saw it nobody paid any attention to it, the look-out not even reporting that light. Perhaps, as I say, they did not see the forward light because they saw so many. The pilot says that it was not there and that he would have seen it if it had been there. I find that it was there.

The result of all this is that the pilot, who did not reduce his speed when he first saw the dredger so as to pass her with care and caution, continued his speed until he was so close that nothing could be done by him to avoid a collision. Therefore, in my opinion, the *Dagmar* is alone to blame.

Solicitors, *Wm. Hurd* and *Son*; *Thomas Cooper* and *Co.*

Nov. 20, 21, *and* 22, 1928; *Jan.* 18; *March* 21; *April* 18, 19, *and* 22; *and May* 15, 1929.

(Before Lord MERRIVALE, P., and Elder Brethren.)

THE PALEMBANG. (*a*)

Collision—River Thames—Vessel at anchor—Swinging—Whether turning signal required—Port of London River By-Laws 1914–1926, *by-laws* 5 *and* 28 (e).

By the Port of London River By-Laws 1914–1926, *by-law* 5, "*the expression 'under way' when used in relation to a vessel means when she is not at anchor, or moored, or made fast to the shore, or aground, and includes a vessel dropping up or down the river with her anchor on the ground.*"

In order to come to anchor, the plaintiffs' vessel, which was bound up river on the flood tide, sounded the turning signal required by the Port of London River By-Laws, by-law 28 (e) *and commenced to swing under helm and engine action. When she had swung about two to three points the anchor was let go with about thirty fathoms, the navigating lights were extinguished, and riding lights exhibited. The plaintiffs' vessel continued to swing, but in the course of swinging her engines were worked ahead for about a minute in order to avoid another vessel.*

Held, that the plaintiffs' vessel was at anchor, and not under way, and was not therefore required to sound the turning signal prescribed by by-law 28 (e).

The Esk (3 *Mar. Law Cas.* (*O. S.*) 242; 20 *L. T. Rep.* 587; *L. Rep.* 2 *A. & E.* 350) *followed.*

DAMAGE ACTION.

The plaintiffs, owners of the steamship *Pakeha*, claimed damages from the defendants, owners of the steamship *Palembang* in respect of damage sustained by the *Pakeha* in a collision which took place in Sea Reach, River Thames. The weather at the time of the collision was foggy. The *Pakeha*, bound up-river on the flood tide, in order to come to anchor on account of the fog, sounded the signal prescribed by the Port of London River By-Laws, by-law 28 (*e*), for a vessel turning in the river with her head to port, namely, four short blasts followed by two short blasts, and began to swing under hard-a-starboard helm and reversed engines. Having swung about two to three points, the pilot of the *Pakeha* ordered the anchor to be let go, with about thirty fathoms, and when it was reported that the anchor was holding, he ordered the navigating lights to be switched off and riding lights to be switched on. No further signal was sounded by the *Pakeha*, save that the bell was rung for fog in accordance with the regulations. Whilst swinging the engines of the *Pakeha* were worked for a short time ahead in order to avoid a collision with a steamer at anchor. When the *Pakeha* had

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

swung nearly head to tide she was run into by the defendants' steamship *Palembang*.

Langton, K.C. and *Alfred Bucknill* for the plaintiffs.—The *Pakeha* was at anchor and was not under way: (*The Esk*, 3 Mar. Law Cas. (O. S.) 242; 20 L. T. Rep. 587; L. Rep. 2 A. & E. 350); *The Romance*, 9 Asp. Mar. Law Cas. 149; 83 L. T. Rep. 488; (1901) P. 17; *The Dagmar*, 141 L. T. Rep. 271).

Stephens, K.C. and *Carpmael* for the defendants.—The *Pakeha* was "under way" within the meaning of the by-laws, and she ought, therefore, to have sounded the turning signal prescribed by by-law 28 (*e*). Reliance was placed upon *The Wega* (7 Asp. Mar. Law Cas. 597; 72 L. T. Rep. 332; (1895) P. 156) and *The Nador* (11 Asp. Mar. Law Cas. 283; 100 L. T. Rep. 1007; (1909) P. 300).

Bucknill replied.

Cur. adv. vult.

May 15, 1929.—Lord MERRIVALE, P.—The collision in question took place on the 26th May 1928 at a few minutes before three in the morning in dense fog in Sea Reach of the Thames at a point about twelve cables above the Chapman Light. The plaintiffs' vessel, the *Pakeha*, a steel twin screw steamship of 7889 tons gross register, 477ft. long, with quadruple reciprocating engines of 850 horse power, and manned by a crew of eighty-three hands, had come to an anchor in the fog in course of her voyage with general cargo from Wellington, New Zealand, to London. The defendants' steamship, the *Palembang*, a vessel of Dutch register of 7051 tons gross, 445ft. long, with triple expansion engines of 500 horse power nominal, came into Sea Reach in course of her voyage, part laden, from Dunkirk to London. Each vessel had an experienced Thames pilot on the bridge at all material times, and both were adequately manned and equipped.

One broad allegation on the part of the *Pakeha* was that in steaming to the point in question on her course, and in coming to a down-river heading, she had been involved in dense fog for more than a quarter of an hour before the collision. On the other hand, the defendants alleged that at the time when they had been proceeding up river with bare steerage way, but not prevented from safe navigation, they found the *Palembang* "suddenly involved in a dense bank of fog," just before the collision. Each vessel blamed the other in respect of action taken on board when both were in the fog. They were agreed, however, that a serious casualty took place presently after the vessels respectively became aware of their mutual proximity, the stem of the *Pakeha* and the starboard bow of the *Palembang* coming into collision with heavy resultant damage to the *Palembang* and some damage to the *Pakeha*.

The plaintiffs' main case was that the *Pakeha*, being at anchor, was run into by the *Palembang*, negligently brought into and navigated in fog at excessive speed. The plaintiffs also alleged improper starboarding of the *Palembang* to cross ahead of the *Pakeha*, and that when the *Palembang* was close to the *Pakeha* she dropped her starboard anchor, bringing her head to port so that the *Palembang* fouled the anchor chain of the *Pakeha* and broke her adrift.

The defendants, while traversing the *Pakeha's* allegation as to the navigation of the *Palembang*, denied that the *Pakeha* was at anchor, and further said that if at anchor she was not showing two riding lights, having none aft. They contended also that during the fifteen minutes before the collision, the *Pakeha* had been a vessel under way about to turn or in course of turning round, bound by by-law 28 (*e*) of the by-laws 1914-26 to sound four blasts and two at intervals of not more than two minutes, and that she had failed to comply with the by-law. Beyond this it was complained that when the vessels were in imminent danger of collision the *Pakeha* had not taken action to get out of the way by slacking her cable and using her engines to go astern. It was said indeed that, on the contrary, she had come ahead towards the *Palembang* and so into collision with her.

The defendant's charge that the *Pakeha* did not display two anchor lights I may deal with at once, by saying that I find both the lights to have been duly lit and to have been burning at all material times.

The main controversy on the facts was that raised by the defendants' allegation that their vessel in course of her voyage up river in Sea Reach was enveloped suddenly by the dense bank of fog in which the collision occurred. Asserting this to be so, Mr. Stephens submitted that those on board the *Palembang* had no warning of the state of things into which the vessel was proceeding, that they navigated their ship with due care when they found themselves in difficulties as to visibility, and that, therefore, they could not be found guilty of negligence so as to give the plaintiffs cause for action for damage due to the collision.

The case was said to be on all fours with that of *The Nador* (11 Asp. Mar. Law Cas. 283; 10 L. T. Rep. 1007; (1909) P. 300) where —to cite from the judgment—"that no sort of warning that the *Nador* was approaching a fog of the density which in fact appears to have been the case." Those in charge "entered the fog suddenly and when they realised that the only thing to be done was to bring the ship to an anchor . . . took the proper steps to do so." Some discussion arose at the hearing here upon the fact that the defendants in the case of the *Nador* formulated in their defence a plea of inevitable accident. This, however, is a matter of form only. The defendants there as here brought before the court the facts on which they relied to show that in navigating in a fog, and coming into collision, they were not guilty of negligence. Negligence, or its absence, is the matter material for determination. The facts of the case as to fog are, therefore, of vital importance.

There is cogent evidence on the part of the plaintiffs that for, at any rate, half an hour before the collision there was from just above the Chapman Light to the place of the collision intermittent fog which made it imprudent to advance up river at any substantial speed. Two vessels, the *Woodcote* and the *Bazalgette*, were brought to anchor because of fog a quarter of a mile down river from the place of collision, a good part of three quarters of an hour before the *Pakeha* let go her anchor.

Each of those was from that time sounding her bell for fog, and both the *Pakeha* and the *Palembang* steamed past them. "Sometimes," said the master of the *Woodcote*, "you could see ships, sometimes you couldn't." Up river of the *Woodcote* and the *Bazalgette* were numerous other vessels sounding during this period in like manner. The defendants' pilot said there were no less than 35 ships so sounding in the upper part of the reach during the night. Most, if not all, of those vessels had come to anchor before either the *Pakeha* or the *Palembang* passed up. On the other hand, the *Pakeha* went ahead with precautions till about half-past two, and with her engines at dead slow from 2.33 until 2.45, although fog signals, including bells, had been heard higher in the reach. The steam tug *Betty* passed the Chapman at nearly the same time as the *Pakeha* and anchored a quarter of a mile or more below her, and the *Betty's* master says that half a minute before the *Palembang* passed the *Betty* the weather was more clear down river, and that there then came on a sudden bank of fog. A good deal of other evidence incidentally supports the view that the density of the fog was intermittent. It would be quite incorrect though to say that it was a sudden fog in which the *Palembang* found herself enveloped. The real question is whether with fog signals of vessels at anchor in fog ahead, haze deepening and fog present in dense banks from time to time lower down, the *Palembang* ought to have proceeded as she did. The ships' bells which were being sounded could be heard, the Elder Brethren inform me, at three-quarters of a mile distance. Several bells were being sounded well below the place of collision.

Those in charge of the *Palembang* did not bring her to anchor when the peril ahead was manifest, but kept her under way at substantial speed. During the ten minutes next before the collision she covered one mile two cables, a speed representing 5.2 miles through the water on a flood tide of about two knots. She was, during this period navigated at such speed that she could not avoid other vessels at the distance at which they could be seen. In these respects the *Palembang* must be held to blame.

The main controversy with regard to the *Pakeha* depends upon whether she ought under the Port of London by-law 28 (*e*) to have been sounding a turning signal of four short blasts and two at intervals of not less than five minutes during some ten or twelve minutes before the collision, whether she did so sound, and if she did not whether her failure in this regard contributed to the collision.

By-law 28 (*e*), so far as is material, and relevant, says that "a steam vessel under way about to turn and whilst turning round shall sound at intervals of not more than two minutes four short blasts in rapid succession followed if turning with her head to . . . port by two short blasts."

By-law 5 provides definitions of the language used in the by-laws generally. It directs, *inter alia*, that "In these by-laws . . . unless there be something in the subject or context repugnant to such construction . . . the expression 'under way' when used in relation to a vessel means when she is not at anchor or moored or made fast to the shore or aground and includes a vessel dropping up or down the river with her anchor on the ground." On behalf of the defendants it was argued that the *Pakeha* ought to be held to have been "under way" and "not at anchor," within the meaning of the by-laws.

On this part of the case several authorities were cited, and, in particular, *The Esk* (3 Mar. Law Cas. (O. S.) 242; 20 L. T. Rep. 587; L. Rep. 2 A. & E. 350), *The Wega* (7 Asp. Mar. Law Cas. 597; 72 L. T. Rep. 332; (1895) P. 156), and *The Romance* (9 Asp. Mar. Law Cas. 149; 83 L. T. Rep. 488; (1901) P. 17). The decisions in these cases do not deal with the constructions of the language used in the present by-laws. All three, however, show what is a vessel at anchor, in the general acceptance of that term among seamen.

In *The Esk* (*sup.*) Sir Robert Phillimore had to determine whether, under the Admiralty Regulations 1858, the schooner *Esk*, which had been at anchor between the Sunk and the Gunfleet Sands was still at anchor when the brig *Gitana* was about to pass her at night in hazy weather. Her white light, as a vessel at anchor, had been seen from the *Gitana* at a quarter of a mile off, and was still in view at the time of collision. The master of the *Esk* had before the *Gitana* sighted her called up all hands to get up anchor, and they had heaved in chain to the extent of about two-thirds of the length let go with the anchor. There was conflicting evidence, for the *Gitana*, it was said that the *Esk* was in motion and forging ahead, and had moved a ship's length after she came in view of the *Gitana*; for the *Esk*, that the anchor was on the ground and holding at the time of the collision, and that the collision caused her to drive and the anchor to come home. The learned judge found that the *Esk* was not in fact holden by her anchor. "The true criterion," he said as to the application of the regulation, "that is, as to the display of navigation lights, must be whether the vessel be actually holden 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." *The Wega* (*sup.*), a case tried before Gainsford Bruce, J., in 1895, involved consideration of the Thames By-Laws

then in force. Under those by-laws : " Where a steam vessel is turning or for any reason is not under command and cannot get out of the way of an approaching vessel," she is required to signify the same by four or more blasts of the steam whistle in rapid succession.

Under art. 7 white lights fore and aft are prescribed for a " vessel . . . lying in the river at her own anchor or at mooring buoys, where she will swing." The steamship *Galatea* came to anchor in Barking Reach in dense fog, took in her side lights, and put up a riding light, and sounded three short blasts, but did not sound the signals required by art. 18. On the part of an approaching ship, the steamship *Wega*, which came into collision with the *Galatea*, it was alleged that the red side light remained exposed for two or three minutes after she had brought to anchor, and, further, that she failed to sound whistle signals so that the *Wega* was misled into supposing her to be an on-coming ship, collided with her as she swung athwart the tide. Regarding side lights, the learned judge found her in fault as alleged, and said : " The side lights ought to have been taken in instantly she was held by her anchor." Sir Robert Phillimore's statement in *The Esk* (*sup.*) that the true criterion of a vessel being at anchor is " whether the vessel is actually holden and under the control of her anchor or not," was considered and adopted by Lord Gorell—then Gorell Barnes, J.—in 1901 in the case of *The Romance* (*sup.*)

Before me counsel for the defendants relied also on the judgment of Gainsford Bruce, J. in the case of *The Wega*, for a passage relating to whistle signals in which the learned judge held that the *Galatea* ought under the by-laws then in force, to have sounded after she had let go her anchor.

As to the *Galatea's* failure in respect of sound signals, the learned judge said, " I think that a vessel throwing herself athwart the river and stopping her way to come to anchor is ' not under command ' within the meaning of the rule, and that it was incumbent upon the *Galatea* to have sounded four or more blasts in rapid succession . . . and I cannot doubt . . . that if the *Galatea* had sounded four short blasts or more so long as the danger lasted that a warning would have been given which probably would have enabled the *Wega* to avoid the collision. It is contended that as the *Galatea* was at anchor before the collision the circumstances which made it incumbent upon her to sound the danger signal had passed. But the danger cannot be said to have passed until the *Galatea* had swung to her anchor . . . so long as she was swinging across the tide, so long, as it seems to me, did the danger occasioned by her turning continue." To apply this decisive passage last quoted to the controversy in the present case would be to assume the obligation of the *Pakeha* in this case to have been governed by a regulation laying down that until a vessel held by her anchor has swung to her anchor so as (if tide is running) to ride with her head to the tide she will sound the signal of four and one or four and two short blasts directed by by-law 28 (*e*). It will be necessary to consider whether by-law 28 (*e*) has this effect.

So far as the judgment in *The Wega* (*sup.*) deals with the obligations in 1895 of vessels which in course of being anchored became out of command I may deal very concisely with the case made against the *Pakeha*. Art. 27 of the by-laws in force in 1895 imposed on all vessels " turning round or for any reason not under command not able to get out of the way of an approaching vessel," a duty in common to sound certain signals. By-law 28 (*e*) now in force deals distributively with a vessel " under way about to turn and whilst turning round," and a vessel " under way not under command or which is unable to manœuvre as required by these by-laws." The learned judge found that in *The Wega*, the *Galatea*, though " at anchor " was " not under command." I was not invited in the present case to find that the *Pakeha* was not under command, nor, indeed, to hold that she made any default under by-law 28 (*f*), and on the advice given me by the Elder Brethren I have no doubt that, at all material times, the *Pakeha* was under command, and able to manœuvre so far as a vessel may do which is held by her anchor.

To return to by-law 28 (*e*), what is to be determined firstly is whether the *Pakeha*, when she was about to turn, and whilst turning round, and not " at anchor," omitted to sound signals obligatory upon her under by-law 28 (*e*) ? It is further to be determined whether, if the *Pakeha* had so sounded, the *Palembang*, warned by such signals, would certainly or in reasonable probability have avoided collision.

The material period of time is that from 2.45 to 2.55. At 2.45 the pilot of the *Pakeha*, having proceeded with his engines stopped for some minutes, ordered the ship's helm hard-a-starboard. He then put the engines full speed astern, and when the vessel had swung two or three points he ordered the anchor to be let go, and presently directed that the navigation lights should be switched off and the anchor lights switched on and the ship's bell rung, which was done. At the time it was done the anchor was on the ground. Thirty fathoms of chain was paid out, the anchor held, and was reported to be holding. The riding lights were switched on at about the time the anchor held. Immediately before putting the helm hard-a-starboard the *Pakeha* sounded the turning signal of four short blasts and two. I do not find that she sounded it subsequently. The anchor was reported to be holding within two minutes, and my impression, from the pilot's evidence, is that he did not consider it incumbent on him, under the regulations, to sound any more turning signals. He took the view, as I think, that from the time the vessel was held by her anchor, his proper course was to be showing anchor lights

instead of navigation lights, and instead of blowing long blasts for fog to sound the ship's bell.

When the *Pakeha* was swinging toward a direct down-river heading—head to tide—engine action half ahead, and ahead for a minute-and-a-half, was taken to avoid a small vessel on her starboard quarter, and the vessel being cleared the engines were stopped, put full astern for about a minute, and again stopped. They remained stopped until—the *Pakeha*, having by this time a heading of about east-south-east, one point southward of a direct down-river course—the masthead lights of the *Palembang* were made out above the bank of fog, the *Palembang* approaching the *Pakeha* fine on her port bow, her masthead lights opening as though she were under a starboard helm.

During several minutes—probably seven or eight—before the *Pakeha's* swing at her anchor was interrupted by her engine action last mentioned, and during a minute after that interruption had passed, no turning signals such as are prescribed in by-law 28 (*e*) were being sounded by the *Pakeha*. Was she required by the by-law to give them? Was she, that is to say, a vessel under way and turning, and not at anchor?

If I am to apply the criterion Sir Robert Phillimore supplied in his judgment in the *Esk* (*sup.*), I must, on my view of the evidence here, find that the *Pakeha* was actually holden by and under the control of her anchor during all the time in question. That was her position according to the meaning which long ago was judicially set upon the words I have to apply. To see whether this meaning is applicable to the words "at anchor" under by-law 28 (*e*), I examine the particular by-law with the associated regulations of the by-laws generally for any other instances there may be of the use of the same words, in order to ascertain whether there is ground for saying that in the by-laws 1914-26 the term "at anchor" has a meaning other than its common meaning. By-law 14, which specified the lights to be shown by vessels "at anchor," and by-law 15, dealing with vessels "at anchor" below Bow Creek, appear to me certainly not to suggest any other than this common meaning. Moreover, under by-law 82 a breach of any regulation is an offence summarily punishable. I am not aware of any ground on which a by-law so enforceable can be construed less strictly in a damage case than it would be if some breach were the subject of proceedings to enforce a penalty.

On the whole I find myself bound to hold that within the meaning of the definition in by-law 5 the *Pakeha* was at anchor at the time in question and accordingly was not under by-law 28 (*e*) required during this time to be sounding a turning signal.

I may add that as a matter of navigation—apart from the by-laws—I am advised that from the time the *Pakeha's* anchor held and her cable was taut, she could not be said to have been under way, though different considerations would arise if, from any cause, she steamed up to her anchor so that the cable ceased to hold her head. This I am satisfied the *Pakeha* did not do. The Elder Brethren inform me further that in the case of a vessel which has let go her anchor and is held by it, and thereafter is using her engines to assist her in getting the heading at which she is to lie, it has not, in recent years, been a common practice in the navigation of the Thames to sound a turning signal during such movement, provided the anchor holds and the cable is taut.

I proceed to deal with the claim on the part of the *Palembang* that if warned by sound signals from the *Pakeha* under by-law 28 (*e*) she would have avoided collision. I attended carefully to the evidence of her pilot and have since discussed with the Elder Brethren the action and relative situation of the two vessels. The pilot certainly did not appear to me, so far as his personal view was concerned, to attribute the collision to any failure of the *Pakeha* to blow a turning signal. He, personally, did not regard the absence of such a signal as a default on the part of the *Pakeha*, though he adopted the view that if he had heard four blasts and two just before he entered the fog he would have "turned his ship round." I was satisfied such a signal would not have conveyed to him that a vessel held by her anchor was coming to a direct down-river heading in the fog, or anything more than that a vessel under way and not at anchor was turning higher in the river above the bank of fog. I believe also that if such a signal had been blown up-river of him, five, three, or two minutes before the collision he would not have done other than he, in effect, did. He expected to get safely through notwithstanding all the fog signals ahead. "If I had turned and lost the tide," he said, "I should have been much to blame."

I may add that on the question of the materiality of the signal of four blasts and two under the circumstances, the Elder Brethren have called my attention to the relative headings of the two ships at the time in question, to the mode in which during the time the *Pakeha* pivoted on a point very slowly abaft of her stem, to the effect that with knowledge of the position of the *Pakeha* those in charge of the *Palembang* expected to pass her, heading down river as she then was, by means of starboard helm action and to the fact that the *Palembang's* collision was not collision with the side of a vessel turning but with a vessel heading in nearly an opposite direction to herself. I do not enlarge on these matters because those I have already dealt with seem to me to dispose of the particular questions I have under consideration.

Complaint was made on the defendant's behalf that when the *Palembang* was seen to be approaching and crossing the bow of the *Pakeha*, the *Pakeha* did not put out cable to her anchor and go astern. This I have discussed with the Elder Brethren and I find that in the *Pakeha's* position the doing of the things

suggested if it were effective would have enveloped her in new risks, but that it probably could have been effectively done in the time available after risk of collision arose.

There was a further allegation that the *Pakeha* came head into collision. I am satisfied she did not.

A contributory cause of the collision was, the Elder Brethren consider, the letting go of the starboard anchor of the *Palembang*, by reason of some misunderstanding on the part of her chief officer immediately before the collision. Her engine action at that time also taken independently of her pilot, if it did not contribute to the casualty did not avoid or diminish it. Each action showed that the *Palembang* was not, at the material time, under the steady control which would no doubt have been found on her bridge under ordinary circumstances.

The result of the various considerations on which I have dwelt is, that I find the *Palembang* solely to blame.

Solicitors: Messrs. *Ince*, *Colt*, *Ince*, and *Roscoe* for the plaintiffs; Messrs. *Waltons* and *Co.* for the defendants.

April 9, 11, 12; *May* 15 *and* 16, 1929.

(Before BATESON, J.)

THE HAYLE. (*a*)

Damage at berth — Liability of owners of berth — Harbour-master acting as ship's agent — Notice limiting liability of the owners of the berth for damage—Knowledge of the harbour-master that the berth was unsafe—Whether knowledge of the owners.

The plaintiffs claimed damages from the defendants for injury to their steamship H. *caused by the* H. *lying aground in the defendants' berth. Before the* H. *was consigned to the berth the plaintiffs received an assurance from the harbour-master that the berth was safe for vessels to lie aground. The harbour-master subsequently acted as agent for the plaintiffs. The court found that the berth was in fact unsafe. The defendants relied upon the knowledge of the harbour-master that the berth was unsafe, which knowledge they contended must be imputed to the plaintiffs by reason of the harbour-master having acted as the plaintiffs' agent. They further alleged that the harbour-master ought to have known of the unsafe nature of the berth, and ought to have drawn the attention of the plaintiffs to the fact in his capacity as their agent. They further relied upon the terms of a printed notice that they did not warrant or guarantee the berths safe, and were not in any event liable for damage contracted at them. There was no evidence that the terms of the notice were known to the plaintiffs, although they were known to the harbour-master.*

Held, that even if the harbour-master had known that the berths were unsafe there was no obligation upon him to communicate such knowledge to the plaintiffs, since such knowledge would have been acquired in his character as harbour-master, and it would have been against the interest of the harbour-master himself to communicate it; that the printed notice did not form part of the contract, the harbour-master not having been appointed agent until after the contract was made; and that the plaintiffs were entitled to succeed.

ACTION for damage sustained by steamship lying in a defective berth.

The plaintiffs claimed damages for injuries sustained by their steamship *Hayle* whilst lying aground in a berth at the wharf at Fremington, near Barnstaple, belonging to the defendants, the Southern Railway Company.

Before arranging to send the *Hayle* to Fremington the plaintiffs addressed an enquiry to Mr. Thatcher, the defendants' harbour-master, and also station-master at Fremington, requesting him to inform them whether the berth was safe for steamers to lie aground. In reply Mr. Thatcher informed the plaintiffs that the berths were perfectly safe for steamers to lie aground, and he also informed them that he himself acted as agent for nearly all boats coming to Fremington, and that he was station-master as well as harbour-master and could attend to all requirements.

Subsequently the *Hayle* arrived at Fremington to discharge a cargo of coal, and the harbour-master acted as ship's agent, paying the pilot and engaging labourers, and making advances to the master of the *Hayle*, for which services he was paid 1*l*. 1*s*. by the plaintiffs.

The *Hayle* sustained certain damage in the berth which Bateson, J., assisted by Elder Brethren, held to have been caused by the defective state of the berth. The defendants then relied upon the knowledge of the harbour-master that the berth was defective, which knowledge they contended he should have communicated to the plaintiffs. They further relied upon a notice, the terms of which were known to the harbour-master, to the effect that the company did not represent, warrant, or guarantee that the berth was safe, and that vessels brought alongside were at the sole risk of their owners, and that the company would not in any event be liable for damage.

Bateson, J. adjourned these questions for further consideration.

Dunlop, K.C. and *Alfred Bucknill* for the plaintiffs.

Schiller, K.C., *Digby*, K.C. and *Dumas* for the defendants.

Fuller v. *Benett* (1843, 2 Hare. 394) and *Rolland* v. *Hart* (1871, 25 L. T. Rep. 191; L. Rep. 6 Ch. 678) were referred to in the course of the argument.

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

BATESON, J.—There remain the questions which I reserved for argument as to whether the defendants can escape liability on the ground that the plaintiffs knew of the dangerous condition of the berth or knew of the terms of a notice by the defendants exempting them from liability. I think the defendants fail on these points also.

It is not contended that the plaintiffs had knowledge otherwise than by the employment as ship's agent of the defendants' harbour-master who knew, or ought to have known, both the danger and the terms. The harbour-master was not employed as a general agent by the plaintiffs, but only for a very limited purpose, namely, to report the ship at the custom house, pay the pilot, and provide the master with money to pay the labourers. I think the harbour-master collected the labour—or more probably the labour collected itself—on the wharf, and the harbour-master sent the labourers down to the ship to get the job. The account for his services is made up of some small sums for telegrams, payment of the pilot, and the money advanced to the master to pay for the labour, together with one guinea for his agency services.

Mr. Schiller put his argument in a very short form. He says that the harbour-master knew, and was, in fact, the agent of the ship ; and that the knowledge of the agent of the ship must be imputed to the plaintiffs as principals. He put it that the harbour-master ought to have known—even if he did not know—the actual condition of affairs and also the terms of the card, which is called a " notice," to the master, owner, and persons in charge of vessels. Mr. Schiller argued that it did not matter whether the case was founded in tort or contract—the same principle must apply. He was rather inclined to think it was contract. He said that the contract was only made when the ship came alongside and not before. The object of that argument, no doubt, was to get rid of certain letters which had been written before the vessel came to the wharf ; and he contended that the knowledge which the harbour-master had was to be imputed to the plaintiffs. He referred me to *Indermaur* v. *Dames* (1867, 6 L. T. Rep. 293 ; L. Rep. 2, C. P. 311, 313), and in particular to the following passage from the judgment of Kelly, C.B., quoting from the judgment of Willes, J. in the court below : " We consider it settled law that he " (a visitor unacquainted with the danger he is likely to incur), " using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know ; and that, when there is evidence of neglect, the question whether such reasonable care has been taken by notice, lighting, guarding or otherwise, and whether there was such contributory negligence in the sufferer, must be determined by a jury as a matter of fact." Mr. Schiller also referred to *Re Fenwick ; Stobart, and Co. Limited* (*Deep Sea Fishery Company's* claim) (86 L. T. Rep. 193 ; (1902) 1 Ch. 507, 511), also a case of a secretary acting in a dual capacity, where it was held by Buckley, J. that the secretary's knowledge, as regards the affairs of one company, did not affect with notice the other company of which he was also secretary. The particular passage relied on was : " What the court has to see is whether the information he gets, as secretary of the one company, comes to him under such circumstances as that it is his duty to communicate it to the other company. Suppose, for instance, as secretary of the first company he learns something which it would be a breach of his duty to that company to communicate to the other company. I should say certainly that it is not notice to the other company." It depends on the circumstances of the case what the position really is. Mr. Schiller also cited *Forbes, Abbott, and Lennard Limited* v. *Great Western Railway Company* (17 Asp. Mar. Law Cas. 347 ; 138 L. T. Rep. 286) with reference to the terms of the notice to show that the terms of this notice were wide enough to protect the company in every possible event.

Mr. Dunlop's case was that the harbour-master did not in fact know ; he said in terms, in his evidence, that the berth was safe ; therefore he did not know that the berth was unsafe, and facts which he ought to have known, but did not know, did not affect the plaintiffs. His principals—if they were principals to this extent—would not be affected with matters which he ought to know but which he, in fact, did not know, and (as far as the berth's unsafety was concerned) as the harbour-master did not know it was unsafe the plaintiffs certainly would not be affected with any knowledge of the unsafety of the berth. He also says that the harbour-master did not really know the contents of the notice, and that there was no evidence that he had ever read it. I do not think, in fact, there was any evidence that he had ever read it. My own view is that if he had ever read it he had forgotten all about it until the accident happened, and then, when the accident did happen, he handed to the master a card with the terms on it. Mr. Dunlop also said that there were two factors which are always necessarily present before knowledge of an agent can be considered to be knowledge of a principal, and he referred me to Bowstead's Law of Agency, 7th edit., pp. 366–7 : " Knowledge acquired by an agent otherwise than in the course of his employment on the principal's behalf, or of any fact or circumstance which is not material to the business in respect of which he is employed, is not imputed to the principal."

Applying those principles to the present case I think it may be said that the harbour-master was not the agent of the plaintiffs to know these matters. I doubt myself whether the harbour-master really had any business to know what the precise condition of this berth was. The engineering department of the railway company were responsible for seeing that the berth was safe. The harbour-master had general supervision of the wharf and did apparently report

whether the time had arrived or was about to arrive when some cleaning of the berth should be done, but as to his knowledge of the condition of the berth or its fitness to receive a ship at different times, I doubt very much whether he was the person who was in a position to know what the condition of things was. But, however that may be, I am quite satisfied that his employment by the plaintiffs was merely for the purposes of reporting the ship and providing funds for the labour—as I have already indicated—and that he was not an agent to know these matters that are relied on in this case.

Further than that the harbour-master was very much interested in getting the ship to come to this particular berth, and it was certainly not to his interest to prevent her coming. In that connection Mr. Dunlop referred me to a passage in *Re David Payne and Co. Limited* (91 L. T. Rep. 777 ; (1904) 2 Ch. 608). Buckley, J. (as he then was) said this : " I understand the law to be this : that if a communication be made to an agent which it would be his duty to hand on to his principals, who in this case, of course, were the board of which Kolckmann was but one member, and if the agent has an interest which would lead him not to disclose to his principals the information which he has thus obtained, and in point of fact he does not communicate it, you are not to impute to his principals knowledge by reason of the fact that their agent knew something which it was not his interest to disclose, and which he did not disclose."

Lastly, Mr. Dunlop referred to *Nelson Line* v. *James Nelson and Sons Limited* (10 Asp. Mar. Law Cas. 581 ; 97 L. T. Rep. 812 ; (1908) A. C. 16) with regard to the terms of the notice, and with regard to the notice itself, even assuming that it could be held that the plaintiffs had notice of the terms. Mr. Dunlop pointed out that before the ship ever went to this berth the plaintiffs had written to the harbour-master to inquire whether the berths at the wharf were always safe for steamers to lie aground, and had received from him a letter stating that the berths were " perfectly safe for steamers to lie aground." Those letters were written, I think, before any contract was made for the ship to take the cargo to the wharf, in order that the plaintiffs might decide whether they should enter into the contract or not, and that letter of the harbour-master no doubt was part of the inducement which led the plaintiffs to make their contract with the railway company to send the ship there. In my view those letters are part of the bargain between the railway company and the plaintiffs for taking the ship to this wharf. There is, therefore, a notice in writing to the plaintiffs by letter, which says that the berths are perfectly safe for steamers to lie aground, and a printed notice which conveyed words to the very opposite effect. In that connection Mr. Dunlop in *Nelson Line* v. *James Nelson and Co. Limited* (*sup.*) cited this passage from Lord Loreburn's speech : " If I were obliged to affix a definite meaning to the disputed language, I should prefer the plaintiffs' construction. But in truth I think the clause, taken as a whole, so ill thought out and expressed that it is not possible to feel sure what the parties intended to stipulate. The law imposes on shipowners a duty to provide a seaworthy ship and to use reasonable care."

This, of course, was a damage to cargo case, but it seems to me that the words there are equally applicable to a case where there is a duty on the defendants to take reasonable care. They may contract themselves out of that duty, but unless they prove such a contract the duty remains. Such a contract is not proved by producing language which may mean that, or may mean something different. As Lord Macnaghten said in *Elderslie Shipping Company* v. *Borthwick* (10 Asp. Mar. Law Cas. 24 ; 92 L. T. Rep. 274 ; (1905) A. C. 93) : " An ambiguous document is no protection." I was also referred in this connection to the Scottish case of the *Aktieselskabet Dampskibet Forto* v. *The Orkney Harbour Commissioners* (1915, S. C. 743, 755). Lord Salvesen, in that case, dealing with the notice of the harbour commissioners to masters of vessels and others making use of the moorings laid down by the commissioners, says : " Even if the notice applied, I doubt whether it would relieve the defenders as in a question with the owner of a ship who was not familiar with its terms, even although the local pilot whom he employed was in knowledge of it. To have this effect in law it would require to be pleaded as a condition of the invitation which the harbour authorities impliedly issue to all vessels having occasion to use the harbour ; and such a condition could not be imported in the case of a person who was not made aware of it. The pilot was not the servant of the shipowner in the sense of making his knowledge on such a subject the shipowner's knowledge. He was a mere agent for the limited purpose of navigating the entrance to the harbour. The conclusive answer, however, seems to me to be (as indeed the history of the notice shows) that it applies only to buoys and moorings which vessels make use of by attaching themselves to them." There he deals not only with the notice, but with the other point of a person being an agent for a limited purpose.

I think this notice was no part of the contract as between the plaintiffs and the defendants, and that the defendants fail on this point also.

I therefore give judgment now for the plaintiffs, subject to a reference.

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

Solicitors for the defendants, *Godfrey Warr Clarkson*, and *Co.*

Monday, June 10, 1929.

(Before HILL, J.)

THE NORMANSTAR. (*a*)

Practice — Taxation of costs — Limitation of liability—Reference—Average statement and adjusters' evidence used at reference as evidence of the claim of each cargo owner—Whether adjuster's charges recoverable on taxation.

The plaintiffs obtained a decree limiting their liability for a collision in which the defendants' vessel was sunk. There were a large number of cargo claims. An average statement was prepared by a firm of average adjusters, and at the reference the solicitors for the cargo owners by agreement tendered the average statement as evidence of the claims of the various cargo owners, and the average adjusters appeared and gave such explanations as were necessary of their statement. On taxation the registrar allowed the defendants 1000*l. for the average adjusters' fees. The plaintiffs objected to such allowance on the ground that the defendants' solicitors were not entitled to pay others to carry out work which ought properly to have been performed by themselves, and upon the further ground that the same average adjusters had been engaged to prepare the defendants' claim against their underwriters.*

Held, that the item was properly allowed on taxation.

SUMMONS to review taxation adjourned into court.

The plaintiffs obtained a decree limiting their liability in respect of a collision in the River Plate between their steamship *Normanstar* and the defendants' steamship *Kuneric*, for which the *Normanstar* was held alone to blame. There were a large number of cargo claims. At the reference the solicitors acting for the cargo claimants tendered by agreement, in lieu of affidavits and vouchers, an average statement prepared by a firm of average adjusters, who also attended the reference and gave any necessary explanations.

On taxation the assistant registrar allowed the defendants 1000*l.* for the average adjusters' fees and 157*l.* 10*s.* for the defendants' solicitors for instructions for brief. The plaintiffs objected to the sum allowed for the average adjusters' fee.

Noad for the plaintiffs.

Alfred Bucknill for the defendants.

June 10.—HILL, J. This was an objection on taxation following a report on a reference by the plaintiffs in a limitation action following a report and reference. The plaintiffs in the limitation action were defendants in the damage action and have been found alone to blame, and therefore had to pay the damages suffered by the other steamship and her cargo. They objected to an allowance by the registrar of a fee paid to well-known average adjusters for preparing particulars. Where there is a decree of limitation of liability, the party obtaining the decree and liable for the damages limited by the decree has in general to pay the costs of the reference—at least, these costs include the costs of the several joint creditors proving the amount of the damages suffered by them. That is obviously just. It would be strange if the wrongdoer could say to the injured parties, "Here is the lump sum for which I am liable to you in the lump; now find out at your own expense how much of it each is entitled to."

Each claimant on the reference must prove the amount of his loss. Where there are several cargo claims and also a ship's claim, it is very often found convenient to prove the claims by affidavit, as the rules permit. Frequently, where the claims have been put into the hands of an adjuster, and he has investigated them, it may be agreed that the results as set out in his adjustment are accepted without incurring the expense of filing affidavits with the relevant vouchers.

When that practice is followed it relieves the claimants' solicitors from personally preparing the affidavits and vouchers, and getting them sworn, and it presents the evidence to the registrar in a very convenient form. In general, where there are a large number of items to be proved it is, I am satisfied, a course which involves less expense than the preparation and swearing of a number of affidavits. In the present case there were many items of damage to be considered. The ship was sunk and salved; the cargo was in part lost, in part salved and re-conditioned; there were salvage and other expenses to be ascertained and distributed among the several claimants before the amount of damage suffered by each could be proved, and the loss of each several claimant had to be proved. The solicitors for the cargo claimants, instead of doing all this work themselves, employed, as I think very wisely, a well-known firm of salvage adjusters to ascertain the facts and set them out in a statement. A similar statement was prepared by the adjusters dealing with the charges and expenses incurred by the ship. A statement was prepared dealing separately—and no doubt incorporated in the first statement I have referred to—with the proceeds of unidentified salvage cargo, and their appropriation of the several parcels belonging to the different claimants, and there was also a separate statement of the general suing and labour expenses and charges. All those were by agreement treated as the evidence in the reference in lieu of affidavits and vouchers. The adjuster attended the reference to give explanations. The registrar, on the basis of the statement, arrived at the figures in the report. The ship's loss worked out at 26,453*l.* and the cargo loss at 328,134*l.* Then came the question of costs. The solicitors' costs for instructions for brief had been carried in at the very moderate figure of 157*l.* 10*s.*—properly so, for they had

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

employed the adjusters to prepare the particulars. On that head 126*l.* was allowed. Had they done all the work no one can doubt that a very much larger sum would have been claimed and allowed for instructions for brief. The adjusters' fee was originally put in as 1575*l.*, but that was amended to 1312*l.* 10*s.*, and the registrar allowed 1000*l.*

In principle I can see no possible objection to such an allowance. The adjusters have done for the claimants work which the claimants' solicitors would otherwise have had to do, and the result has been that the facts and figures set out in the adjustment have been accepted in evidence. Had that course not been followed the claims could only have been proved by bringing a large number of witnesses from the River Plate, or by a great number of affidavits, mostly sworn in the River Plate, with the appropriate vouchers annexed, supplemented by evidence, which might have been very lengthy, as to the appropriation of the salvage and other charges to the respective items of ship and each parcel of cargo. It is not for me to question the quantum allowed. But I have little doubt that the cost of so preparing the brief and proving the claims would have very largely exceeded the aggregate of the 1126*l.* allowed by the registrar.

The appellants seem to think it is relevant that the claimants may have employed the same adjusters to prepare their claim against the underwriters. I cannot see the relevance. It is true that an adjustment as against underwriters must first of all claim the amount of the respective losses. So far it proceeds in the same way. Then the adjusters have to ascertain the respective insurances and underwriters, and have to distribute the losses according to the amounts insured among the underwriters, and so ascertain what each underwriter has to pay and to whom he has to pay it. This second half of an adjustment against underwriters is irrelevant to any inquiry against the wrongdoer. But this second half is not included in the adjusters' fees charged in this case. I might add that it is a fallacy to suppose that for other purposes the adjusters are employed by the underwriters. It is obvious, therefore, that I must dismiss the appeal with costs.

Solicitors, *Wm. A. Crump* and *Son*; *Ince, Colt, Ince*, and *Roscoe*.

Tuesday, June 11, 1929.

(Before BATESON, J.)

THE ESSEX ENVOY. (a)

Collision—Damages—Detention—Time charter-party — Cesser clause — Payment of hire to cease if time lost owing to collision or damage preventing the steamer from working for more than twelve hours—Loss of time whilst carrying out permanent repairs of damage sustained in collision before the making of the charter-party—Application of cesser clause—Whether hire properly deducted.

A time charter-party contained the following cesser clause:

"In the event of loss of time from deficiency of men or stores, breakdown of machinery (whether partial or otherwise), collision, stranding, fire in ship and (or) cargo, damage or interference by authorities preventing the working of the vessel for more than twelve running hours, the payment of hire shall cease until she be again in an efficient state to resume her service at the place where the accident occurred. . . ."

After the steamer came on hire she went into dry dock for four days to repair damage which she had sustained in collision before coming on hire. The owners allowed the charterers four days' hire, and claimed to recover the amount so allowed from the defendants in the collision action.

Held, that the above cesser clause applied to damage arising before as well as after the making of the charter-party; that the charterers were entitled to deduct four days' hire; and that the owners were entitled to recover the amount so deducted from the defendants as damages for loss of use of their steamer.

MOTION in objection to registrar's report.

The plaintiffs, the Hall Line Limited, claimed damages from the defendants, owners of the steamship *Essex Envoy*, in respect of damage sustained by the plaintiff's steamship *City of Lyons* in a collision which took place at Port Said on the 11th Dec. 1926. The defendants admitted liability for the collision. After the collision temporary repairs were carried out, and the vessel eventually proceeded to the United States. On the 21st March 1927 the *City of Lyons*, being then at Philadelphia, was chartered by the plaintiffs to the Ellerman Bucknall Steamship Company Limited upon a time charter-party by the terms of which it was provided as follows:

1. The said owners agree to let and the said charterers agree to hire the said steamship for the term of about six months from the day she is placed at the disposal of the charterers at Philadelphia in such dock, wharf or place as customary, and as charterers may direct, she being then ready with clear, clean holds to receive cargo; and being tight, staunch, strong and in every way fitted for the service. . . .

2. The steamer is expected ready about the 26th March 1927.

11. In the event of loss of time from deficiency of men or stores, breakdown of machinery (whether partial or otherwise), collision, stranding, fire in ship and (or) cargo, damage or interference by authorities preventing the working of the vessel for more than twelve running hours, the payment of hire shall cease until she be again in an efficient state to resume her service at the place where the accident occurred. . . ."

On the 25th March the *City of Lyons* was put at the disposal of the charterers at Philadelphia; on the 27th March she went into

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

dry dock for permanent repairs, which it was agreed lasted four days. This period of time was deducted by the charterers from the hire payable under the charter-party, and the plaintiffs claimed to recover the amount so deducted by way of damages from the defendants. At the reference the registrar allowed the amount claimed. The defendants moved to vary his report by omitting the sum claimed in respect of the four days in question.

B. B. Stenham for the motion.—The cesser clause has no application to damage arising before the vessel came on hire. It is impossible to give effect to the clause unless the accident occurred during the course of the service, since the service is to be resumed at the place where the accident occurred. The parties in the present case do not desire the resumption of service at Port Said, where the accident occurred. No other place being specified, the clause upon a proper construction cannot apply to an accident which took place before the steamer was chartered. [Other reasons, not material to this report, were also advanced by counsel.]

Brightman.—The charterers were clearly entitled to make a deduction of four days' hire. The cesser clause cannot be construed so as to impose upon them an obligation to pay for time during which they did not enjoy the use of the steamer. Such a construction would be manifestly unjust.

B. B. Stenham replied.

BATESON, J.—In my view this appeal fails. In consequence of a collision between the *City of Lyons* and the *Essex Envoy* which occurred at Port Said on the 11th Dec. 1926 the *City of Lyons* was so injured that she had to be put into dry dock and repaired. The repairs necessarily occupied four days, and in my view the owners of the *City of Lyons* lost the use of their vessel for four days. The measure of damage for the loss of the use of the vessel for four days is no doubt the amount of hire which the owners could have got for their ship. In fact, they had a charter-party at the time for their ship, and the charterers have not paid for the hire for the four days while the vessel was under repair. That affects only the measure of damage, because if the vessel had been repaired before the charter-party was entered into, the owners would have had to delay chartering her for four days, and would have lost the hire for those four days, on which they could have obtained hire for their ship. It is said that because of the terms of the charter-party and because of what happened the owners could have recovered hire for the use of their ship during the four days when the owners took her out of the power of the charterers to use her and dry-docked her while they did the repairs. I do not think that argument, ingeniously put forward as it was by Mr. Stenham, ought to prevail. The vessel after the accident was allowed a voyage (by the surveyor's certificate in Port Said) to Calcutta and back to the United Kingdom for repairs. She, in fact, went to Calcutta, but did not come to the United Kingdom. She went to Philadelphia, via New York, to discharge her cargo. She was surveyed in New York on the 16th March 1927, and on the 21st March the charter-party in question, which was a six months' charter, was entered into by Ellerman and Bucknall Steamship Company Limited, of London, and the Hall Line Limited, of Liverpool, who were the managing owners of the *City of Lyons*, which I understand belongs to the Ellerman Line. Messrs. Hall, the Ellerman Line, and Ellerman and Bucknall, are no doubt closely associated, but all different entities. The charter-party was signed on the 21st March. The vessel arrived at Philadelphia on the 24th March. She finished her discharge and was handed over to the charterers on the 25th March. She loaded two tons at Philadelphia. She left Philadelphia on the 26th March, arriving at New York on the 27th March; she was there examined by surveyors after she had got alongside, was dry-docked on the 30th, came out of dry dock on the 3rd April, and started loading on the 9th April. The master, I think it is, said: "We were ready for loading and had it not been for this damage probably we should have commenced." There was a telegram from a Mr. Niven who, I am told, is the surveyor in New York, to the Hall Line, the agents in Liverpool, quoting the offers for repairs and stating that the vessel was not required for loading until the 4th April. So that there was the evidence of the master that he probably would have loaded and the evidence of this surveyor who said that she was not required for loading.

The registrar's finding, as I understand it, with regard to this matter is that the vessel was prevented from working for more than twelve hours, and that the damage prevented the use of the vessel for more than twelve hours, so I suppose that he accepted the master's evidence that the vessel would have loaded but for the fact that she was being repaired in dry dock.

It seems to me that the charterer was prevented from using and lost the use of this vessel (owing to her being repaired for damage in dry dock) for four days after she had come under the charter-party. The charter-party, which is a charter-party for a vessel from the day she is placed at the disposal of the charterer "staunch, tight, fitted for service, and to be so maintained." That is clause 1. Clause 4 says: "The charterer shall pay for the use and hire at the rate of [so much] per calendar month, commencing when she is placed at the charterer's disposal." Then comes the clause which is really the clause upon which the whole argument before me, and, as I understand it, the whole argument before the registrar was based. Clause 11: "In the event of loss of time from damage preventing the working of the vessel for more than twelve running hours the payment of the hire shall cease until she

shall again be in an efficient state to resume her service at the place where the accident occurred." I have read the material words of the clause; I have not read the whole of it.

Mr. Stenham for the motion in objection takes three points. He says the cesser of hire only applies to an accident after the vessel comes on hire. With regard to that, I think the words are wide enough to cover a case of this kind, because in this case there was damage which prevented the working of the vessel for more than twelve running hours. The vessel could not be loaded or used by the charterer when she was in dry dock, and that is what she was wanted for. Therefore, there was a loss of time to the charterers, and under those circumstances the payment of hire is to cease. Taking the words in their ordinary and natural meaning, there was a loss of time from damage preventing the working for more than twelve hours. He says that it must be damage that occurs after the vessel comes on hire. The clause does not say so, and one can well imagine many cases where damage which has occurred before the vessel comes on hire may not be discovered, or may not be repaired until after the vessel comes on hire, and if so, the parties, by the terms of the clause, seem to me to have provided for such a matter. As a matter of business, I should think this happens quite constantly, and the words are simple enough to cover such a case, and I do not see any reason why I should confine it to damage subsequently received. Then his second point was that in this case there was no loss of time, and his point upon that was—as I understand it—that, inasmuch as there was a telegram saying that the vessel was not wanted for loading until a particular date, there was no loss of time. I think if the words had been "loss of use" there might have been a good deal more to be said for Mr. Stenham's argument, but I myself cannot see how, if the ship is being dry-docked and the charterer has not the benefit of the time when she is being dry-docked, he has not lost time under the charter-party. He has lost four days to which he had a right, and that is a loss of time. His last point was that there was not prevention of the working of the ship. It seems to me that if you put a ship into dry dock to repair a rent in her, as I am told there was in this case, which had been boxed in with cement temporarily, the vessel could not be used for the ordinary purposes of a charterer, namely, to control, work, load and send her across the sea. Therefore, she was prevented from working and the damage did prevent the working of the vessel. Taking the view that I do, this clause seems to me to be applicable to the present case. There has been a loss of use of this ship suffered by the owner of the ship involving a loss of money measured by the amount which the charterer did not pay.

It is quite true that these companies are all closely inter-related, and the accounts are made up by one clerk in one of the companies who may very likely act in a similar capacity for the other companies, for all I know, but it seems to me that it was a proper debit note that was sent in for the hire which allowed the deduction of the amount claimed. I cannot imagine any shipowner who had taken the ship out of the hands of his charterer for four days while he repaired her properly sending in any account other than that which was sent in in this case. He could not charge for her when his ship had really not been at the disposal of the charterer. At any rate, that is what has been done in this case, and I think it is right. If he had sent in such a claim, I think the charterer would have been quite justified in claiming those four days back under this clause and under the facts of this case. What use the charterer was going to make of the ship after he has hired her is no concern of the *tort feasor* in this case, and if it were, the fact that he was not going to use her would not avail the defendants as an answer to the claim in this case. Loss of time I have already pointed out is not the same as loss of use.

For these reasons I reject this motion with costs.

Motion dismissed with costs.
Report of Registrar confirmed.

Solicitors: *Thomas Cooper* and *Co.*, for the motion; *Gregory, Rowcliffe*, and *Co.*, agents *Hill, Dickinson*, and *Co.*, Liverpool, contra.

June 25, 26, *and July* 23, 1929.

(Before HILL, J. and Elder Brethren.)

THE PRINCESS. (*a*)

Collision — Negligence — Dumb barge moored alongside steamer during night — Barge unattended — No riding light — Port of London River By-Laws 1914–1926, *by-law* 14.

The defendants' dumb barge was sunk in a collision at night whilst moored fore and aft alongside the plaintiffs' steamship S. *The* S. *was lying moored at a tier in the River Thames. The tier was not a usual barge mooring. No riding light was exhibited by the barge, and she was left unattended during the night. Subsequently the* S. *settled down upon her, and sustained damage.*

Held, that there was no negligence in leaving the barge unattended.

By the Port of London River By-Laws 1914–26, *by-law* 14, *it is provided that a vessel under* 150*ft. in length when at anchor or moored shall, by night, exhibit forward where it can best be seen, but at a height not less than* 10*ft. and not exceeding* 20*ft. above the hull, a white light (hereinafter called the riding light) in a lantern so constructed as to show a clear, uniform, and unbroken light visible all round the horizon at a distance of at least one mile. . . . . Provided that* (a) *where masted vessels*

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

are lying made fast to the moorings in the tiers, only the outermost off-shore of such vessels in each tier shall be required to exhibit the riding light. . . . (c) Lighters lying at the usual barge moorings in the river above Gravesend, and lighters lying made fast at wharves, piers or jetties, or alongside vessels thereat, shall not be required to exhibit the riding light.

Held, that the defendants' dumb barge was a vessel which was required to exhibit a riding light.

DAMAGE ACTION.

The plaintiffs, owners of the steamship *Stork*, claimed damages from the defendants, owners of the dumb barge *Princess*, for damages sustained by the *Stork* in settling down upon the *Princess* when the latter was sunk alongside the *Stork*.

On the morning of the 22nd Oct. 1926 the *Stork* was lying moored at Mill Stairs Tier, River Thames, heading down river. On the previous day the *Stork* had been discharging cargo into the defendants' dumb barge *Princess*, and during the night the *Princess* had been left moored fore and aft alongside the *Stork*. The *Princess*, which was partly laden, had been left unattended during the night. No riding light was exhibited on the *Princess* during the night, but an anchor light was exhibited on the *Stork*.

During the night a collision took place between the *Princess* and some unknown vessel, in consequence of which the *Princess* sank. As the tide fell the *Stork* settled down upon the *Princess* and sustained damage.

The Port of London River By-Laws 1924–26 provide as follows:

14. A vessel under one hundred and fifty feet in length when at anchor or moored shall, by night, exhibit forward where it can best be seen but at a height not less than ten feet and not exceeding twenty feet above the hull a white light (hereinafter called the riding light) in a lantern so constructed as to show a clear, uniform and unbroken light visible all round the horizon at a distance of at least one mile. . . . Provided that: (*a*) where masted vessels are lying made fast at the moorings in the tiers, only the outermost off shore of such vessels in each tier shall be required to exhibit the riding light . . . (*c*) Lighters lying at the usual barge moorings in the river above Gravesend, and lighters lying made fast at wharves, piers or jetties or alongside vessels thereat, shall not be required to exhibit the riding light . . .

Dunlop, K.C. and *O. L. Bateson* for the plaintiffs.—The onus is upon the defendants to satisfy the court that the *Princess* sank without negligence on their part: (*The Merchant Prince*, 7 Asp. Mar. Law. Cas. 208; 67 L. T. Rep. 251; (1892) P. 179). The *Princess* ought not to have been left unattended: (*The St. Aubin*, 10 Asp. Mar. Law Cas. 298; 95 L. T. Rep. 586; (1907) P. 60). A riding light ought also to have been exhibited on the *Princess* in accordance with by-law 14 of the Port of London River By-laws 1914–26. Mill Stairs Tier is not a usual barge mooring.

Batten, K.C. and *Dumas* for the defendants.—There was no negligence in leaving the *Princess* unattended. As to the alleged failure to show a riding light, no riding light was required under proviso (*a*) and (*c*) of by-law 14.

Cur. adv. vult.

July 23, 1929.—HILL, J.: This case involves a claim for damages for negligence by the owners of the steamship *Stork* against the owners of the dumb barge *Princess*. The *Stork* was a vessel of 2029 tons gross and 270ft. long. She was lying moored at Mill Stairs Tier, in the River Thames, heading down river, part laden.

The *Princess* was a steel dumb barge of 130 tons carrying capacity, 74ft. long, and on the day preceding the damage to the *Stork* she was lying alongside the *Stork*, on the *Stork's* starboard side, heading up river; that is to say, the *Princess's* starboard side was alongside the *Stork's* starboard side. The *Princess* was attached to the *Stork* by ropes fore and aft and breast ropes. The *Princess* had come there on the afternoon of the 21st Oct. 1926, and had received part of a cargo of asphalt from the *Stork*. At five o'clock in the afternoon she had about 40 tons in her in the after part. Work for the night then ceased and the lightermen left the *Princess* there. During the night she carried no light and she had no one on board. High tide was at 2.17 a.m. on the following morning. Some time during the night the *Princess* sank, and as the tide fell the *Stork* rested upon her, and both vessels received damage. The plaintiffs sue the owners of the *Princess* for the damage.

Now a barge ought not to sink and get into such a position that a steamer alongside of her sits on her. That she got into such a position is, I think, *primâ facie* evidence of negligence. The *Stork* had no steam and could not remove herself in time, even although those on board had known that the *Princess* had sunk in dangerous proximity to the *Stork*. *Primâ facie*, therefore, there is evidence that the damage to the *Stork* was due to negligence for which the defendants were responsible. That has shifted the burden on to the defendants.

The defendants contend that this sinking was without negligence on their part. As they were bound to do, they set out to prove what was the cause of the sinking. Unless they did that they could not say that there was no negligence on their part. I find that the incursion of water was due primarily to damage to the *Princess*, as described in the survey reports. The damage to the *Princess* was on the port side 2ft. forward of the cabin bulkhead. What was the cause of this damage? I am advised, and I entirely agree, that it must have been sustained when the *Princess* was afloat, and by some other vessel striking the *Princess*. No one, except the man who did the mischief, knows what vessel struck the *Princess*—and possibly he does not know. But it is, as I find, certain that some vessel did strike the

Princess. I accept the evidence that up to 5 p.m. the damage did not exist. Another barge in the barge tier near by was broken adrift during that night. The watchman of the *Stork* did see a tug and tow which passed, forcing her way through craft in that neighbourhood, and it may be that the craft was driven against the *Princess*. At any rate, some vessel during that night was carelessly handled in the neighbourhood, and the result was that something came into collision with the *Princess* and did her damage. The result of the damage to the *Princess* was that she made water and sank.

I, therefore, find that the incursion of water which caused the *Princess* to sink was by reason of collision with some unknown vessel or craft. That, however, does not completely discharge the onus which rests upon the defendants. They must further show that the collision and the sinking were without negligence of their part. The plaintiffs say that the defendants fail to do that for two reasons: (1) that the barge ought to have had a man in charge; (2) the barge ought to have been exhibiting a light. If either of these propositions is sound, then it is clear that the defendants cannot show that the sinking was without negligence on their part. If a man had been on board he might have given warning to prevent the collision; or he might shortly after the collision have discovered the leak caused by it and obtained assistance in order to remove the barge to a position where she would have sunk clear of the *Stork*. The damage was such that it must have taken a considerable time for sufficient water to enter and sink the barge. If the barge had been exhibiting a light the collision might never have happened.

I am not able to find that it was negligence to leave the barge unattended. Whether, in river or in dock, a barge ought to be attended depends in each case on the particular locality and time and the other circumstances of the particular case. The *Princess* was fast fore and aft alongside the *Stork* in the tier. She was on the side of the steamer remote from the main traffic of the river. There might be some traffic on the south side between the barge tiers and the steamer, or in or out of St. Saviour's dock. But St. Saviour's dock is only a small inlet, and the traffic was not likely to be considerable; nor was there any reason to expect that such traffic as there was would not keep clear of the steamers at the tier and craft moored alongside them. I have asked the Elder Brethren for their view. They are of opinion that it was not improper to leave the barge unattended. I am of the same opinion.

But that still leaves the question of the light, and that depends on the Port of London By-Laws, No. 14. The first part of by-law 14 provides as follows: "A vessel under one hundred and fifty feet in length when at anchor or moored, shall, by night, exhibit forward where it can best be seen but at a height not less than ten feet and not exceeding twenty feet above the hull a white light (hereinafter called the riding light) in a lantern so constructed as to show a clear, uniform and unbroken light visible all round the horizon at a distance of at least one mile. Provided that in the case of a lighter the riding light may be placed on the highest available part thereof." That applies to the *Princess*. She was a vessel; she was moored; she was moored fore and aft to the *Stork*, which was herself moored fore and aft. So far, therefore, the rule would impose upon the *Princess* the obligation to exhibit a riding light. But there are certain provisos to the by-law. Proviso (*a*) is as follows: "Where masted vessels are lying made fast at the moorings in tiers, only the outermost off shore of such vessels in each tier shall be required to exhibit the riding light." The *Princess* was not a masted vessel. Then proviso (*c*) reads as follows: "Lighters riding at the usual barge moorings in the river above Gravesend, and lighters lying made fast at wharves, piers or jetties or alongside vessels thereat, shall not be required to exhibit the riding light." The *Princess* was not lying at any usual barge mooring nor was she made fast to a wharf, pier or jetty, nor was she alongside a vessel at a wharf, pier or jetty. There is, therefore, nothing to take the *Princess* out of the obligation imposed upon her by the rule, to exhibit a riding light on her highest available part. She had no light. Disobedience to the rule is negligence.

The defendants cannot prove that the absence of a light was not a cause of the collision. They fail to discharge the onus which is upon them, and therefore there must be judgment for the plaintiffs.

Solicitors: *Batham* and *Greig; J. A.* and *H. E. Farnfield.*

July 3, 4, 5, 8, 15, *and* 25, 1929.

(Before HILL, J. and ELDER BRETHREN.)

THE TOVARISCH. (*a*)

Collision—Lights—"Flare-up" light—May be shown if necessary to attract attention—Green pyrotechnic light shown—Whether "flare-up" light authorised by regulations—Regulations for Preventing Collisions at Sea 1910, *art.* 12.

Art. 12 *of the Regulations for Preventing Collisions at Sea* 1910 *authorises the use by any vessel of a "flare-up" light, if necessary to attract attention, in addition to the lights which she is by the regulations required to carry.*

Held, that art. 12 *does not authorise the use of a green or red pyrotechnic light, and that a "flare-up" light means an ordinary flame, and not a specially coloured flame.*

Quære, *whether it is permissible to use a "blue" pyrotechnic light, which burns with a more*

(*a*) Reported by GEOFFREY HUTCHINSON Esq., Barrister-at-Law.

penetrating light, nearer a pure white than the yellow of an ordinary flame.

DAMAGE ACTION.

The plaintiffs, owners of the Italian steamship *Alcantara*, claimed damages from the defendants, owners of the Russian four-masted barque *Tovarisch*, in respect of a collision between the *Alcantara* and the *Tovarisch*, which took place in the English Channel. In consequence of the collision the *Alcantara* sank with all hands, with the exception of a single survivor.

The facts and arguments of counsel fully appear from the judgment of Hill, J.

Langton, K.C., *Digby*, K.C., and *Cyril Miller* for the plaintiffs.

Dunlop, K.C., *Stranger*, and *Krougliakoff* for the defendants.

Cur. adv. vult.

July 25, 1929.—HILL, J.—The vessels involved in this collision were the Italian steamship *Alcantara* and the Russian sailing ship *Tovarisch*. The collision happened on the 24th Feb. 1928. The *Alcantara* was a single screw steamship of 1682 tons gross, 289ft. long, she was laden with mineral ore, and manned by a crew of twenty-three hands all told. Her lights were electric. The *Tovarisch* was a four-masted barque of 2472 tons gross, 284ft. long, she was heavily ballasted, drawing 17ft. 2in. forward and 18ft. aft. She was employed as a training ship for the Russian Mercantile Marine. Her crew was ninety-five hands all told, including about sixty cadets. Her lights were oil. The *Alcantara* was bound up Channel for Calais. The *Tovarisch* was bound down Channel, after passing the South Foreland and Dover. The collision was in the neighbourhood of Dungeness, the defendants say about S.S.W. of Dungeness, and about three to four miles distant. The ships were in collision, the bowsprit and stem of the *Tovarisch* with the port side of the *Alcantara*. The *Alcantara* sank within a few minutes and all on board her were lost except one man who, at the moment of the collision, was in the engine room and who came on deck, and, as the *Alcantara* sank under the bows of the *Tovarisch*, caught hold of a chain attached to the bowsprit and ten minutes later was hauled on board the *Tovarisch*. It may be that nothing that could be done would have saved any others. But it is much to be regretted that the *Tovarisch* did not immediately bring herself to as she could easily have done without risk to herself. She threw out lifebuoys, and prepared to lower boats port and starboard, but by continuing on her course she was already past the place of collision.

The master and the third officer say that they did not know that the *Alcantara* had sunk. But the look-out knew it ; he had seen her go down. It is strange that the master should have made no inquiry as to the ship with which he had collided. The fact that the plaintiffs are without any evidence except that of the one survivor, who was in the engine-room at the moment of collision, and had last been on deck some twenty minutes before, makes the case one of difficulty for the plaintiffs, and also for the defendants, and still more for the judge. The plaintiffs called this witness and put in the log of the *Tovarisch*, and put in certain answers to interrogatories. That was the plaintiffs' evidence as to the facts of the collision. The plaintiffs also called two surveyors. The defendants were able to call such evidence from the *Tovarisch* as they thought fit. They called the third officer, who was in charge of the watch, the master, who had been on deck when Dungeness was passed, and who came on deck very shortly before the collision, an A.B., a cadet who was at the wheel, and a cadet who was on the look-out. These were the defendants' witnesses as to the facts of the collision. Two other men from the ship were called on the question of the efficiency of the *Tovarisch's* green light, as well as a Board of Trade inspector, and also a surveyor as to angle and speed. My task was not lightened by the fact that the bulk of the evidence of the defendants was given in Russian, and that there were evidently differences in interpretation. I would suggest that where witnesses are going to give their evidence in a foreign language through an interpreter it would be very desirable that two interpreters should be employed so that they might work in relays. To try to interpret evidence for four or five hours a day must be very trying work, and I would suggest that interpreters should be treated as shorthand writers are, by being permitted to work in relays.

The place of collision may, I think, be accepted. Being on S. 60° W. the *Tovarisch* had had Dungeness abeam about twenty-eight minutes before the collision.

The time : The defendants fix it at about 8.10 p.m., the plaintiffs at about 7.52 p.m. The precise agreement of the time is not important. It was shortly before the change of watch on the *Alcantra*, and shortly after the change of watch on the *Tovarisch*.

Weather : The plaintiffs plead hazy with fair visibility, the defendants hazy. Pavon (the survivor from the *Alcantara*) says he was on deck about twenty minutes before the collision and it was then fine. He could see the moon (which must have been fairly low in the west) but not the coast. The *Tovarisch's* log at 8 p.m. records "On horizon haze." The weather records of Dungeness Lighthouse and Varne Lightship (put in by the plaintiffs) record fog and the sounding of their fog horns. This may denote a greater or less degree of fog. The defendants' preliminary act says the *Alcantara's* lights were seen at about one mile. The look-out judged the distance at which he saw the masthead light as about three-quarters of a mile. Assuming the lights were seen as soon as they could be seen, and assuming the speeds were about equal, and about six-and-a-half knots, the third officer's estimates of time between sighting and collision

which work out at two-and-a-half to three minutes, would give a visibility of about two-thirds of a mile. I take it that the visibility was two-thirds of a mile. I take it that the visibility of the *Alcantara's* lights was somewhere between two-thirds of a mile and one mile. It may be that the electric lights of the *Alcantara* were visible at a greater distance than the oil lights of the *Tovarisch*.

Wind: It is agreed that it was a moderate breeze from about East. The master of the *Tovarisch* said East to E. by S. Dungeness at 6 p.m. and 9 p.m. records E.N.E., the Varne at the same hours East. The *Tovarisch's* log records E. by N. It was said that the *Tovarisch* had the wind on the port quarter, with yards braced accordingly and had the sails full.

Speeds: The evidence of Pavon is that the speed of the *Alcantara* was about six-and-a-half knots. He said that the telegraph was at full speed, but two hours before he had had orders to reduce the revolutions and had reduced them from seventy-eight to sixty-eight. At seventy-eight the speed was eight knots, and at sixty-eight it would be something under seven knots. The *Tovarisch* had all square sail except royals, on three masts (which he calls fore, main, and second main masts), had nothing on the fourth or jigger mast, and had three head sails, outer jib, jib and fore staysail. The plaintiffs say she was making about six-and-a-half knots, and the *Tovarisch* log so records, and that may be accepted. The surveyors agree that there was not much difference between the speeds of the two vessels at the moment of collision.

Courses: The course of the *Tovarisch* was S. 60° W. That is the defendants' evidence and the record of the *Tovarisch's* log. The *Alcantara's* course cannot be precisely fixed. But it may, I think, be taken that it was something between N. 76° E. and N. 82° E. The answers put in by the plaintiffs establish that the lights first seen by the third officer of the *Tovarisch* were masthead, red and green, one-and-a-half to two points on the starboard bow. As the heading of the *Tovarisch* was at that time S. 60° W.. it follows that the heading of the *Alcantara* at that moment was not less than 76°, and not more than 82° east of north. It is, of course, possible that the *Alcantara* had seen the *Tovarisch* and had already ported before she was seen by the third officer of the *Tovarisch*. But that is not the defendants' case, nor, I think, the plaintiffs' case. The *Alcantara* was bound for Calais and very probably had set a course from the *Royal Sovereign* to the Varne to pass the Varne on her port hand. From the defendants' place of collision to the Varne is N. 76° E. The *Alcantara* would be on a course a little east of that. I take the *Alcantara's* course as about N. 78° E. to N. 80° E.

Lights: An attack is made by the plaintiffs upon the *Tovarisch's* green light. The plaintiffs' surveyors say that when they examined it, Mr. Kinley, on the 27th Feb. 1928, and the 1st March 1928, and Mr. Camps on the 1st March 1928, the cog of the spindle did not properly work upon the wick, with the result that the wick might slip down. They had no doubt that the burner in the lamp produced in court was not the burner they examined. It is unfortunate that the defendants' attention was not at once called to the burner. That was not the fault of the plaintiffs' surveyors; the defendants' agents had an opportunity of sending a surveyor with Mr. Kinley, but di not avail themselves of it. A Board of Trade surveyor inspected the *Tovarisch's* lights, probably on, and certainly not later than the 1st March 1928; whether before or after Mr. Kinley's second inspection does not appear; he found nothing wrong with the working of the wick. The defendants' evidence is that the side lights were burning brightly. The log so records. It would be very unlikely that in so frequented a part of the Channel the *Tovarisch* should be sailing without lights. On the evidence as a whole I find that the green light was burning. The lamp is a good type of lamp. I am unable to find that the green light was not, in fact, being exhibited according to the rules. As I have said, in the weather which prevailed, it is possible that the sidelights of the *Alcantara* were visible to the *Tovarisch* at a greater distance than that at which the light of the *Tovarisch* was visible to the *Alcantara*.

Part of the *Alcantara* first in collision: The defendants' evidence was that the *Alcantara* was struck in the way of the foremast, and that she sank by the head. Pavon's evidence was that when he reached the deck from the engine room, and he would come abaft the bridge, the bowsprit of the *Tovarisch* was over the *Alcantara* between holds three and four. At that time the bowsprit must have been over the after part of the *Alcantara*, for it was to it that Pavon clung. I think Pavon must be right about this. It is not of great importance but I find that the *Alcantara* was struck abaft the engine room.

Angle of the blow: The defendants' evidence is about four points. The defendants' surveyor thinks the angle was about 45°. The plaintiffs' surveyor thinks 63°. I am not able to decide definitely. It was not less than 45° and not more than 63°.

Before I deal with the manœuvres of the vessels I will get rid of the question of speed. I am advised that in the weather which prevailed neither ship can be found guilty of proceeding at excessive speed. I agree. Nor on the evidence am I able to find that the collision was due to bad look-out on either vessel. It is the plaintiffs' case that the *Tovarisch* saw the *Alcantara* and acted wrongly. It is the defendants' case that the *Alcantara* saw the *Tovarisch* and acted wrongly. The case has to be decided on other grounds than look-out. At the same time I am advised that the navigating officer of the *Tovarisch* was not in anything like so good a position as he would have been had he been, as is usual in sailing ships, on the poop. He was not in a position to keep an

effective look-out, or have a clear view along the side of the ship. Moreover, he was in a very bad position for giving helm orders, and seeing that they were understood and carried out. The owners of the *Tovarisch* have placed a bridge athwart ships a little abaft of the second mainmast and abreast of its rigging, just forward of the forward boat davit and the after pair of davits shown on the photograph. The wheel is in the usual position, on the poop aft; it is about 72ft. abaft the bridge. The navigating officer keeps his watch on the bridge, he shouts his helm orders to the men at the wheel, to give orders he must turn round towards them, and for the moment cease to look out himself and have his back to the look-out stationed on the forecastle head; at night, at any rate, he cannot see him, and, if they make a mistake, he cannot instantly be aware of it and correct it. I am advised that with those arrangements the ship was not under proper control.

Before I deal with the manœuvres, it will be well to consider a question of law. The third officer of the *Tovarisch* burned a green pyrotechnic light, holding it out from the starboard side of the bridge. It is spoken of in the pleadings as a green flare. Specimens were produced in court—ordinary green and red pyrotechnic lights. The *Tovarisch* carried a supply of such lights—kept on the bridge—from time to time they were used; the third officer had some in his pockets, and, as I have said, lit one. The defendants say this was a light authorised by the regulations. If authorised it must be by art. 12: "Every vessel may, if necessary, in order to attract attention, in addition to the lights which she is by these rules required to carry, show a flare-up light, or use any detonating signal that cannot be mistaken for a distress signal." Art. 31 included among distress signals "flares on the vessel (as from a burning tar barrel, oil barrel, &c.)." I am not, for the moment, concerned with the condition "if necessary in order to attract attention." I am concerned with the meaning of "a flare-up light." The defendants say it may be of any colour, shown from any part of the ship. I cannot agree. In my opinion, in the language of the sea it means a light, which is not in a lamp, and is produced by setting fire to something which burns with an ordinary flame and does not include specially coloured flames. So also the Elder Brethren understand by a "flare-up light" an ordinary flame. So far as the regulations are concerned the phrase "flare-up" or "flare-up light" is, I believe, found for the first time in the regulations of 1863. In 1863 I doubt if pyrotechnic coloured lights were known, I mean of the kind you now hold in your hand. I daresay coloured powders, which were ignited to produce a coloured light, were known, but I very much doubt whether the pyrotechnic light which you grasp with your hand was known as long ago as 1863. The powders which were contained in a little box I can remember as a little boy letting off on Guy Fawkes Day, but they were not the sort of things which I could hold up in my hand. I have traced the history of "flare-up" or "flare-up light" in the regulations. In 1910 the phrase occurs in art. 8 (pilot vessels); art. 9 (*d*) and (*f*) (fishing vessels); art. 10 (overtaken vessel); and art. 12. Art. 12 first appeared in the regulations of 1896 (where also it was art. 12). Art. 10 first appeared in the regulations of 1880 (as art. 11), and was repeated in the regulations of 1884 and the regulations of 1926. There was no corresponding article in the regulations of 1863. The second paragraph was added first in the regulations of 1896; it is stated in Mr. Marsden's 5th edit. (1904), that it was added because doubts had been expressed as to the legality of carrying a fixed stern light: (see *The Imbro* (6 Asp. Mar. Law Cas. 276; 1889, 60 L. T. Rep. 936; 14 Prob. Div. 73)). Art. 9 relates to the lights of fishing vessels and fishing boats. It is a tedious task to trace the history of this regulation. The rules as to fishing vessels have been altered so often and. when issued, suspended, that I will not even attempt to do it. Art. 8 relates to pilot vessels, and corresponds with art. 8 of 1896 and of art. 9 of 1884 and art. 9 of 1880 and art. 8 of 1863. In art. 12 the phrase has always been "show a flare-up light . . . that cannot be mistaken for a distress signal." In art. 10 the phrase has always been "a white light or a flare-up light." The power to carry the white light fixed and screened has existed since 1896. As to art. 9 the phrase a "flare-up" first occurs (as far as I can find out) in the regulations of 1863, art. 9, which relates to open fishing boats and other open boats. It provides that if they do not carry side lights they shall carry a lantern with green and red slides and exhibit it in sufficient time to prevent collision so that the green light is not seen on the port side nor the red light on the starboard side. It then provides for a bright white light, when the vessel is at anchor or attached to her nets, and stationary. And adds "fishing vessels and open boats shall, however, not be prevented from using a flare-up, in addition, if considered expedient."

For this was substituted art. 10 of 1880 which added to the regulations of 1863, by making special provisions as to trawlers and vessels engaged in drift net fishing, repeating in nearly the same words the permission as to flares. "Fishing vessels and open boats shall not be prevented from using a flare-up in addition if they desire to do so." Art. 10 of the regulations of 1884 (Sept. 1884) repeated with modifications art. 10 of 1880 and retained the provisions as to "flare-ups" on the following words: "Fishing vessels and open boats may at any time use a flare-up in addition to the lights which they are by this article required to carry and show. All "flare-up" lights exhibited by a vessel when trawling, dredging, or fishing, with any kind of drag net shall be shown at the after part of the vessel except that, if the vessel is hanging by the stern to her trawl, dredge, or drag net, they shall be

exhibited from the bow." A regulation of 1884 added special provisions as to steam trawlers and sailing trawlers prescribing the lights to be carried by them. A further Order in Council of the 24th June 1885, altered the regulations of Dec. 1884, so far as related to sailing vessels engaged in trawling, and gave them an option of carrying a white light visible all round the horizon and also " a sufficient supply of red pyrotechnic lights which shall each burn for at least thirty seconds " and directed that " one of the pyrotechnic lights shall be shown on approaching, or on being approached by another ship or vessel, in sufficient time to prevent collision."

This I believe to be the only reference to pyrotechnic lights in the regulations. They were used under that regulation, and an instance of their being used may be found in the case of *The Orion* (7 Asp. Mar. Law Cas. 88; 65 L. T. Rep. 500; (1891) P. 307). Then came the regulations of 1896 generally, and they postponed the question of fishing vessels' lights to a subsequent Order in Council: (see Marsden, 5th edit., p. 506). I gave the reference to Marsden for the 1880 regulations. That will be found in the second edition of Marsden, and the 1884 regulations will be found in the third edition of Marsden.

I have not found out when the new fishing vessels' lights order was made which was incorporated in 1896, but there was an order on the 23rd Oct. 1905 which I have not seen, and it may be that that was it. Finally the whole set of regulations as to fishing vessels was recast by an Order in Council of the 4th April 1906, art. 9 of which is set out in Marsden, 6th edit., p. 353. Pyrotechnic red lights have disappeared. The provision as to sailing vessels engaged in trawling is now art. 9 (*d*) (2): " Shall carry a white light in a lantern . . . visible all round the horizon and shall also, on the approach of or to the other vessel, show where it can best be seen a white flare-up light or torch in sufficient time to prevent collision." Art. 9 of 1910 repeats art. 9 of 1906. The provision as to sailing trawlers is art. 9 (*d*) (2). Art. 9 (*f*) repeats in slightly different terms the permission which existed since 1863 to use a flare-up light. The words are: " (*f*) Fishing vessels and fishing boats may at any time use the flare-up light in addition to the lights which they are by this article required to carry and show." Now, looking at the regulations considered as a whole, from one end to the other of them, there is, in my view, nothing to justify the display of a red or green pyrotechnic light on a sailing boat. Red pyrotechnic lights are only once mentioned and then are taken out of the regulations flare " white," and that is in a rule relating to sailing trawlers which substituted a " flare-up " light for a red pyrotechnic light. The phrase a " flare-up " or " flare-up light " has appeared in the rules since 1863. Since 1863 it has been used in the regulations relating to " fishing vessels or open boats," and in the regulations relating to pilot vessels. Since 1880 it has been used in the regulations relating to an overtaking vessel.

Since 1896 it has appeared in art. 12, which authorises its use " if necessary in order to attract attention."

Mr. Marsden in the fifth edition (1904) in regard to art. 12, says at p. 364: " The ' flare-up ' light intended by the article, presumably, is that in common use; and care must be taken that, if any of the modern pyrotechnic lights are used, they are such as cannot be mistaken for other lights prescribed by the regulations." This passage has been repeated by later editors.

Test the matter by art. 10. If the defendants' contention is right the overtaken vessel may show a red or a green light from her stern. It is absurd to suppose that the regulations have that effect. Test it again by art. 9 (*f*); the result is nearly as absurd. A fishing vessel which is bound to carry the white lights prescribed, or, if a steam trawler, a screened tricolour lantern, may also burn a coloured light visible all round the horizon from any part of the vessel. I hold that the " flare-up " light means an ordinary flame, and not a specially coloured flame. My only doubt is whether what is called a blue pyrotechnic light is permissible—it burns with the effect of a more penetrating light, which is nearer a pure white than the yellow of an ordinary flame. I do not decide that. But of this I am satisfied, that the words " flare-up light " include neither a green flame nor a red flame. To hold otherwise would be to invite confusion and disaster. Flare-up lights are not screened, and show all round the horizon. If the defendants' contention were right, a green pyrotechnic light, or a red, might be burned on either side of the ship, or at the stern, or in the bows, from whatever direction the other ship was approaching, and whether she was meeting, crossing, or overtaking.

The lights prescribed by the regulations for the *Tovarisch* were the red and green side lights, *i.e.*, lights in lanterns properly screened. If it was necessary in order to attract attention, she was entitled to show something which burned with an ordinary flame. It was a breach of the regulations to exhibit a green pyrotechnic light.

I now return to the defendants' narrative, and, *inter alia*, have to consider whether that breach caused or contributed to the collision.

The story of the third officer and the answers which the plaintiffs put in is this: The *Tovarisch* saw both side lights of the *Alcantara* one and a half to two points on the starboard bow at an estimated distance of about a mile and, about a minute later, at an estimated distance of half to three-quarters of a mile, lost the red and had only the green light about two points on the starboard bow. Upon this the helm was ordered hard-a-starboard and the third officer took from his pocket a green pyrotechnic light and lit it and held it out from the starboard wing of the bridge. About half a minute later the red light of *Alcantara*

reopened and a short blast was heard. Upon this the order "hard-a-port" was given. Two turns of the wheel had been carried out under the order hard-a-starboard, and under the order hard-a-port the wheel was put right over before the collision. According to the answer put in the green pyrotechnic light was burned right up to the collision, but, according to the evidence of the third officer, it was dropped when the order hard-a-port was given. The third officer said there was a misunderstanding in the answer. After the red light of the *Alcantara* opened, her green light was shut and a second faint short blast heard. According to the evidence the order "hard-a-port" was given one minute or a little more before the collision. We thus have the green light of the *Tovarisch* right ahead of the *Alcantara;* the *Tovarisch* passes on to the starboard bow of the *Alcantara* and the vessels are green to green; the *Tovarisch* begins to alter to port, and burns the green light. The *Alcantara* ports or hard-a-ports with a short blast and opens the red light; the *Tovarisch* hard-a-ports, the *Alcantara's* green light is shut in. The collision follows in a minute or rather more. I accept Pavon's evidence that he had shut off steam and stopped the engines before the collision; his estimate of time was one minute. He had heard a blast of his own whistle before that; he did not know what it was; his estimate of time was four minutes before the collision. After his experiences, too much reliance cannot be placed on his recollections of intervals of time, but he heard the blast before he received the order to stop.

From these facts I conclude the following: (1) The *Alcantara* when first seen had the *Tovarisch* right ahead and then had the *Tovarisch* showing a green light on the *Alcantara's* starboard bow, and the *Alcantara* was in a position to pass the *Tovarisch* green light to green light. There was no absolute need for the *Alcantara* to alter her course. On the courses if neither altered they would have passed with one to two cables between them.

(2) From the position of green to green the *Alcantara* did port or hard-a-port and later alter her course to starboard. She must have altered to starboard to produce the angle of collision even if it be only 45°.

(3) Before the collision the *Alcantara* did stop her engines, but she never reversed and she maintained her speed of six and a half or even seven knots until the last minute or so.

(4) The *Alcantara* did not port or hard-a-port until after the *Tovarisch* had begun to show the green pyrotechnic light. According to the third officer's estimate of times the light had been burning half a minute before the *Alcantara's* red light reopened.

(5) The *Tovarisch* immediately the red light of the *Alcantara* was lost began to starboard and at the same time lit the green pyrotechnic light.

(6) The *Tovarisch* immediately the red light of the *Alcantara* reopened hard-a-ported and kept hard-a-port helm up to the collision.

It is clear from what I have said that the *Alcantara* attempted to cross what was in fact the heading of the *Tovarisch.* And if she knew that she had a ship showing a green light on her starboard bow she was clearly to blame; she was guilty of a most foolish action. But she had had exhibited to her a brilliant pyrotechnic light. If she had already seen the green light of the *Tovarisch* the pyrotechnic light would probably have obliterated the feebler flame of the lantern. How the pyrotechnic light would show upon the sails is a matter of conjecture. What was the *Alcantara* to think of it? I have asked the Elder Brethren. They say they would have regarded it as an imperative demand to take action—a warning to the *Alcantara* that she was doing something dangerous, and an urgent call to her to do something different. In these circumstances they are of opinion that the *Alcantara* could not be blamed for porting or hard-a-porting; so also with regard to the engines, they think the *Alcantara* cannot be blamed for stopping instead of reversing. The master of the *Alcantara* would be right if he thought "I may be wrong if I keep ahead, I may be wrong if I go astern, I will stop and see." What the *Alcantara* did in fact contributed to the collision, but it was not the fault of the *Alcantara* that she did it. The burning of the green light was the cause, and was negligent, and the *Tovarisch* is to blame.

I should add that it would be difficult for the *Tovarisch* to justify the burning even of a flare of the ordinary kind. In the circumstances if the vessels were green to green, it would be misleading and, if they were green to green it was unnecessary to attract attention, and the condition of art. 12 did not exist. In one set of circumstances a flare might have been justified, namely, if the *Alcantara* having originally had both her side lights open to the *Tovarisch* had continued to keep them open, *i.e.*, had continued to approach with risk of collision. But that is not the defendants' case. If it had been the star-boarding of the *Tovarisch* must have been wrong beyond all doubt.

What I have already said is enough to show that the plaintiffs have proved the *Tovarisch* to blame, and the defendants have not proved the *Alcantara* to blame. But in case I am wrong about the green pyrotechnic light, it is well that I should deal with the other charges made by the plaintiffs against the *Tovarisch.* They are two. It is said the *Tovarisch* was wrong (1) to starboard and (2) to hard-a-port. In the first instance, when the *Tovarisch* saw the red and green of the *Alcantara* on the starboard bow the vessels were approaching so as to involve at that moment risk of collision. It was the duty of the *Tovarisch* at that moment to keep her course and speed. Whether the *Tovarisch* was justified in starboarding immediately depends on whether the risk was finally at an end. The position was similar to that of steamships of crossing courses where the duty of the stand-on ship to keep course and speed continued until the ships have definitely

passed out of the phase of crossing ships. See *The Orduna* (14 Asp. Mar. Law Cas. 574; 122 L. T. Rep. 510; (1919) P. 381). The Elder Brethren are of opinion that it was not right for the *Tovarisch* to starboard as soon as she did.

It is a difficult question and I need not decide it. But this, at any rate seems clear. If the position of the ships was such that it was necessary to call attention it can only be because the ships are in such a position that there was still risk of collision. And either the *Tovarisch* ought to have kept her course or she ought not to have burned any sort of flare.

As to the hard-a-porting of the *Tovarisch,* the Elder Brethren advise me, and I entirely agree, that it was the worst thing the *Tovarisch* could have done. She was called upon to act by the porting of the *Alcantara.* The men at the wheel were already putting the wheel to starboard and the *Tovarisch* had begun to swing. How much she had swung I am unable to say. I am unable to place too much reliance on the men at the wheel, each of whom says he was doing the steering. But it was a substantial matter. With the wind on her port quarter she could alter her heading more rapidly to port than to starboard. The third officer said that by hard-a-starboarding the helm he could get the sails shaking in one and a half minutes. In fact, though the helm was already partly over to starboard there was time to get right over to port before the collision. The head sheets could have been let go and that would have assisted the starboard helm. If the men were at stations—Mr. Dunlop said there was no evidence that they were not—the yards could have been braced and the ship kept under control. But as there was a smooth sea and a moderate wind there was no danger in throwing the *Tovarisch* flat aback. I am advised that if the hard-a-starboard helm had been continued, the *Tovarisch* would very probably have brought herself parallel with the *Alcantara* and avoided the collision altogether. Sailing as she was, the *Tovarisch* had almost as much power of stopping her way by throwing herself up into the wind as a steamer would have had by reversing her engines. The *Tovarisch* was to blame for hard-a-porting and for failure to continue hard-a-starboarding. The result is that I find the *Tovarisch* alone to blame.

Anybody who is interested in finding out what lights sailing ships had to show before the Regulations prescribed them will find an interesting book by Dr. Pratt, of Doctors' Commons, which deals with the law on that subject before 1863.

Solicitors: for the plaintiffs, *Richards* and *Butler;* for the defendants, *Middleton, Lewis,* and *Clarke.*

July 24 and 25, 1929.

(Before HILL, J.)

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

Limitation of liability — Dock-owner — Damage to vessel in docks at Blackwall—Dock-owner also in control of docks at Falmouth—Whether limitation calculated upon tonnage of largest vessel within the dock at Blackwall or dock at Falmouth—" Within the area over which such dock . . . authority performs any duty or exercises any power "—Merchant Shipping (Liability of Shipowners and others) Act 1900 (63 *&* 64 *Vict. c.* 32).

By the Merchant Shipping (Liability of Shipowners and others) Act 1900, *s.* 2 (1) " *the owners of any dock shall not, where without their actual fault or privity any loss or damage is caused to any vessel . . . be liable beyond an aggregate amount not exceeding* 8*l. for each ton of the tonnage of the largest registered British ship which at the time of such loss or damage occurring, is, or within the period of five years previous thereto has been, within the area over which such dock or canal owner . . . . performs any duty or exercises any control.*"

Held, that, where a dock-owner exercised control over docks at Falmouth and docks at Blackwall, the docks at Falmouth were not within the area at Blackwall within which the dock-owners exercised control; and therefore that where loss or damage was caused to a vessel in the docks at Blackwall the dock-owners were not entitled to limit liability upon the tonnage of the largest vessel which had within the specified period been within the docks at Falmouth.

LIMITATION ACTION.

The plaintiffs, R. and H. Green and Silley Weir Limited, obtained a decree limiting their liability for loss or damage caused to the defendants' steamship *Ruapehu* whilst undergoing repairs in the plaintiffs' dry dock at Blackwall in May 1923 (reported 17 Asp. Mar. Law Cas. 270; 137 L. T. Rep. 353; (1927) A. C. 523) Messrs. R. and H. Green and Silley Weir Limited claimed to limit their liability to the sum of 8*l.* per ton on the tonnage of the *Ruapehu*, she being the largest vessel which had been in their dry dock at Blackwall within the stipulated period of five years.

The Merchant Shipping (Liability of Shipowners and others) Act 1900 (63 & 64 Vict. c. 32), s. 2 (1) provides as follows:

The owners of any dock . . . shall not, where without their actual fault or privity any loss or damage is caused to any vessel or vessels, or to any goods, merchandise or other things whatsoever on board any vessel or vessels, be liable to damages beyond an aggregate amount not exceeding 8*l.* for each ton of the tonnage of the largest registered British ship which at the time

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

of such loss or damage occurring, is, or within the period of five years previous thereto has been, within the area over which such dock or canal owner, harbour authority, or conservancy authority, performs any duty or exercises any power. . . .

Langton, K.C. and *Carpmael* for the plaintiffs.

Le Quesne, K.C. and *Pilcher* for the defendants. —The plaintiffs are not entitled to limit their liability upon the tonnage of the largest vessel which has been within the docks at Blackwall, because they in fact exercise control over docks at Falmouth, owned by the Falmouth Dock and Engineering Company Limited, and a vessel of greater tonnage has within the stipulated period been within the docks at Falmouth.

Langton, K.C. replied.—It is not admitted that the plaintiffs exercised any power or control over the docks at Falmouth. Assuming that they do so, the limit of liability is still the tonnage of the largest vessel which has been in the docks at Blackwall, because Falmouth is not in fact within the area of Blackwall, but is in another totally different area.

HILL, J.—Under sect. 2 of the Merchant Shipping (Liability of Shipowners and Others) Act 1900 the question as to the amount of the limit of liability is dealt with, and the plaintiffs' right to limit under that section is in their capacity as dock owners. It has been held that they are within the terms of the section as the owners of a dock. The *Ruapehu* was damaged by fire in the larger of the plaintiffs' two dry docks at Blackwall. The *Ruapehu* herself was the largest registered British ship which had been in either of those dry docks during the five years ending on the 14th May 1923, the date of the fire, and upon the tonnage basis of the *Ruapehu* the limit would be 69,067*l.* 7*s.* 2*d.* The question is whether you have to look outside those two dry docks which are within the plaintiffs' ship repairing yards, and the defendants say you have. Some question arose yesterday as to whether you can have regard to the dry dock of the Thames Ironworks Company at Canning Town, of which, at the material time, the plaintiffs were the lessees, but that point has become only of academic interest, because it has been ascertained that no ship as big as the *Ruapehu* can have been in that dry dock, because it is incapable of containing any ship as large as the *Ruapehu*. That leaves the main question that is raised on the pleadings, and that is this: it is said that in ascertaining their limit of liability you must look not only at the largest ship which was within the dry dock in which the collision happened, but to some other dry dock, and to some other ship—you must look at docks in this case at Falmouth, because it is said that there are docks at Falmouth in the nominal ownership of the Falmouth Docks and Engineering Company, but over which the plaintiffs exercise power. It is said, therefore, regard must be had to those dry docks, and to the largest British ship which has been in those dry docks within five years before the fire. It is admitted that there was a ship —the *Shropshire*—larger than the *Ruapehu*, which was within those dry docks within the period in question. Now ought I to pay any attention at all to docks at Falmouth? Assume that it can be made out that the plaintiffs performed duties or exercised powers over such docks, the words of the section are "Within the area over which such dock, canal, or harbour authority performs any duty or exercises any power." You have got to find out what was the largest British ship within the five years within an area, and that area has to be the area over which the dock company performs a duty or exercises a power. The words are "the area," not "the areas." An area I take to be a plane surface the boundaries of which are defined. In the Oxford Dictionary the definition is "the plane surface contained within given limits," and I think there was a quotation from Webster's Dictionary "a plane surface within bounds." The context in which the phrase "area" is used might show that a different meaning was to be attached to it, but here the context shows that the primary meaning is to be given to the words "the area over which such dock or canal owner performs any duty or exercises any power." You have to find out an area, and that has to be an area over which the dock-owner is exercising any power. Now here the two dry docks are within one area—the ship repairing yard—and over the whole of that area the plaintiffs exercised power. The docks at Falmouth were not within the one area of the docks at Blackwall. There were many hundreds or thousands of intervening areas between Blackwall and Falmouth over which the plaintiffs performed no duty and exercised no power at all. If the defendants' contention were right, I can see no reason at all for limiting the inquiry to other docks in the United Kingdom. I see no reason, if they were right, and if a dock in the Thames and a dock at Falmouth are to be considered as within the same area, why a dock on the Thames and a dock at Singapore should not equally be considered as within the same area.

But even if there is some reason why you should limit your consideration to the United Kingdom, it still remains to my mind clear that a dock at Falmouth and a dock at Blackwall must be, so far as the dock-owner is concerned, within different areas.

Then it remains to consider what is the area that you have to have regard to. It is in my view that area over which the limiting dock-owner performs a duty or exercises a power, which area contains within it the particular dock in which damage has occurred. In this view I think I am very much strengthened by what was said by Lord Atkinson, in 1927, A. C. at p. 341 (17 Asp. Mar. Law Cas. at p. 277; 137 L. T. Rep. at p. 360), because I think he treats that which I am now deciding as being a matter so obvious that it must be taken as granted.

That being so I do not feel disposed, myself—I am quite clear about this—to go clearly into the question whether it is established that the plaintiffs did exercise power over the area of the Falmouth docks. There is a very close association between the two companies, and, indeed, the plaintiffs may be regarded as the dominating influence, or controlling influence, but it still remains that the Falmouth docks were owned by the Falmouth Docks and Engineering Company and not by the plaintiffs.

However, while I am not at all inclined to assent to the proposition that the plaintiffs did exercise power within the meaning of this section in the Falmouth docks, I do not think it is necessary to consider it, because what I have already said about the meaning of the word " area " determines the fact.

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

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

July 19, 22, *and* 30, 1929.

(Before HILL, J.)

THE ERIK BOYE. (*a*)

Bill of lading—Cargo of flour—Unseaworthiness—Steamer unfit to carry flour cargo—Implied warranty that steamer fit to carry cargo—Harter Act.

Where a cargo of flour, shipped under bills of lading which incorporated the United States Harter Act, was damaged owing to insufficient ventilation and failure to draw off hot air from the holds, such failure being due to the character and construction of the ship,

Held, that the damage to the flour was caused by breach of the implied warranty of seaworthiness for the cargo in question ; and that the United States Harter Act did not exclude the implied warranty of seaworthiness for cargo, or cut down such implied warranty to an undertaking on the part of the shipowner to use due diligence to make the ship seaworthy.

THE plaintiffs were indorsees to whom the property passed by indorsement of bills of lading of a cargo of flour in bags, shipped on board the defendants' steamship *Erik Boye*, a tramp steamer of about 3400 tons dead weight. The flour was shipped for carriage from Portland, Maine, to Danzig. The terms of the bills of lading incorporated the United States Harter Act, by sect. 3 of which it is provided as follows :

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

Upon discharge of the cargo it was found that a quantity of the bags had been damaged by " sweat." The cause of the " sweat " was insufficient ventilation, causing evaporation in the holds, due to failure to remove the hatch coverings from time to time during the voyage, and to closing the ventilators at night.

Raeburn, K.C. and *G. St. C. Pilcher* for the plaintiffs.

Dunlop, K.C. and *Balloch*, for the defendants, argued that in a vessel of the type of the *Erik Boye* the hatch covers could not be removed at sea with safety, nor could the ventilators be safely left open at night even during fine weather. In these circumstances it was argued that by incorporation of the Harter Act, there was no implied warranty that the *Erik Boye* was seaworthy for the plaintiffs' cargo, but merely a warranty that the plaintiffs had used reasonable diligence to make the *Erik Boye* seaworthy. The real cause of the damage was the " inherent defect " in the plaintiffs' cargo, which gave rise to accumulation of moisture in the holds.

HILL, J.—The plaintiffs are indorsees of bills of lading of flour in bags shipped on board the defendants' steamship *Erik Boye* for carriage from Portland, Maine, to Danzig. The property passed to the plaintiffs by indorsement.

The bills of lading represent all the cargo on board the *Erik Boye.* She shipped a whole cargo of flour in bags. The goods were acknowledged by the bills of lading to be received in apparent good order and condition. A few bags were not delivered. A considerable quantity, some thousands of bags, were delivered damaged. It is common ground that the damage was by sweat, that is the condensation of vapour in the holds.

The *Erik Boye* was a new ship. She was of about 3,400 tons deadweight—a ship therefore of no great size. She had two holds with four hatches. The engine room and boiler room are amidships. Above the main deck amidships is a long bridge deck. In the 'tween decks, except for a space amidships, cargo is carried. The flour on this voyage was stowed in the holds and also in the 'tween decks. The hatches have deep coamings rising 3ft. 1in. above deck and carried 1ft. below deck. These hatches are in the main deck at No. 1 and No. 4, and in the bridge deck in No. 2 and No. 3. Under No. 2 and No. 3 are hatches

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

in the main deck, but they were not covered. The damage was confined to the after end of the fore hold, and the fore end of the after hold. It was worst in the square of the hatch coamings, and extended down, spreading out. There was no damage in the way of No. 1 and No. 4 hatch. In the master's letter of the 20th Nov. it is stated that when the hatches were opened, "No. 1 and No. 4 were in superb condition, quite dry and free from sweat. No. 3 was very bad, and No. 2 in a horrible condition." The shipping agents on the 22nd Nov. wrote, "After opening the hatches a large number of bags were discovered to be wet and mouldy. . . . There are still wet bags to be discharged out of the holds." That is also the plaintiffs' case. There was a dispute of fact as to how much of the 'tween deck aft of No. 2 hatch, and forward of No. 3 hatch, was occupied by cargo, and as to whether the square of the hatches was filled right up with cargo or an empty space left. As to the 'tween deck the point is unimportant, the damage was in and near the hatches. As to the space in the square of the hatch coamings I have the evidence of Mr. Wein that it was full, and the master's letter, which says: "The ship is full . . . also in 'tween decks there is perhaps place for about fifty sacks altogether in No. 1 and No. 2 hatch coamings." This point also is not of much importance; the square of the coamings formed a space into which hot air would rise, and in which there was nothing to cause any circulation of air; and whether the bags of flour were close up to the bridge deck, or a little below, drippings of condensed moisture from the underside of the bridge deck equally fell upon them.

The neighbourhood of No. 2 and No. 3 hatches was naturally the hottest part of the ship—being immediately forward and aft of the engine and boiler space. No. 2 was naturally the hotter of the two being next to the boiler space.

It is clear that the damage was caused by the evaporation in the holds and 'tween decks, and the rising of the hot humid air to the under surface of the bridge deck, and especially to the hatch coverings in No. 2 and No. 3 hatches, and subsequent condensation.

The voyage was an ordinary North Atlantic voyage for the time of the year; for the most part in very good weather, but with some days of very bad weather.

The flour was sound ordinary flour. It was shipped during what the master described as an Indian summer. That it was well cared for before shipment appears from the master's letter: "On the whole they are very particular about the cargo which arrived here in closed railway wagons which are covered everywhere inside with thick paper to protect the sacks." The flour stowed at the after and fore ends of the ship arrived, as the master said in his letter, "in superb condition." In the way of No. 2 and No. 3 hatches there was no damage except from the drippings of condensed vapour. Flour contains some moisture, but the plaintiffs' evidence is that when properly stowed and carried it travels with a very slight percentage of damage. There was no evidence to contradict this. It needs an adequate ventilation. The plaintiffs attack the means of ventilation and the failure to use the means. They say the ventilators were not sufficient in number and were wrongly placed. They say it was negligent to close them at night in fine weather. They say that a hatch covering should have been removed from time to time to permit the escape of hot air from the enclosed square of the hatch coamings. The defendants' reply that the means of ventilation were fully up to and, indeed, in excess of the standard of ventilation of a ship of the type of the *Erik Boye*. They say that for a ship like the *Erik Boye* it would have been imprudent to leave the ventilators unclosed at night even in fine weather for fear of a change of weather and flying spray. They say that for the safety of the ship it would have been dangerous not to keep the hatches covered, battened down and secured throughout the voyage. In other words, they say that there was nothing they could do to prevent condensation from a sound cargo of flour from causing damage.

I do not think it useful to decide as to the details of the means of ventilation or the use of them. For it seems to me to be clear that either on the one hand the means were deficient or not properly used, or on the other, that a ship of the size and construction of the *Erik Boye* is not able to carry safely a whole cargo of flour. I will assume that it was necessary to keep the ventilators closed at night because they were not lifted high enough above the water level, and that it was necessary to have irremovable hatch coverings because of the damage of seas in heavy weather. It naturally followed that in the hotter part of the holds there would be a rise in the temperature sufficient to cause evaporation, and that the hot air would rise and reach the enclosed squares of the hatch coamings, within which, it is agreed, there was very little circulation of air and from which the hot air had no means of escape, and was bound to condense when the deck above was cooled by water or by air. That means that the *Erik Boye* was not fit to carry a whole cargo of ordinary sound flour in the ordinary conditions of the bill of lading voyage.

I can see no answer to the plaintiffs' claim.

The Harter Act does not relieve the shipowner of the implied warranty that the ship was reasonably fit to carry the plaintiffs' flour: (See Carver's Carriage by Sea, par. 19A and *Stanton* v. *Richardson*, 1 Asp. Mar. Law Cas. 449; 1874, 33 L. T. Rep. 193; L. Rep. 7 C. P. 435). As pointed out by Channel, J. in *McFadden* v. *The Blue Star Line* (10 Asp. Mar. Law Cas. 55; 93 L. T. Rep. 52; (1905) 1 K. B. 697), the implied warranty is absolute and is not cut down by the Act to an undertaking to exercise due diligence to make the ship fit. He further

adds " the incorporation of sect. 3 does nothing more than give immunity respecting loss from specified causes provided the shipowner has exercised due diligence to make the ship seaworthy." The specified cause relied on by the defendants in the present case is : " inherent quality " of the flour. It was not any " inherent quality " of the flour that caused the damage. It was the accumulation of hot air not drawn off. The more the defendants prove that it was impossible, by use of the appliances they had, to prevent the rise of hot humid air into the square of the hatch coamings, and its retention there until condensation followed, the more the defendants prove that the *Erik Boye* was a vessel not reasonably fit to carry the plaintiffs' flour.

Therefore there will be judgment for the plaintiffs.

Solicitors : *Wm. A. Crump* and *Sons ; Thomas Cooper* and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

July 19, 22 *and* 23, 1929.

(Before SCRUTTON, GREER and RUSSELL, L.JJ.)

NEW LIVERPOOL EASTHAM FERRY AND HOTEL COMPANY LIMITED *v.* OCEAN ACCIDENT AND GUARANTEE CORPORATION LIMITED. (*a*)

ON APPEAL FROM THE KING'S BENCH DIVISION

Insurance (Marine)—Insurance of barge—Barge lying moored—" Body tackle, apparel, ordnance . . . . boat and other furniture "—Moored barge or coal hulk—Damage to moorings—Claim under policy—Whether moorings covered by policy—Marine Insurance Act 1906 (6 *Edw.* 7, *c.* 41), *Sched. I., r.* 15.

The plaintiff's barge, Black Diamond, was insured by the defendants by a policy dated the 27th April 1926, *for* 400*l. part of* 800*l. The insurance was expressed to be on the " body, tackle, apparel, ordnance, munition, artillery, boat and other furniture " of the vessel, " while lying moored at Eastham Ferry stage or elsewhere, with liberty to be towed to any dock or place not beyond the Rock Light to load coal, for repairs and (or) overhaul, while there and until back again at her moorings or held covered ; with liberty to moor in the Manchester Ship Canal while the operations for deepening the Eastham Canal are in progress. For and during the space of twelve calendar months commencing at noon on the 27th day of April* 1926, *and ending at noon on the 27th day of April* 1927," *and was against the usual perils. During the currency of the policy the moorings to which the insured barge was attached were damaged and the plaintiffs claimed under the policy. On the defendants refusing to pay, the plaintiffs brought an action in the Liverpool County Court. The County Court judge found that the moorings were " tackle and furniture of the barge " and were therefore covered by the insurance.*

The underwriters appealed to the Divisional Court. But the Divisional Court differed in opinion—Wright, J. holding that the underwriters were liable and Talbot, J. holding to the contrary. The appeal was accordingly dismissed. The underwriters thereupon appealed to the Court of Appeal and that court, by a majority (Russell, L.J. dissenting) upheld the judgment of the County Court judge, holding that the underwriters were liable.

APPEAL by the underwriters from the decision of the Divisional Court (Wright J. and Talbot, J.) dismissing an appeal from the Divisional Court.

The following statement of the facts is taken from the judgment of Wright, J. in the Divisional Court.

The underwriters are in this case appealing against the judgment of the County Court judge holding them liable for certain expenses incurred in respect of the moorings of the steel barge, *Black Diamond*, due to a casualty in July, 1926. The underwriters assert that the moorings constitute no part of the subject matter insured. The County Court judge has found the contrary.

The *Black Diamond* was insured under a time policy for one year, dated the 27th April 1926. The insurance was for 400*l.* part of 800*l.* and was on the " body, tackle, apparel, ordnance munition, artillery, boat and other furniture," of the vessel, and was expressed to be on that subject-matter " while lying moored at Eastham Ferry Stage or elsewhere, with liberty to be towed to any dock or place not beyond the Rock Light to load coal, for repairs and (or) overhaul, while there and until back again at her moorings or held covered ; with liberty to moor in the Manchester Ship Canal while the operations for deepening the Eastham Canal are in progress. For and during the space of twelve calendar months commencing at noon on the 27th day of April 1926, and ending at noon on the 27th day of April 1927 " and was against the usual perils.

The policy contained a warranty that she was seaworthy and otherwise fit and equipped for the purpose and use intended, subject, however, to the Institute Time Clauses attached. It is clear from the policy that the purpose and use intended was of a special character—that is, the barge was to serve as a moored barge or coal hulk in the place specified, subject to the liberties expressed.

The assured owned a number of steam ferries, and the barge was used for the purpose of coaling them. She was to be moored to the Eastham Ferry Stage, that is in the Mersey close to the entrance to the Manchester Ship Canal, where she has lain so moored since 1913, with perhaps

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

occasions when she was shifted. The policy gave certain limited liberties to move, as set out, but such liberties were merely ancillary to the main adventure. The Eastham Canal, or Cut, is tidal, and the barge was obviously subject not merely to the tides, which ran strong there, but also to the wash of big steamers which passed to and from the canal, and it is also obvious that it was essential for such intended purpose and use that the barge should be strongly moored at each end, so that she could not swing in the tideway. In fact she was moored at her stern to the stage by an 8in. manilla and a 3in. wire rope attached to bollards on the stage, and at the bow she was provided with three bollards to which were attached three chain cables leading to three anchors; one cable was 85 fathoms and the anchor was 20cwt.; another was 60 fathoms and its anchor was 12cwt.; the third cable was 60 fathoms and its anchor was 20cwt. These or similar moorings had been used since 1913. It was not suggested that they were too big for the purpose, though they were far in excess of what would have been required for a barge used for navigation in the ordinary way. The underwriters' surveyor, who was employed by them to survey after the casualty, when the moorings dragged and had to be picked up and relaid, reported that the moorings which have been adequate for years past are now insufficient for their purpose. The moorings are heavy enough, but the south and south-east anchors are on a rock bed and therefore have not much holding power. The south-west anchor was placed in a hole on the west bank, but on each occasion was dragged out. The surveyor added: "I understand steps are now being taken to prevent the possibility of a similar accident occurring again."

In the action the defendants, as a first plea, and as an alternative to their plea that the moorings were not insured, alleged as follows: "The losses in respect of which the plaintiffs' claim arises are attributable to the inadequate moorings of the *Black Diamond* in breach of the implied terms of the said policy that she should be seaworthy and (or) reasonably fit to encounter the ordinary perils of the seas while lying moored at Eastham Ferry Stage, and the plaintiffs are accordingly not entitled to recover therefor"; and they gave the following particulars: "The moorings of the *Black Diamond* were inadequate in that they were of insufficient length and (or) strength and improperly secured to the ground and (or) anchored in or on unsuitable ground with no or no sufficient holding."

Wright, J., in the course of his judgment in the Divisional Court, said: In my judgment the underwriters cannot successfully contend that the moorings in question were not part of the barge and her necessary equipment for the insured adventure and the use and purpose intended, within the policy description of the barge, her body, tackle and furniture. I think so much follows from the words of the policy, the description of the adventure, and the conditions of the place where the barge was moored. So much must be presumed to have been within the knowledge of the underwriters as matters which in the ordinary course of their business underwriters, as such, ought to know (Marine Insurance Act 1906, s. 18 (3) (*b*)). These moorings, furthermore, in my judgment, are within the words of rule 15 of the rules for the construction of the policy embodied in the Marine Insurance Act 1906. "The term 'ship,'" says rule 15, "includes the hull, materials and outfit, stores and provisions for the officers and crew, and, in the case of vessels engaged in a special trade, the ordinary fittings requisite for the trade."

The moorings are, in my judgment, ordinary fittings requisite for the special trade of a moored coal hulk such as the *Black Diamond* in the place where she was moored. As Lord Mansfield said in *Pelly* v. *Royal Exchange Assurance* (1757, 1 Burr. 341, at p. 348): "The insurer, in estimating the price at which he is willing to indemnify the trader against all risques, must have under his consideration the nature of the voyage to be performed, and the usual course and manner of doing it. Everything done in the usual course must have been foreseen and in contemplation, at the time he engaged. He took the risque upon a supposition that what was usual, or necessary, would be done."

The underwriters have contended that as anchors and cables would not be taken on board the barge, but would be left behind if under any of the limited liberties specified in the policy the barge was temporarily removed from her place, they could not be deemed to be part of the ship; but the case just cited shows that a temporary separation during an adventure does not remove what is part of a ship or its furniture from the insurance, if such removal is justified by custom: and the same must apply to obvious necessity, as, for instance, here, if the barge acted on any of the liberties to move, it is obvious that she would leave the anchors behind. An anchor is part of the ship's furniture: (see *Margetts* v. *Ocean Accident and Guarantee Corporation Limited*, 9 Asp. Mar. Law Cas. 217; 85 L. T. Rep. 94; (1901) 2 K. B. 792) even when lying at the scope of the cable; indeed, the term "furniture" includes whatever is necessary for the proper fulfilment of the insured adventure, the absence of which would render the vessel unseaworthy: (*Hogarth* v. *Walker*, 9 Asp. Mar. Law Cas. 84; 82 L. T. Rep. 744; (1899) 1 Q. B. 401; (1900) 2 Q. B. 283).

For these reasons I am of opinion that the actual anchors and cables in this case were part of the subject-matter insured. I cannot see any force, in such a case as this, in the underwriter's contention that the anchors and chains are not insured because they were larger than would have been carried by an ordinary navigating barge, since what was insured was not an ordinary navigating barge; indeed, the underwriters' case seemed to be that the anchors and chains were not large enough.

Nor is the issue affected because the moorings were what were called permanent or ground moorings; they were the property of the assured, and were appurtenant to the barge (there was no evidence that they were used for other vessels), and, indeed, were necessary for her. No doubt the barge might have been moored to buoys which belonged to the harbour authority, or to someone other than the assured, and which would not have been covered; but in fact she was not so moored, and the underwriters had no right to assume that this was so; nor is there evidence that they did so assume. On the contrary, the County Court judge has found as a fact, not only that the moorings were necessary for the insured purpose, but also that the underwriters knew or could have known the method in which she was moored; and he bases that finding in part on a casualty in the previous year, in which the moorings had been fouled by a vessel, and the papers had come before these underwriters on the previous year's policy. A similar finding would also flow as an inference from the policy and the surrounding circumstances.

I think the County Court judge was right, and that the appeal should be dismissed.

I ought to add three things: (1) the allegations of unseaworthiness were abandoned at the trial; (2) apparently on the underwriters' recommendation the anchors were, after the casualty in question, buried or cemented to make them more efficient to hold the barge; and (3) the three underwriters who took the balance of 400*l.* not taken by the defendant underwriters paid, as the County Court judge states. I only mention this last circumstance to add that it does not affect my judgment.

Talbot, J., who differed from Wright, J., in the course of his judgment said: The question at issue lies in a very small compass, and depends on very simple considerations. There is no doubt that the barge, *Black Diamond*, is normally moored at the Eastham Ferry Stage, near the entrance to the Manchester Ship Canal in the Mersey, and that she is chiefly if not wholly used for coaling ferry boats which ply from there to Liverpool. It is also clear that in order that she may be safely and properly moored, it is necessary that she be moored at both ends, and that her bow moorings should be something of the kind which is in fact provided for by her owners. The whole question is whether these moorings, consisting of three heavy anchors and the chains attached, come within the words of the policy: "The body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the good ship or vessel called the steel barge *Black Diamond*." The burden is on the plaintiffs to prove that they do.

I agree with the contentions of the appellants that these words naturally mean things which are normally on the ship and accompany her on such voyages as she makes, and no case has been produced in which they have been applied to anything else. There is no reason to think, certainly no evidence, that these anchors and chains have ever been on board the barge at all, nor does there seem to be any reason why they should be. This being so, the appellants contend that they are not tackle, apparel, or furniture of the barge at all, but are simply appliances provided at the mooring place for her use, which would be equally available for any other barge which might be substituted for her, or which might be brought to the place by those who own the moorings or by anyone to whom they might be willing to allow the use of these moorings. In my view this is a reasonable view of them, and I do not see that the bow moorings which remain in the river, whether this or any other barge is there or not, are essentially different from the stage to which the stern of the barge is moored.

Test it in this way: If the Mersey Docks and Harbour Board decided to provide a proper mooring place for such barges or hulks as the *Black Diamond* at this place, they must provide some such appliances as those under discussion, and might provide appliances identical with them. Such appliances would be part of the necessary equipment of the mooring place. How do they become anything else because the happen to be provided by the owners of the barge which uses the mooring place? No doubt they are necessary for the safe and proper discharge by the barge of her special functions, but they are so necessary as being an essential part of the mooring place at which she lies, and not as part of herself, her tackle, furniture, or fittings. Again, if the owners had two barges which used these moorings in turn, counsel for the respondents admitted that he would find it difficult to contend that the moorings were tackle or furniture of both or either.

I do not see how it can affect the true description of the moorings that in fact they are used by one barge only.

These are the short reasons which lead me to the conclusion that the appeal should be allowed, but, as Wright, J. agrees with the learned judge of the County Court, it will be dismissed with costs.

The underwriters appealed.

Clement Davies, K.C., *Wilfrid Lewis*, and *J. G. Trapnell* for the appellants.—The question arises in this case whether, on the construction of a policy of marine insurance, permanent moorings are insured by a policy covering "ship, hull, furniture, tackle, &c., of and thereon." It is submitted that they are not. It is to be observed that the ship was insured while she was being moved away from her moorings. By rule 15 of Sched. I. to the Marine Insurance Act 1906 (6 Edw. 7, c. 41), "The term 'ship' includes the hull, materials, and outfit, stores and provisions for the officers and crew, and, in the case of vessels engaged in a special trade, the ordinary fittings requisite for the trade, and also, in the case of a steamship, the machinery, boilers, and coals and

engine stores, if owned by the assured." [SCRUTTON, L.J.—Is the question here one of fact or of law?] A question of law is involved in this appeal. Wright, J. relied on sect. 18 (3) (*b*) of the Marine Insurance Act 1906, which provided that "In the absence of inquiry the following circumstances need not be disclosed, namely: (*b*) any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge and matters which an insurer in the ordinary course of his business, as such, ought to know."

It is not enough to show that the insurer knew of the existence of the permanent ground moorings, if the insurer is to be saddled with the risk, they must be clearly designated in the policy. In this case the moorings, it is submitted, are not covered by the policy. There is no evidence that the moorings in question are the ordinary fittings of a special trade. The burden of proof is on the insured to show that the moorings in question are covered by the policy and they have not discharged the onus. This barge can be taken away for repairs and not return for months, and during her absence some other barge can take her place. The moorings are quite independent of any barge in particular.

R. E. Gething for the respondents.—The County Court judge was right in holding that the underwriters are liable on the policy of marine insurance in this case. The subject-matter of the insurance is a moored barge. The permanent moorings in question are ordinary fittings which are requisite for the trade in which the barge was engaged. The word "furniture" in a marine insurance policy has a wide meaning and covers any necessary part of the outfit: (see *Brough* v. *Whitmore*, 1791, 4 Term Rep. 206). The question is one of fact, and there is evidence to support the judgment of the County Court judge.

SCRUTTON, L.J.—In this case an action was brought in the Liverpool County Court by the New Liverpool Eastham Ferry and Hotel Company Limited, who own a block of mixed properties in the neighbourhood of Eastham Lock, including ferry boats, ferry pier, and a coal hulk. In the action the plaintiffs claimed under a policy of insurance on the coal barge, *Black Diamond*, for damage to certain permanent moorings of the barge. The County Court judge held that the plaintiffs succeeded.

On appeal the Divisional Court differed in opinion, Wright, J., taking the view that the County Court judge was right and Talbot, J. taking the view that he was wrong. The judgment of the County Court judge therefore stood, and the insurance company now appeals to this court.

I am bound to say, as appears from the difference of opinion in the Divisional Court, that the matter is one of considerable difficulty, and my mind has fluctuated considerably in the course of the case and is not at the present moment in a condition of very stable equilibrium. The matter is made a little artificial by two circumstances: first, that so far as the question is one of fact there is no appeal from the County Court, and if there is any evidence on which the County Court judge could come to the conclusion to which he did come, that conclusion binds us, although I might have reached a different conclusion on the facts myself. And secondly, for some reason which I do not understand, the parties in the court below agreed that if these moorings came within the policy a certain sum was recoverable as damages, although without that agreement, I should have thought that it was clear that some of the items claimed did not come within the policy. Consequently, I am in the unfortunate position of having to give a judgment which I probably should not give if I was hearing this case as a judge in the Commercial Court.

The matter arises in this way: the *Black Diamond* spends her life in the summer in coaling the ferry steamers which bring pleasure seekers to the stage belonging to the plaintiffs. She lies loaded with coal and moored at one end to the stage and at the other end to the bank. Her moorings to the stage are of the ordinary barge character, and when she goes, as she occasionally does, to obtain more coal, she pulls her stage moorings on board and proceeds with them. The moorings at her other end are of a very different character. They are three heavy anchors and chains, and when she goes to fill up with coal or to be repaired she leaves those moorings behind her. The ends of the chains are tied to the stage and there she leaves them. Apparently, when she was bought many years ago, she was bought with two anchors and 100 fathoms of chain. She now has at that end of her moorings three anchors and 200 fathoms of chain, and the exact nature of her moorings is rather obscure. I do not know whether the question has arisen in the Mersey, but in the Thames there has been a question with regard to the legal character of these permanent or ground moorings. When there are substantial moorings of a coal hulk, which the hulk would never take on board as a ship takes an ordinary anchor on board, but which she, when moved, would leave behind her as permanent moorings in the river, the question has arisen whether the moorings constitute an occupation of land in the river bed, so as to lead them to be rated. Of course, that is not the question in this case, but the authorities show that the character of a particular mooring turns on the particular facts.

In *Cory* v. *Greenwich Churchwardens* (1872, 27 L. T. Rep. 150; L. Rep. 7 C. P. 499), moorings were held not rateable. Some of the moorings were stones with ropes tied to them, and it was found as a fact that they could be hauled on board by the derrick's own machinery if she was moved, and Wills, J. held that there was not enough occupation of the river bed to make the owners of the derrick liable to be rated. Another case—*Cory* v. *Bristow* (1877, 36 L. T.

Rep. 594; 2 App. Cas. 262)—decided shortly afterwards, had a different result. It was found that the moorings were as firm as it was possible to place them in the bed of the river and each derrick was attached to these moorings. The derricks could not weigh the moorings as ships weigh anchors, but could only move from them by casting off the cables and leaving the anchors and stones behind; and it was held that there was rateable occupation. Obviously, therefore, the question of the nature of these permanent or ground moorings is a question of degree.

When there is a finding which is a question of degree, is it a finding of fact or a finding of law. The language to be construed in this policy is: "Whilst lying moored at Eastham Ferry Stage or elsewhere, with liberty to be towed to any dock or place to load coal upon the ship or vessel the steel barge *Black Diamond*," and the insurance is on "the body tackle apparel ordnance munition artillery boat and other furniture" of the *Black Diamond*. So the question is whether these three heavy anchors and chains which are used to moor the *Black Diamond* in a particular place, and which she leaves behind her when she goes to take in more coal, are the "tackle apparel and furniture" of the *Black Diamond*. It may also be a question whether these moorings are "materials or outfit" of the *Black Diamond*, or ordinary fittings requisite for the trade of a coal hulk, within the meaning of rule 15 for the construction of a policy contained in the Marine Insurance Act 1906, which says that the term "ship" includes the hull, materials, and outfit, and, in the case of vessels engaged in a special trade, the ordinary fittings requisite for the trade.

There is some vagueness about the position of these anchors, and so far as I understand the evidence the first appears, and the other two do not appear, to have been buried in the soil. The County Court judge has found that these anchors and chains are part of the outfit and tackle of the barge and are part of her ordinary fittings in her trade as a hulk. Is that a finding of fact or of law? It seems to me that the answer to that question is a question of degree. At a certain point an anchor and chain are obviously part of the tackle of a ship. At another point the anchor and chain, like a bollard on a quay, become a fixed and permanent thing, to which the ship moors herself but which is no more part of the ship than the bollard and quay are part of the ship, or the stage to which the *Black Diamond* is moored is part of the ship. Then between those two points there may be a very difficult set of intermediate facts, and different minds may draw different conclusions with regard to whether an anchor and chain are part of the tackle or are a permanent mooring place not part of a ship. I have several times expressed my own opinion that a question of degree of that sort is a question of fact. I expressly said so in *Ducker* v. *Rees Roturbo Development Syndicate* (138 L. T. Rep. 598; (1928) A. C. 132), and the House of Lords adopted the same view.

That case was concerned with a finding of Commissioners of Income Tax, and from them there is no appeal on questions of fact just as there is no appeal on fact from the County Court judge. A man selling one picture is not carrying on a trade, but a man selling 100 pictures a year is probably carrying on a trade as a picture dealer. A man who lends money once a year is not a moneylender, but if he lends money to 100 people in the year he is probably a moneylender. At some point it becomes a question whether the man is or is not a picture dealer or a moneylender; it is a question of degree, and, in my opinion, a question of fact.

Now whether these anchors and chains did or did not pass from being fittings of the ship to being permanent moorings which are not part of the ship is a question of degree and, in my view, a question of fact. The County Court judge had therefore, the right to decide it, as there was some evidence on which he could come to his conclusion, and though I am not sure that I would have come to the same conclusion myself, we are bound by his finding.

The parties have agreed that, if the plaintiff can recover, the amount of the damages is 87*l.* odd. That sum appears to me to include some matters that could not possibly be recovered under the policy. I cannot conceive that if a ship drags her anchor you can recover under a policy of marine insurance on the ship the cost of bringing her back to the place from which she dragged or the cost of taking up the anchor and examining it. I only mention this because I do not wish this decision to be taken as a decision of the Court of Appeal that under a policy like this matters such as the parties here have agreed upon can be recovered.

For these reasons, the question of fact and the agreement with regard to the damages, I feel that my judgment is a very artificial one and is not one which I should probably have delivered if sitting as a judge in the Commercial Court. But as I am sitting here to decide an appeal from a County Court judge, who is supreme on fact if there is any evidence on which he can come to a conclusion of fact, and the parties have agreed the amount of the damages, I have come to the conclusion that the appeal must be dismissed.

Greer, L.J.—I agree that the appeal fails, and I think I go a little further than Scrutton, L.J. in the view that I take of the judgments of the County Court judge and of Wright, J., for I think that those judgments, on the facts as I understand them, were right whether they were conclusions of fact or conclusions of law. I treat it as agreed between the parties that if any sum is due under the policy, the proper amount to be paid is 87*l.* 18*s.* 10*d.*, and I therefore confine myself to considering whether the damage was or was not covered by the policy.

The policy is on a moored barge, and one has to consider the history of the barge; what it was and what it was obtained for; what was its outfit and what the purpose for which as the insurance company knew, it was intended to be used. It was bought from Messrs. Grayson by the respondents for 800*l.*, and the contract specifically provided that "mooring and towing bollards are to be supplied and fitted and mooring gear in the shape of two suitable anchors and about 100 fathoms of cable." Then, after referring to wood fenders with half-round facing irons, the contract says: "No other outfit or equipment to be placed on board by the sellers."

It does not, of course, conclude the matter, but it is not without significance that two of these anchors and part of the cable which was ultimately used were bought as part of the outfit or equipment of this barge which was to be sued as a moored barge. When the accident which led to this action happened the barge was moored to the stage at her stern and was moored at her bow to cables and three anchors, one of 20 cwt. on each side and one of 12 cwt. between them. The cables and anchors at the bow were moored to the three bollards referred to in the contract, and I cannot help thinking that from the start it was intended that there should be three anchors as part of the outfit or equipment of this moored barge, and that while the two larger ones were purchased from Messrs. Graysons with the barge the other either belonged to the respondents at the time or was acquired by them afterwards to complete what I may call the mooring outfit of the barge.

Before referring to the policy I may refer to the evidence, which shows that the barge was purchased on the 14th March 1913, and says that the moorings supplied were used from that time under similar conditions. I suppose that means that the conditions were the same throughout, that there were these three moorings at the bow, and that the moorings, the chains and anchors which formed part of the outfit of the vessel, were used from the start for mooring her. Then one finds in the correspondence letters written before the date of the policy which seem to me important.

After referring to the correspondence, his Lordship continued: I think we are entitled to take into consideration these facts which were known to both parties, when we are deciding whether these anchors and chains were part of the outfit, tackle, or furniture of this moored barge within the meaning of the policy, and we must remember that the word "outfit" is included in the word "ship" by rule 15 of the rules for interpretation in the schedule to the Marine Insurance Act 1906. We are entitled to take those facts into consideration when interpreting words which apply to a vessel of this sort which, while moored, was doing her work as a vessel.

Then with regard to the policy. The subject-matter of the insurance is described as "the body, tackle, apparel, ordnance munition, artillery, boat, and other furniture of and in the good ship or vessel called the steel barge *Black Diamond* while lying moored at Eastham Ferry Stage or elsewhere, with liberty to be towed to any dock or place not beyond the Rock Light to load coal, for repairs, and for overhaul, while there and until back again at her moorings, with liberty to moor in the Manchester Ship Canal while the operations for deepening the Eastham Canal are in progress. For and during the space of twelve calendar months commencing at noon on the 27th April 1926, and ending at noon on the 27th April 1927."

I read that as meaning that the subject-matter of the insurance is a barge whose main occupation during the period of the insurance is to lie moored at Eastham Ferry Stage. She has liberty to depart on certain occasions from those moorings and to moor elsewhere, but to the knowledge of insurers and insured she will as a general rule be moored at the Eastham stage. She is insured as a moored vessel, with, possibly, occasional trips away.

Most vessels do not lie at anchor for very long. They have anchors which are suited for the mooring which they require. This vessel has to be moored for a long period; she has to stand considerable strains on her moorings, and it is important for her work as a coaling barge that she should be steady at her moorings. Accordingly, she must have anchors of greater holding power than she would have required if she had been a barge sailing about the Mersey with loads of various kinds; and I think that the policy should be interpreted, as Wright, J. interpreted it, as covering that which is the furniture of a moored barge, that which is, in the words of the schedule, part of the outfit of a moored barge, the barge being moored in a way, and for a purpose, which was known to both parties.

If the anchor had not been purchased in connection with the vessel, if it had been supplied in the river by some person other than the owner of the barge, it would clearly not have been part of the furniture, fittings or outfit of the vessel; and if it had been purchased by the respondents, or used by them, independently of this barge, and this barge had found it there when it went to the moorings, it would not have been part of the furniture fittings or outfit of this barge.

I agree with Wright, J., and with the County Court judge, that the moorings were part of the furniture, tackle or outfit of the barge within the meaning of the policy, and I think, therefore, that as there was a difference of opinion in the Divisional Court, the judgment of the County Court judge must stand.

RUSSELL, L.J.—This case certainly presents considerable difficulty, but the view which I have formed coincides with that of Talbot, J. Although the craft with which we are concerned here is a coal barge moored in the Mersey, the matter is a seafaring matter, and

in such a matter I need hardly say that I differ from Scrutton, L.J. and Greer, L.J. and Wright, J. with great diffidence; but since I have formed a view, I think that I ought to state it.

I wish to make two preliminary observations. First, I can find no facts found by the County Court judge which would warrant us in attributing to the words of the policy any other than their natural meaning. And, second, the fact that the respondents, when they purchased this barge sixteen years ago purchased with it certain mooring gear is an irrelevant and improper matter to take into consideration in construing the policy.

With those two observations I turn to the question which arises for decision. The barge is moored in this way: at the bow she is moored by three cables, each attached to an anchor, two of the anchors weighing a ton and the middle one weighing 12cwt. At the stern she is moored by two cables attaching her to bollards on Eastham Ferry Stage, and if and when she leaves her moorings for any purpose and goes away she does not take with her the anchors or any part of the cables, but the bow anchors and cables are left in the river and the stern cables are hauled up on to the stage and are left there. The barge never takes this mooring gear on board at all. When she comes back she picks it up again and re-moors in the same spot, and the question is whether those cables and anchors are part of the subject-matter insured by the policy.

I think it is purely a matter of construction. The County Court judge has, as I read his judgment, decided the case on the construction of the words of the policy and nothing else; he has not found any facts that were in dispute.

In the Divisional Court, Wright, J. decided in favour of the respondents on two grounds; he held that, on the construction of the policy itself, the cables and anchors were part of the subject-matter of the insurance; and he held that even if they were not within the words of the policy, *per se*, they were brought within the policy by reason of rule 15 in the First Schedule to the Marine Insurance Act 1906. Talbot, J. took the contrary view.

That being so, I turn to the policy. The only words which would cover this are " tackle, apparel and other furniture of and in the good ship or vessel called the steel barge *Black Diamond*." I am quite unable to hold, in view of the facts of the case as we know them, that these cables and anchors are tackle, apparel and furniture of and in the barge; nor is the matter improved in any way in my opinion by reference to rule 15. That rule provides that the word " ship " in a policy shall include the whole materials and outfit, stores and provisions for the officers and crew, and in the case of vessels engaged in a special trade, the ordinary fittings requisite for that trade. The latter words are relied on, but in my opinion the rule does not apply here. The only evidence of a special trade is that this barge carried on the trade of coaling, and I think it is impossible to say that these cables and anchors were fittings requisite for the coaling trade; they were, in my opinion, no such thing.

I think, therefore, that the appeal should succeed.

Appeal dismissed.

Solicitors for the appellants, *J. A.* and *H. E. Farnfield.*

Solicitors for the respondents, *Godfrey Warr, Clarkson,* and *Co.,* for *Evans, Lockett,* and *Co.,* Liverpool.

Oct. 22, 23, 24, 25, *and Nov.* 11, 1929.

(Before SCRUTTON, L.J., GREER, L.J., and SLESSER, L.J.)

SILVER AND ANOTHER *v.* OCEAN STEAMSHIP COMPANY LIMITED. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Bill of lading — Carriage of goods by sea — Damage during transit and discharging — Acknowledgment by shipowners that goods received in apparent good order and condition —Estoppel—Goods delivered in a damaged condition—Exceptions—Liability of shipowners —Carriage of Goods by Sea Act 1924 (14 & 15 *Geo.* 5, *c.* 22), *Sched., Art.* III., *rr.* 3, 4, *Art. IV., r.* 2 (*m*), (*n*).

The plaintiffs were the indorsees of bills of lading in respect of parcels of cans of frozen eggs which had been delivered to the defendants for carriage from Shanghai to London. A large number of parcels were in a damaged condition when delivered. A certain amount of the damage was caused before the goods were loaded on the defendants' ship, and some of the damage was caused during the voyage from Shanghai to London; also during and after discharging the goods in London. The defendants had issued bills of lading stating that a number of cases were shipped " in apparent good order and condition," for delivery subject to conditions thereinafter mentioned. The first condition mentioned in each bill of lading was " this bill of lading is subject to the rules contained in the Schedule to the Statute of the United Kingdom of Great Britain and Northern Ireland, entitled the Carriage of Goods by Sea Act."

Rule 3 *of Art.* III. *of the Schedule to the Carriage of Goods by Sea Act* 1924, *provided that the carrier should on demand of the shipper issue to the shipper a bill of lading showing* " (inter alia) . . . (c) *the apparent order and condition of the goods,*" *and by rule* 4 " *such a bill of lading shall be* prima facie *evidence of the receipt by the carrier of the goods as therein described . . .*"

By Art. IV., r. 2, " *Neither the carrier nor the ship shall be responsible for loss or damage due, arising or resulting from . . .* (m)

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

wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods. (n) *Insufficiency of packing.*"

In answer to the plaintiffs' claim the defendants pleaded that the goods were damaged before shipment and also that they were insufficiently packed, and they relied on the exceptions in the Schedule to the Carriage of Goods by Sea Act 1924 *as excepting them from liability.*

Held, that the defendants having issued bills of lading acknowledging the receipt of the goods in apparent good order and condition could not afterwards prove that the goods were damaged before shipment if such damage would have been apparent on reasonable inspection, nor could they rely on the exception of insufficiency of packing in Art. IV., r. 2 (*n*) *of the Schedule to the Carriage of Goods by Sea Act* 1924, *if such insufficiency of packing would have been apparent on reasonable inspection.*

Appeal from a decision of Roche, J.

The plaintiffs, who were the indorsees of bills of lading in respect of two parcels of cans of frozen eggs—one parcel consisting of 16,000 cans and the other of 5334 cans— which had been delivered to the defendants in May 1927, for carriage from Shanghai to London, claimed damages from the defendants for alleged breach of the contract of carriage evidenced by the bills of lading. The plaintiffs alleged that the goods were in a damaged condition when delivered in London, and that the defendants were liable. Alternatively, they alleged that the damage was caused by the defendants' alleged negligence.

The defendants pleaded that the damage was due to the inherent defects or quality or vice of the goods, or was due to insufficiency of packing, and while denying liability they brought into court the sum of 350*l.*

The plaintiffs, in reply, said that the defendants, by their bills of lading, having acknowledged the receipt of the goods in apparent good order and condition, and having accepted the goods without protest and with full knowledge of their packing, and having given clean bills of lading in respect of such goods, were not entitled to rely on any inherent defect, quality, or vice of the goods, nor on the exception of insufficiency of packing within the meaning of Art. IV., r. 2 (*n*), of the Schedule to the Carriage of Goods by Sea Act 1924.

Roche, J., came to the conclusion that the bulk of the damage was done before loading, or, if after loading, was due to the cans being of a shape calculated to cause the damage, but that some damage was done by the defendants in the course of discharging the cargo by nets, and he decided that the amount—350*l.*—which the defendants had paid into court was sufficient to cover the damage caused by the method of discharging by nets, which he thought was negligence on the part of the defendants, and he gave judgment for the defendants on the plea of payment into court.

The plaintiffs appealed.

Clement Davies, K.C., and *G. St. C. Pilcher*, for the appellants.

S. Lowry Porter, K.C., and *James Dickinson*, for the respondents.

Cur. adv. vult.

Nov. 11, 1929.—The following judgments were read :

Scrutton, L.J.—This appeal relates to damage done to a large shipment of Chinese eggs while in course of transit from China to London. The transit was from shipper's warehouse in Shanghai to cold stores in London, the defendants' ship being only responsible from delivery on board in Shanghai to delivery overside in London. The liquid content of the eggs was contained in metal cases, holding 42lb. each, cases of a rectangular shape, and, therefore, with twelve right-angled edges. The cases were not covered with any cloth, fibre or cardboard covering. The contents were frozen and the cases were carried in refrigerated holds. The more usual method of conveyance was either in rectangular cases covered with some kind of covering, or in circular drums which are sometimes uncovered. In this case the rectangular cases of the size in fact used were used at the request of London purchasers for reasons connected with their own business. They were probably uncovered for cheapness. With regard to shape, rectangular cases were obviously better for the ship's stowage, as cylindrical cases wasted room in stowage. But the right-angled edges were probably more likely to damage other goods even in careful stowage and handling ; and were certainly more likely to do so if there was negligent handling. There was in the whole transit from shipper's warehouse to store very considerable damage to the cases. None of it was due to failure of refrigeration. But out of 21,334 cases shipped, 10,982 cases were damaged in their metal coverings, so that London purchasers rejected them. The damage varied in degree, but when experienced checkers at the stores tallied them in at Nelson's Wharf, 1,038 were damaged out of 5,334 ; at Bermondsey Cold Store, out of 16,000 cases 1732 were recorded as specially damaged. When the goods were more carefully examined and the two parcels taken together out of 21,334 cases, 2499 were classed as heavy and exceptional damage, on which 1337*l.* 5*s.* 3*d.* was claimed, and 8433 were classed as slight damage ; in all nearly 11,000 cases were damaged out of 21,334.

These figures are nearly accurate, but owing to some small parcels being dealt with in various ways, are only to be taken as approximate. They show heavy and unusual damage, and the question is where was it caused, and is the ship responsible to any and what extent for it. The cases go through a number of stages between shipper's warehouse and London stores, and one difficulty is that witnesses at each stage deny that any damage was caused at their particular stage. Yet at the end of the

transit there was this very large damage. The judge below has not accepted the evidence of any of the witnesses who say that there was no damage at their particular stage, and finds, as I understand him, that there was damage at every stage. though not necessarily damage for which the ship was responsible. The cases are surveyed by Lloyd's surveyor in shipper's store and are then taken down to the ship's side by insulated van and lighter. This is stage one. Stage two : The cases are hoisted on trays over ship's rail and placed on ship's deck, from whence, after casual examination, they are lowered into ship's hold and stowed one by one in tiers. Stage three is the transit from loading to commencement of discharge—the voyage. There is no suggestion of any specially bad weather on the voyage, and I do not think either side suggests any special damage in this stage. Stage four is discharge from the ship's hold to the consignee's insulated barges. Stage five is carriage by the insulated barges to the wharf and discharge there. Stage six is carriage by insulated vans to the cold store. I understand the learned judge to find that 50 per cent. of damage was caused before discharging commenced, described in the evidence as "old damage," and that none of it was caused by negligence of the ship's men in loading. This must apparently mean that in the judge's view this 50 per cent. was made up of damage before loading, for which the ship is not responsible, and damage in loading resulting from insufficiency of packing, for which again the ship is not responsible. The judge finds damage in discharging, for which the ship is responsible, in that the ship's people negligently discharged the cases in nets, during which process the cases were unnecessarily flung about. He assesses this damage as not exceeding 10 per cent. of the total damage assessed in money. This leaves 40 per cent. of the damage to be accounted for, in his view, to either after discharge from the ship or in discharge due to the nature of the packages, without negligence on the part of the ship. There is very specific evidence about the negligence in discharging in nets and the damage thereby caused; there is not much evidence with regard to the amount of damage at any stage—except that with regard to ultimate total damage both in number of cases and in money loss, which damage has to be accounted for somehow—to enable the damage to be divided between the various persons who may be liable for it. I think any conclusions with regard to the amount of damage at any stage must be in the nature of a jury estimate, made on very slight materials, and I should be very slow to interfere with the estimate of the judge below, unless I thought the estimate was very substantially wrong, or was vitiated by erroneous views on legal considerations. The plaintiffs, appellants, submit that they have been awarded far too little in getting only 10 per cent. of the actual damage sustained.

It is necessary, therefore, to go in detail into the various stages with the legal considerations affecting them. The transit begins with a survey of the cases by Lloyds' surveyor at the shipper's refrigerating store on the 23rd May and the 24th May. The survey describes the cases as "strong rectangular tins—no fibre or other cover." Tins—one hundred and fifty in number—were weighed; others taken at random, sounded, and found solid frozen. The cargo is certified as "fit for transportation." It cannot be said that there is any individual examination of the cases for perforations or punctures. The cases then go down in insulated vans to be loaded into insulated barges and taken alongside the ship. All refrigerated cargo at that time of year is loaded at night, but the ship has clusters of electric lights on deck and in the insulated hold. Alongside the ship the cases are stowed on a tray with some side protection—eighty-four tins in each lift—in a block seven cases long and three cases wide and four cases high. It is obvious that in the block of eighty-four tins, having 504 sides, only eighty-one sides in the block are externally visible. When the tray is landed on the ship's deck a ship's officer taps the external tins to see if they are frozen, and if he sees any damage to the tins, he rejects the damaged tins. The tray is then lowered into the hold and each tin is individually handled by the stowing gang, and if any damage is seen in that process the tin is rejected. In fact, a small number of the original 21,334 tins were rejected at this stage, the shippers say fifty, the ship sixty. It is not clear whether they were replaced by sound tins, but 21,334 cases seem to be the total shipment.

Then comes the stage which raises the first question of law. On the 25th May a bill of lading is signed stating that a number of tins are shipped "in apparent good order and condition." After issuing such a bill, can the ship prove that at the time (1) the tins were perforated or punctured, or (2) that they were insufficiently packed, or must it be taken that on shipment the tins, so far as reasonable inspection would discover, were not perforated or punctured and were by all reasonable inspection sufficiently packed? The Carriage of Goods by Sea Act 1924, only directly applies to carriage of goods from Great Britain abroad, not from abroad—for example, China to Great Britain. But the bills of lading by which the shipowner acknowledges the receipt of goods, are for 16,000 and 5,334 cases respectively in apparent good order and condition "for delivery subject to conditions and exceptions hereinafter mentioned" and the first condition mentioned in each bill of lading was "this bill of lading is subject to the rules contained in the Schedule to the Statute of the United Kingdom of Great Britain and Northern Ireland, entitled the Carriage of Goods by Sea Act, hereinafter referred to as 'The Rules.'" Though the Act does not apply to this bill of lading, the parties have apparently by agreement made the rules in the Schedule to the Act conventional terms of the bill of lading. Rule 3 of Art. III. of the Schedule requires the

carrier to issue a bill of lading showing the apparent order and condition of the goods, which by rule 4 is to be *primâ facie* evidence of the receipt of goods as described.

Two questions seem to arise at this stage. First, under the law prior to the Carriage of Goods by Sea Act 1924 a shipowner who received goods which he signed for "in apparent good order and condition" to be delivered in the like good order and condition, and who delivered them not in apparent good order and condition, had the burden of proving exceptions which protected him for the damage found. The present bill of lading runs "shipped in apparent good order and condition for delivery, subject to conditions," etc. Has any difference been made in the old law by this wording? In my opinion no difference has been made. I agree with the view expressed by Wright, J. in *Gosse Millard Limited* v. *Canadian Government Merchant Marine* (17 Asp. Mar. Law Cas. 385; 138 L. T. Rep. 421; (1928) 1 K. B. 717) in similar words, that there is still an obligation to deliver in the like apparent good order and condition unless the shipowner proves facts bringing him within an exception covering him. Lord Sumner, in *Bradley and Sons* v. *Federated Steam Navigation Company Limited* (17 Asp. Mar. Law Cas. 265; 1927, 137 L. T. Rep. 266) appears to express the same view.

The second point of law is this. It has been decided in *Compania Naviera Vasconzada* v. *Churchill and Sim* (10 Asp. Mar. Law Cas. 177; 94 L. T. Rep. 59; (1906) 1 K. B. 237), and affirmed in the Court of Appeal in *Brandt and another* v. *Liverpool, Brazil and River Plate Steam Navigation Company Limited* (16 Asp. Mar. Law Cas. 262; 130 L. T. Rep. 392; (1924) 1 K. B. 575), that the statement with regard to "apparent good order and condition" estops—as against the person taking the bill of lading for value or presenting it to get delivery of the goods—the shipowner from proving that the goods were not in apparent good order and condition when shipped and, therefore, from alleging that there were, at shipment external defects in them which were apparent to reasonable inspection. Art. III., r. 4, which says that the bill shall be *primâ facie* evidence—not *primâ facie* evidence only, liable to be contradicted—can hardly have been meant to render the above decisions inapplicable. For the information relates to the shipowner's knowledge; he is to say what is "apparent," that is, visible by reasonable inspection to himself and his servants, and on the faith of that statement, other people are to act, and if it is wrong, act to their prejudice. I am of opinion that rule 4 of Art. III. has not the effect of allowing the shipowner to prove that goods which he has stated to be in apparent good order and condition on shipment, were not really in apparent good order and condition, as against people who accepted the bill of lading on the faith of the statement contained in it. Apparent good order and condition was defined by Sir R. Phillimore in *The Peter der Grosse* (3 Asp. Mar. Law Cas. 195; 34 L. T. Rep. 749; 1 Prob. Div. at p. 420) as meaning that "apparently, and so far as met the eye, and externally, they were placed in good order on board the ship." If so, on the decision in *Compania Naviera Vasconzada* v. *Churchill and Sim* (*sup.*), the shipowner is not allowed to reduce his liability, by proving, or suggesting, contrary to his statement in the bill of lading, that the goods in respect of matters externally reasonably visible, were not in good condition when shipped. Now, what was reasonably apparent to the shipowner's servants loading at Shanghai at night, but under clusters of electric light? The ultimate damage was classed by the surveyors as (1) serious damage where the tins were gashed or punctured, damage easily discernible in handling each tin; (2) minor damage, pinhole perforations, which on tins covered with rims were not easily discernible, but which were found when the tins were closely examined. I have considered the evidence and I find that the first class of damage was apparent to reasonable examination; the second, having regard to business conditions, was not apparent. The result of this is that the shipowner is estopped against certain persons from proving or suggesting that there was gash or serious damage when the goods were shipped. He may raise the question whether there was not minor or pinprick damage at that time, but having regard to the small quantity of goods rejected for visible damage, I should not estimate the amount of such minor damage at shipment as very high. The question as to whether the shipowner is prevented by the statement with regard to "apparent good order and condition" from relying on the allegation or exception of "insufficiency of packing"—one of the exceptions under the rules in the schedule to the Act—is more difficult. The shipowner's contention is that there was insufficiency of packing, because (*a*) the eggs were packed in uncovered tins, and, therefore, were difficult to handle when frozen and had less protection than if the tins were covered; (*b*) the tins had sharp edges and corners and were, therefore, dangerous to each other; and (*c*) that the tins were of too thin plating to stand the wear and tear of contact with other tins.

The facts that the tins were (1) uncovered, and (2) with rectangular edges, were obvious on shipment. If this was insufficient packing the insufficient packing was obvious. I cannot think that a shipowner who receives, say, a wooden case broken open at one corner or side can describe it as "in apparent good order and condition," and afterwards prove the opposite. And if the insufficiency of the packing is obvious, again I think it cannot be described as in apparent good order and condition. In truth, the rectangular uncovered packages are not "insufficiently packed," but may be dangerous to other cases and are difficult to handle, each matter being obvious to external inspection. Some suggestion is made that the metal containers were too thin, and they were obviously too thin to resist the treatment which

they received. But it appears from the letter of the 26th Aug. 1927 that the metal was of the same thickness as the Union Cold Storage Company's usual tins. I do not see why rectangular tins, carefully stowed, should damage each other, and they are obviously better for the ship in stowage, in that they waste less space than round tins, while their lack of covering is apparent.

I am, therefore, of opinion, that, against the proper person, the shipowner is estopped by his statement that the cans were shipped in apparent good order and condition from proving that they were insufficiently packed, or in fact seriously gashed, but that he may prove or suggest pinholes on shipment as not being reasonably apparent. The old damage, that is, damage done before discharge, found on discharge, was variously estimated at 10 per cent. and 40 per cent., and "considerable." The judge finds 50 per cent. On the view which I take above, this must be reduced by eliminating (1) any heavy damage done before shipment; (2) any damage done before discharge due to insufficient packing. If so, and considering the nature of the ultimate damage, I think, if the old damage is reduced to 25 per cent., covering pinprick damage before shipment, and damage due to the ordinary wear and tear on a voyage of parcels properly packed, the shipowner has a larger allowance than he is entitled to. Whether the consignee is entitled to rely on the statement with regard to apparent good order depends on whether he relied on the statement without knowledge of its untruth to his prejudice. It was argued that as he ordered square tins and uncovered tins, he must have known that they were insufficiently packed. He certainly ordered square tins, but he had certainly no knowledge of the make of the edges, which were said to be unusually sharp. The statement that he ordered uncovered tins is based on his telegram of the 18th May ordering "plain" tins. But this, I think, clearly relates only to absence of mark, as the letter of the 21st June, contrasting "plain tins" with tins branded "Superegg," shows. In my view, the consignee in London had no knowledge of any facts that showed that the tins shipped were not in apparent good order and condition. The last objection was that the witness did not say that he relied on the bill of lading being a clean bill of lading by reason of the statement with regard to good order and condition. The mercantile importance of clean bills of lading is so obvious and considerable that I think the fact that he took the bill of lading, which is in fact clean, without objection, is quite sufficient evidence that he relied on it.

One comes next to the evidence with regard to the discharge, in which the judge has found ship's negligence. While the evidence with regard to the exact amount is not as satisfactory as it might be, this is due to the ship's officers' or agents' quite improper refusal to sign lightermen's receipts stating the amount of damage, or to keep any tallies themselves. They knew that the method of discharge was being objected to and that damage was being done and they refused to sign lightermen's receipts. They cannot complain if the estimate of damage is inaccurate or taken only at the wharf.

The facts with regard to the discharge are these. The uncovered frozen tins were slippery to handle or pile. They were discharged by piecework, the men having an obvious motive to do the work quickly. This, so far as it saves the ship demurrage, is to the advantage of the ship, but may lead to the cargo being handled too hastily. It is for this reason that, according to the evidence, the cold stores pay their men by time and not by piecework, finding that they get more careful, though slower, handling. These tins were at first stacked on a wooden tray, with very slight sides. It was found that some tins slid off or fell unpleasantly near the heads of people working below. They not unnaturally protested, and the ship adopted a system of discharging in nets. When the tins were first placed in the net the bottom tier showed flat. But as soon as the net was hoisted the flat tier disappeared and the tins were pressed together. The chief officer of the ship admitted that there was a chance of damage at that stage. But when the net was lowered into the lighters and set down the chance of damage became almost a certainty. The chief officer describes what happens as follows: Question 241: "(Q.) And is it this danger of knocking against the sides that makes you say the trays are better than the nets? (A.) It is to prevent them slipping out. They are slippery, and when they let go the side of the net the whole block of tins collapses. When they land the net in the lighter the whole block of tins collapses. The top tier would slip 2ft. or 3ft." Mr. Silver, who saw the discharge in nets, protested at once; he "saw the tins all jumbled up in the nets."

I have considered the evidence and come to the same conclusion as the judge below that there was a negligent method of discharge, for damage done by which the ship is liable. I am satisfied that a very considerable part of the actual damage was caused by this negligence. I do not understand how he can have arrived at so small a figure as 10 per cent. of the actual damage being attributable to actual discharge. If, as he finds, 50 per cent. of the actual damage was caused before discharge, and 10 per cent. by negligence in discharge, this leaves 40 per cent. to be caused after discharge. While there is some slight evidence of rough handling at the wharf, on the other hand, this work was done by men on time work, with no inducement to hurry, with special wooden trays with high sides. I am quite unable to discover the evidence that would justify the judge in the division of this damage into 10 per cent. ship and 40 per cent. after ship.

Endeavouring to assess the damage on the figures which I have gone carefully into,

somewhat as a jury would, I am of opinion that if 25 per cent. of the actual damage is assigned to the period before discharge, 50 per cent. to discharge, and 25 per cent. after discharge, the ship is being treated very generously. It may be that the learned judge below has arrived at his figure of 10 per cent. by deducting from the actual damage some percentage as due to insufficient packing. In my view, he is not entitled to do this; first, because of the estoppel, and, secondly, because in my view a man who discharges cargo negligently is not entitled to say: "If I had discharged the cargo properly there would have been some damage, which I can deduct from the damage caused by my negligence." Further, in my view of the estoppel, the ship cannot claim that some tins were delivered to it gashed and some damaged by insufficient packing.

I assess these two classes of damage before discharge at 10 per cent. as compared to 15 per cent. due to non-apparent pin-prick damage before discharge and ordinary wear and tear on voyage. I have stated these figures in order that if any part of my assessment should be dissented from my resultant total may be modified. The percentages which I have given are of the total money values. I am conscious that they are rough-and-ready estimates; but I think that if they were arrived at by a jury they could not be upset. As I have said, I think that they err on the side of generosity to the shipowner, and I am influenced to some extent by the improper refusal of the shipowner's servants to take or agree tallies of actual damage on discharge protecting them by a reference to "old damage."

In my view, therefore, the damage for which the shipowners are liable should be roughly assessed at 60 per cent. of the actual damage, and judgment for 2100*l.* with costs should be entered for the plaintiffs, the judgment of the learned judge with regard to amount and costs being set aside.

GREER, L.J.—The appellants, plaintiffs in an action against the respondents, bring this appeal against the judgment of Roche, J., whereby it was decided that a sum of 350*l.* paid into court by the defendants was sufficient to satisfy their claim for breach of contract of the carriage of two parcels of cans of frozen eggs from Shanghai to London.

By their statement of claim the plaintiffs claimed to be the owners of a parcel of 16,000 cans and a parcel of 5,344 cans of frozen eggs delivered to the defendants' steamship *Aeneas* by the Henningsen Produce Company for carriage from Shanghai to London and delivery to shippers' orders or assigns. They made their claim as owners of the said goods and indorsees of the bills of lading to whom the property in the said goods passed by reason of the indorsement of the said bills of lading. They alleged that the goods were delivered in a damaged condition in London, and that the defendants were liable for breach of the contract of carriage which was evidenced by the two bills of lading. Alternatively, they alleged that the damage was caused by the negligence of the defendants.

By their defence, after the formal denials of the plaintiffs' allegations, the defendants pleaded that the damage was due to the inherent defects or quality or vice of the said goods, or was due to the insufficiency of packing thereof, and that by the terms of the bills of lading they were exempted from liability, and while denying liability they brought into court the sum of 350*l.*

The plaintiffs, by their reply, pleaded that the defendants by the bills of lading having acknowledged the receipt of the said goods in apparent good order and condition on board the Steamship *Aeneas*, were estopped from denying that the goods were shipped in apparent good order and condition, and by par. 3 of the reply they alleged that the tins containing the frozen eggs were square and had sharp corners, and that they were not covered with fibre and (or) hessian cloth and (or) cardboard, and therefore that the defendants, having accepted the said goods without protest and with full knowledge of the matters aforesaid and having given clean bills of lading in respect of such goods were not entitled to contend that the said matters or any of them constituted acts or omissions of the shipper and (or) inherent defect, quality, or vice of the said goods and (or) insufficiency of packing thereof within the meaning of the exceptions in art. IV., r. 2, of the Schedule to the Carriage of Goods by Sea Act 1924.

When the goods were delivered to the ship at Shanghai, it was, of course, apparent to those in charge of the receipt of the goods that the eggs were packed in square tins which necessarily had sharp corners, and that they were uncovered. It was also ascertained that some of them had been damaged before delivery to the ship, and fifty cases were refused on this ground. The goods were carried to London, discharged on to the quay, received by the plaintiffs and put into store, and when finally examined it was found that 2625 tins were badly gashed, and in respect of these tins the plaintiffs suffered loss to the amount of 1377*l.* 1*s.* 6*d.*, that 8357 tins had small dents and holes in respect of which 1044*l.* 12*s.* 6*d.* was the loss sustained, and there were certain charges incurred for labour, surveyors' fees, and agency, which the plaintiffs also claimed. The learned judge came to the conclusion that some damage was done by the defendants in the course of discharging the cargo by nets, but he did not find any damage occasioned by any act of the defendants at any other time, and he further decided that the amount paid into court was sufficient to cover the damage occasioned by the method of discharge by nets, which he thought was negligence on the part of the defendants' servants, and he gave the usual judgment in favour of the defendants on the plea of payment into court.

The bill of lading incorporated the rules contained in the Carriage of Goods by Sea Act

1924, and the defendants relied on the exception of insufficiency of packing contained in Art. IV., r. 2, of the schedule of the said Act. The bill of lading contained the words "shipped in apparent good order and condition," and the first question to be determined is whether the defendants are estopped by these words from alleging that the goods were either in a damaged condition when shipped, or that they were insufficiently packed by reason of the fact that the tins were square and unprotected. It was decided in *Compania Naviera Vasconzada* v. *Churchill and Sim* (10 Asp. Mar. Law Cas. 177; 94 L. T. Rep. 59; (1906) 1 K. B. 237), that those words in a bill of lading are not contractual, but that they contain a representation of fact which may create an estoppel in favour of a purchaser relying on the words in the bill of lading and acting on them to his detriment. The case was decided in 1906, and I think we ought to accept as good law the proposition that the words are not words of contract but only representations which may give rise to an estoppel. I observe also that the decision in *Compania Naviera Vasconzada* v. *Churchill and Sim* (*sup.*) was referred to with approval by Scrutton, L.J., in *Brandt* v. *Liverpool, Brazil and River Plate Steam Navigation Company Limited* (16 Asp. Mar. Law Cas. 262; 130 L. T. Rep. 392; (1924) 1 K. B. 575).

The elements necessary to create an estoppel are three. There must be (1) a statement of fact, (2) relied on by the person alleging estoppel, and (3) he must have acted on the representations to his detriment. So far as the alleged estoppel is concerned with the shape of the tins and the absence of cover, I am of opinion that the plea of estoppel was not established. I doubt very much whether the statement "shipped in apparent good order and condition" has any reference to original defects of quality or type. The words seem to me to refer rather to acquired damage or defect in the goods rather than to original defects of quality or type. I doubt whether a square tin can be said to be not in good order and condition because it is square and has always been so, or because it is uncovered and has always been so uncovered. I am inclined to think that the words are confined to deterioration or damage which has occurred to the goods of the quality and type delivered. A distinction is drawn by Channell, J., in *Compania Naviera Vasconzada* v. *Churchill and Sim* (*sup.*) between quality and condition, and I observe that in the definition section of the Sale of Goods Act 1893 it was considered necessary to specially provide that the word "quality" in the Act should include "condition." It appears to me that when the goods were received for shipment, the shipper and the shipowner were considering that there might be a claim for damage caused during the carriage by sea. In these circumstances the shipowner is willing to say to the shipper, "I admit that up to the present the goods have not been damaged so far as can be discovered by such examination as can reasonably be expected. He does not seem to me to be admitting anything as to the fitness of the goods of the kind presented for carriage at sea, but only as to their undamaged condition.

It is, however, unnecessary to decide this point, as there are other sufficient reasons for holding that no estoppel was proved so far as the shape of the tins and the absence of covering are concerned. From Mr. Silver's evidence it is clear that he had ordered square tins and knew that he was going to have square tins shipped to him. I think it is also extremely probable from the letters which he wrote that he knew that the tins would come uncovered, but, in any case, he gave no evidence that he relied on the bill of lading as a statement that the tins were other than square, or that they were covered, and it is remarkable that after he received the bill of lading he never suggested in the letters and telegrams which he wrote that he had been led by the bill of lading to believe that he would get tins other than those which in fact came forward, that is to say, uncovered square tins.

As regards the question whether the defendants are estopped from denying that the tins accepted by them on the bills of lading were free from gashes and pin-holes, I think there would be such an estoppel as regards gashes and pin-holes which could have been ascertained by such reasonable examination as can be expected when goods of this kind are delivered for shipment under the conditions necessarily prevailing, that is to say, delivery by night. The plaintiff, Mr. Silver, in his evidence did not say that he relied on the statement that the goods were received free from apparent external damage, and in the absence of any statement that he did rely on the bills of lading, it is contended that the court is unable to find his plea of estoppel proved as regards this damage. I think, however, though with some doubt, that the court would be entitled to conclude on the grounds of high probability that he was influenced by the statement that the goods were shipped in apparent good order and condition, and that he must have believed that they were free from reasonably discoverable damage when shipped, and that in accepting the bills of lading and taking delivery he acted to his detriment, but I am not satisfied that all such damage would be apparent on any reasonable examination. On the other hand, I am satisfied that if there was any considerable damage when the goods were shipped, in excess of the fifty cases that were rejected, a substantial part of such damage would have been discovered on a reasonable examination.

I agree with the learned judge's finding that by reason of their shape combined with the thinness and weakness of the metal, which latter defect was not apparent, the goods were insufficiently packed, and that the insufficiency of packing was one of the causes of the damage complained of. But the exception of insufficient packing which was incorporated in the bill of lading by reference to the rules contained in

the Carriage of Goods by Sea Act 1924 will not protect the defendants if negligence be proved. Even if the liability of the shipowner be that of a common carrier, and it is proved that the damage is within the exception in the contract of carriage, the owner of the goods can still recover notwithstanding the exceptions if he shows that the damage was caused by the negligence of those for whom the shipowner is responsible. The plaintiffs failed to prove any negligence in loading or in the carriage to London, but they did prove negligence in the discharge. The plaintiffs had to prove not merely negligence; they had to prove the amount of damage which they suffered due to that negligence. It was satisfactorily proved by the plaintiffs that the loss which they suffered by reason of the damage finally ascertained as existing at the time when the cans were taken into store in London slightly exceeded the amount claimed, which was 3544*l*. There was evidence that a considerable portion of this damage was old damage, and one of the plaintiffs' witnesses admitted that the old damage was as much as 40 per cent. For the reasons which I have given it seems to me impossible to hold the defendants liable for any of the old damage, except such of it as may be affected by the limited estoppel which I have found as stated in the earlier part of my judgment.

The damage for which I hold that the plaintiffs are entitled to be compensated is comprised under two heads: (1) Damage which in fact occurred before the goods were received for shipment under the bills of lading and was of such a character as to be apparent on a reasonable examination. The defendants are precluded by the estoppel from alleging that this damage was not caused while the goods were in their custody. They cannot rely on the exception of insufficiency of packing as the cause of damage, because the exception only applies to damage arising during the carriage of the goods. (2) Damage occasioned by negligence in the discharge of the cans.

I cannot think that Roche, J. was right in his finding that the 350*l*. paid into court is sufficient to satisfy the damages for which the defendants are liable. I think on the contrary that a very considerable part of the damage ultimately found was due to causes for which the defendants are responsible. The goods were discharged by casual labour paid by the piece. I think it very improbable that any large amount of damage was done after the goods were discharged from the ship, but no doubt some of the ultimate damage ought to be attributed to this stage in the journey from Shanghai to the London stores.

This appeal, like all appeals from judgments given on a trial before a judge alone, is a re-hearing. The judge's findings do not depend on the relative value which he attached to the oral evidence of witnesses at the trial. He had to make an estimate based on the general facts of the case and on probability. In my judgment a fair estimate of the damage for which the defendants are liable is 50 per cent. of the total damages, and if the result of this appeal depended on my judgment, the appeal would be allowed and judgment entered for the plaintiffs for half their claim, that is to say, for 1772*l*., and with costs here and below.

Slesser, L.J.—This is an appeal from a judgment of Roche, J, whereby he assessed damages against the defendants for 350*l*. in an action for breach of contract resulting in damage to cargo. The plaintiffs in the action were the holders of two bills of lading which together covered the goods in question. The defendants are the shipowners. It is not disputed that this cargo arrived at the cold storage depot in a very considerably damaged condition; the damage consisted in gashes, perforations and dents in the tins in which the frozen egg product was contained. The damage was apparently caused by one or more tins coming in contact with their neighbours; nor is there any real dispute that it was the pointed corners of such tins which gashed, pierced or dented the other tins which suffered damage.

The evidence in the case largely resolved itself into inquiries at what stage or stages of the journey this damage occurred, and, for this purpose, the journey may conveniently be divided into five periods; the first being the period when the goods were on their way from the cold store in Shanghai to the ship, the second the loading into the ship, the third the voyage, the fourth the discharging from the ship into lighters, and the fifth the conveyance by the lighters to the wharf and thence to the storage depot in London. It is only for the purpose of loading, carrying and discharging, the second, third and fourth periods that the shipowners, on any view, can be made responsible. In substance, the learned judge has come to the conclusion that the damage began during the first period, when the tins were on their way from the cold storage at Shanghai to the ship and continued while they were being loaded on board the ship in Shanghai and that some damage was done during the discharge from the ship into lighters and some when the goods were being dealt with by the lightermen and vanmen at the later stages of the progress. In effect, the only period which he excludes from possibility of damage is the voyage itself, and, as there is no evidence that during the voyage any damage was done, I also exclude that part of the journey from my consideration.

The 350*l*. which the learned judge has awarded to the plaintiffs is arrived at in this way; on arrival in London after an abortive effort to land the tins on trays or boards, the shipowners resolved to use nets; and the evidence is very considerable that, while the tins were in these nets, the tins were "all jumbled up," to use the words of one witness; that they "shot out all over the place when the net opened," in the words of another; and, in the language of a third, "when the net opened

the tins spilt all over the show." The learned judge has come to the conclusion that the nets were unsuitable and that they did aggravate the damage, but he has refrained from giving what he believed to be the full damage caused by the nets, because he says that he thinks that some part of the damage due to the nets could not properly be complained of because some of it was inevitable in any event. In the result, he thinks that 10 per cent. is a fair estimate of the amount of damage due to the nets—the whole of the claim amounting to 3,544*l.* odd, of which sum he awarded the plaintiffs 350*l.*, the amount paid into court by the defendants. It is not at all easy to estimate with any exactitude the degree of damage produced at each stage of the journey; but certain principles may, I think, be applied which have brought me to a conclusion, on amount, different from that of the learned judge.

In the first place the bills of lading contained the usual provision that the goods are shipped in apparent good order and condition. It is provided by clause 1 of each bill of lading that the bill is to be subject to the rules contained in the Schedules to the Carriage of Goods by Sea Act 1924, and it is pleaded by way of reply in this case, in par. 2, that the defendants, having acknowledged the receipt of the said goods in apparent good order and condition on board the *Aeneas*, are now estopped from denying as against the plaintiffs that the said goods, when shipped, were in apparent good order and condition. The effect of these words has been discussed in several cases; but it is sufficient to refer to the judgment of Channell, J. in the case of *Compania Naviera Vasconzada* v. *Churchill and Sim* (10 Asp. Mar. Law Cas. 177; 94 L. T. Rep. 59; (1906) 1 K. B. 237), in which case the American Harter Act was incorporated in the bill of lading. That case was approved in *Brandt and another* v. *Liverpool, Brazil, and River Plate Steam Navigation Company Limited* (16 Asp. Mar. Law Cas. 262; 130 L. T. Rep. 392; (1924) 1 K. B. 575). See also *Martineaus, Limited* v. *The Royal Mail Steam Packet Company Limited* (1912, 12 Asp. Mar. Law Cas. 190; 106 L. T. Rep. 638). Here the rules in the Schedule to the Carriage of Goods by Sea Act 1924 are incorporated, the wording of which statute does not affect the old principle (per Lord Sumner in *Bradley and Sons* v. *Federal Steam Navigation Company Limited* (1927, 17 Asp. Mar. Law Cas. 265; 137 L. T. Rep. 266), and it was held that by the words "shipped in good order and condition," the shipowners were bound by the representation of the Master, not as words of contract but by the way of estoppel. In this case, however, a complication has arisen by reason of the fact that whereas the gashes may reasonably be said to be apparent, the perforations were not so apparent. Channell, J. in the case above cited —*Compania Naviera Vasconzada* v, *Churchill and Sim*, says (10 Asp. Mar. Law Cas. 177; 94 L. T. Rep. 59; (1906) 1 K. B. at p. 244): "In my opinion not only was there damage in fact, but it was damage of such a character that it must have been apparent to anyone."

In my judgment the estoppel in this case goes no further than what was apparent to anyone, which, I think, includes the gashed tins, but reasonably excludes the less apparent perforations and punctures. It then remains to inquire how much of this damage was sustained after the discharge when the tins passed out of the control and responsibility of the shipowners. There is evidence of Mr. Towers that at Nelson's Wharf, where the 5,000 tins were sent, the tins were pitched into trays and were handled too quickly, and at the National Wharf there was also throwing of tins which must have caused damage; and Mr. Bettly also says that he saw some damage done at National Wharf, and Mr. Holmes says that at Nelson's Wharf the tins were not properly handled. Holding as I do that the shipowners are estopped from suggesting that any of the gashed tins were injured at the time they were shipped in apparent good condition, I am prepared to accept the amount of liability on this head as computed by Scrutton, L.J.

There remains for consideration the position of the tins which were not apparently damaged by gashes with regard to which the shipowners may properly say that the bill of lading does not estop them. Approaching this as a question of fact without any estoppel, I think that two periods, namely, the loading and the voyage, may be excluded from consideration as there is no evidence which satisfies me that during either of those periods any injury was sustained. This leaves, however, three periods, the periods before loading, discharge and after discharge, for which the shipowners are only responsible for one, namely, the period of discharge, and again, as I agree with the principles of assessment laid down by my Lord, I adopt his estimate of the shipowners' liability.

The liability of the shipowners is further disputed on a ground with which I have yet to deal. The bills of lading, as I have said, incorporate the rules in the Schedule to the Carriage of Goods by Sea Act 1924, and the defendants rely upon Art. IV. thereof, which provides, so far as is here material, that "neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from: (*n*) insufficiency of packing," and it is said here that there was, in fact, insufficiency of packing, for two reasons, namely, first, that the corners of the tins being square and pointed were dangerous unless they had been protected by some covering; and, secondly, that the tin itself was too thin to resist the contact of the points of the other tins. The learned judge has found that the packing was insufficient on the ground that the tins had eight points of excessive and unusual sharpness, such as has never been known or seen in the trade before. He does not appear to have accepted the view that they were too thin as had been contended. Dealing with the question of the pointed tins, I think that such insufficiency of packing must

have been apparent to the shipowners. In *Barbour* v. *South Eastern Railway Company* (1876, 34 L. T. Rep. 67), in which it was held that the plaintiff, sending furniture by train, had a duty to pack the furniture, the defendants, the railway company, declined the packing, and, as a result, the goods were conveyed unprotected as the packing of the consignor was insufficient. Cleasby, B. in that case said (34 L. T. Rep., at p. 68) :" The goods were delivered in a manifestly unsafe condition."

Now, I think there may well be cases where the insufficiency of the packing is not apparent ; but in this case, where the insufficiency, if any, was obvious, the shipowners were nevertheless prepared to take the goods without complaint and give a clean bill that the goods were shipped in good order and condition. I think that the capacity of the goods safely to travel was part of their order and condition ; and so, being apparent on the face of it, I cannot see how the shipowners can now say that the goods were insufficiently packed. In *Gould* v. *South Eastern and Chatham Railway Company* (123 L. T. Rep. 256 ; (1920) 2 K. B. 186), it is true that it was held that where goods were insufficiently packed, the carrier's knowledge of their condition at the time of their receipt would not necessarily preclude him from setting up as a defence that the damage was due to the insufficient packing. In Story on Bailments the rule with regard to the obligation of a common carrier, at par. 492 (*a*) (9th edit., p. 463), is stated not to cover, among other things, the goods " not being properly put up and packed by the owner or shipper " ; and Atkin, L.J., in *Gould's Case* (123 L. T. Rep. 256 ; (1920) 2 K. B., at p. 193), says that " the defendants' knowledge of the improper packing . . . did not make them responsible." Younger, L.J. concurred ; but a distinction must be drawn, in my judgment, between a mere knowledge of improper packing and a written statement, on which a consignee might reasonably be expected to act, that they are in fact in a proper order and condition, such as was given in the present case. In the present case, the defendants accept the goods, not only with a knowledge of their condition, but with a statement that that condition is proper.

In my judgment, the clean bill of lading, once the alleged defect in packing is apparent, takes the case out of the ambit of *Gould's* case (*sup.*) and other authorities to the like effect. The appellant took the bill and may be assumed to have relied upon it to his detriment, in the absence of any evidence to the contrary, and although Mr. Silver may have known that square tins were being shipped to him he was entitled to assume that the shipowners did not regard such square uncovered tins as dangerous in that they had said that the goods were shipped in apparent good order. In *The Tromp* (15 Asp. Mar. Law Cas. 338 ; 125 L. T. Rep. 637 ; (1921) P. 337) it was held that where potatoes were shipped in wet bags described as shipped in apparent good order and condition, the shipowners were estopped from saying that the external condition of the bags was bad. The bill of lading so endorsed affords evidence that externally and so far as meets the eye the goods are shipped in good order and condition : *The Peter der Grosse* (3 Asp. Mar. Law Cas. 195 ; 34 L. T. Rep. 749 ; 1 Prob. Div. 414).

With regard to the allegation that the tins were too thin, the evidence is not sufficient to justify the court in coming to the conclusion that the tins were insufficiently packed. Indeed, there is some evidence that other consignments had been made with tin of precisely the same thickness ; nor does the learned judge appear to rely upon this alleged defect.

In the result, I have come to the conclusion that the defence of insufficient packing is not made out, and, therefore, the defendants are responsible for the damage to the tins to the extent and to the amount mentioned by Scrutton, L.J.

Appeal allowed.

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

Solicitors for the respondents, *Stokes* and *Stokes*, agents for *Cameron*, *MacIver*, and *Davie*, Liverpool.

Friday, Dec. 6, 1929.

(Before SCRUTTON, LAWRENCE, and GREER, L.JJ.)

THE SANDGATE. (*a*)

ON APPEAL FROM THE ADMIRALTY DIVISION.

Charter - party — Dispatch money — Cargo to be taken from alongside " at the average rate of 125 tons per working hatch per day " — Marginal clause — Consignees not obliged to take cargo from alongside at a higher rate than 500 tons per day—Construction—Chamber of Shipping Welsh Coal Charter 1896 (*Form A*).

A charter-party provided that a cargo of coal should be discharged " at the average rate of 125 tons per working hatch per day," and by a marginal clause it was further provided that the consignees should not be obliged to take cargo from alongside at a higher rate than 500 tons per day. The vessel had four cargo hatches, and other non-cargo hatches, such as poop and bridge hatches.

Held, that the expression " working hatch " did not mean cargo hatches, as distinguished from non-cargo hatches, but referred to cargo hatches from which cargo was capable of being worked, as distinguished from cargo hatches from which cargo was incapable of being worked, e.g., by reason of the fact that there was no cargo in

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

the holds to which such cargo hatches gave access. The obligation of the consignees to take cargo was, therefore, not fixed at 500 tons per day, but depended upon the number of cargo hatches from which cargo could be discharged. From those cargo hatches from which cargo was capable of being discharged, the consignees were obliged to take at the rate of 125 tons per day.

Appeal from a decision of an Admiralty Divisional Court (Lord Merrivale, P., and Hill, J. (reported 168 L. T. Jour. 399), dismissing an appeal from a decision of the judge of the Mayor's and City of London Court.

The appellants (plaintiffs), owners of the steamship *Sandgate*, claimed from the respondents (defendants), who had acted as brokers for the charterers of the *Sandgate*, the sum of 55*l.* 18*s.* 9*d.*, which the respondents claimed to be entitled to retain as dispatch money due under the terms of a charter-party under which the *Sandgate* had been chartered to carry a cargo of coal. The charter-party provided that dispatch money should be payable at the rate of 15*l.* for a running day or *pro rata* in respect of time saved at the port of discharge. It was further provided that the cargo should be taken from alongside by the consignees at the average rate of 125 tons "per working hatch per day"; and by a marginal clause it was also provided that the consignees should not be obliged to take cargo from alongside at a higher rate than 500 tons per day. The *Sandgate* had four hatches which were used as cargo hatches and certain hatches, such as the bridge hatch and poop hatch, which were not used for the discharge of cargo. The shipowners claimed that the meaning of the charter-party was that the consignees were obliged to discharge at the rate of 125 tons per day from each hatch other than hatches which were not cargo hatches (such as the bridge or poop hatch), whether discharge was in fact capable of proceeding from such cargo hatches or not; on this basis only five-and-a-half hours had been saved by the charterers. The respondents contended that the expression "per working hatch per day" meant per cargo hatch capable of being worked in the circumstances, and excluded cargo hatches which were incapable of being worked, as, for example, where the cargo in the hold had already been completely discharged. On this construction of the clause the charterers had saved three days and twenty-three hours, and were entitled to retain dispatch money amounting to the above sum. The judge of the Mayor's and City of London Court gave judgment in favour of the defendants.

The plaintiffs appealed.

Clement Davies, K.C. and *W. R. Howard* for the appellants.

Raeburn, K.C. and *G. St. C. Pilcher* for the respondents.

Oct. 17, 1929.—Lord Merrivale, P.—I confess I have found this a very interesting little controversy between the parties. I was impressed yesterday by Mr. Clement Davies' argument, who, as was to be expected, presented a captivating view of the facts from the point of view of his clients, the shipowners. It was necessary, however, to hear the other side and to consider the arguments of both sides in relation not only to the documentary matter here, but to the subject-matter, and to remember that this is a business transaction—a business transaction of the discharge of a cargo of coal carried from South Wales to Rosario. The bulk of the cargo was estimated at about 4600 tons. The vessel was a vessel which had numerous holds; apparently she was alternatively used for grain cargoes and for other cargoes—she had numerous holds and numerous hatches—and the charterers for coal, dealing with the vessel about which there does not appear to be particular knowledge except what can be got from a plan, chartering for coal to be discharged in a port as to which it is presumed they had knowledge in respect to its facilities, and so forth, have modified a common form of charter-party to deal with the particular case, and what is being done here is to see what it is really the parties have agreed as to lay days, and consequently as to these two matters which depend upon the lay days, demurrage in the one event and dispatch money in the other possibility. That is done to see what the parties have agreed, having regard to the subject-matter, the position of each of them, the terms of the common form contract, and the special provisions which the charterers introduced for their advantage.

What you find is that the common form charter-party provided for a rate of freight payment at the option of the consignees of the cargo either at the actual delivery or bill of lading quantity minus 2 per cent.; it provided for that and dealt with the bulk of the cargo. Then came the question with regard to discharge. The charter-party provides that the consignees are to discharge. They are to discharge over the side at the ship's expense and they are to receive the cargo and remove it as one of the terms of their primary obligations. As the common form charter-party is framed, it provides for a standard rate of discharge irrespective of the number of holds and governed by the number of available days, so many tons a day—cargo which is roughly 4600 tons, so many tons a day. The appellants here, the shipowners, say that the contract means 4600 tons, or as the case may be, to be discharged at the rate of 500 tons per available day.

When you come to reflect about that you wonder why, if they meant that, they did not say so—why they deviated into these various specific matters, with that simple proposition of 500 tons per available day. But they did not. You have to look at what they actually did, what they consented to, in order to see what they conceded to the charterers and consignees. The charterers knew less about the ship than the shipowners; but here was a ship

with a good many hatches and more than four holds; it appears by the bill of lading, and what is admitted to be one of the contents of the bill of lading, that what was in question here for the carriage of coal was four holds, and that there were to be working hatches of four holds—it would be four working hatches when there was work to be done—and in that state of the matter the consignees required this, that the average rate at which they were to discharge was 125 tons per working hatch on the available days; and they added a memorandum that they were not to be obliged to take the cargo away at a higher rate than 500 tons a day. That was a provision for their protection, not something which they had undertaken as governing the standard rate of discharge. What they undertook as governing the standard rate of discharge was discharge at the rate of 125 tons per working hatch, and that being so, it has been quite rightly recognised both at the hearing below and in the arguments here that what you have in truth to determine here, is, what is meant, upon the fair view of the facts and documents, by that term "per working hatch."

As I say, I was much impressed by the mode in which Mr. Clement Davies presented this, and I could see what a simple and in some respects advantageous contract it would be if you worked it out so that there was a governing figure. That is only a general observation. What does "125 tons per working hatch per available day" mean? When you come to look at the facts of this case, "working hatch" does not mean a hatch capable of being used for the discharge of the hold, as I think. That has so wide a meaning that it would be impossible to apply it as between business people, and I do not think it means a hatch in which there had been coal, a hatch which had been used for the discharge of coal. I think it is a business provision that so long as the consignees are proceeding in a businesslike way with the discharge of the ship, not playing tricks with it, such as were suggested, they are fulfilling their obligation if they discharge 125 tons from each hatch at which coal can at that time be discharged. That is what I think is their obligation. That view is helped by the later words in the second line of clause 7 in the charter-party, to which my brother called attention, "provided the vessel can deliver it at this rate." If there is coal in the hatch and in the course of work regularly done it can be delivered, there is a working hatch, and you are to go on working, applying your standard at per hatch and not for the bulk of the cargo at per day until you have found out that the consignees have fulfilled their obligations.

As I have said, I was very much struck with the simple proposition which was put by the appellants, but I have come to the conclusion very definitely that it is wrong and that the learned judge was right in holding that these consignees having completed the discharge at a better rate than 125 tons per working hatch—interpreting "working hatch" in the sense as I understand it—were entitled to say to the shipowners: "Now you must pay dispatch money for the working time we have saved by discharging at a greater rate than that at which we were bound to discharge." It is a simple proposition when one has all the materials for working it out.

The conclusion at which I arrive is that the learned judge was right in his decision.

HILL, J.—I agree. The right of the charterers depends upon the correct ascertainment of the lay days under the charter. The form of charter used is one of the Chamber of Shipping documentary forms, and provides for the ascertainment of lay days by putting upon the charterer the obligation to take delivery at an average rate of so many tons per day, Sundays and holidays excepted, provided the ship can deliver at that rate—125 tons per working hatch per day—with a proviso that the charterers shall not be bound to take more than 500 tons. The shipowner contends that as soon as the number of hatches is ascertained the quantity is fixed; two hatches, 250 tons; three hatches, 375 tons; four hatches, 500 tons; and, but for the proviso, with five hatches, 625 tons. If that contention is right the obligation is the same throughout the discharge of the whole cargo, whether a smaller hold has already been emptied or not. They say that the word "working" is only used to denote cargo hatches as distinguished from other hatches, such as bunker hatches. If so, one does not know why they did not say "cargo hatch," which would have been a simple expression to have used, but if the effect is as contended by the shipowner it is not easy to see why the shipowner, who knew his own ship and knew that he had four cargo hatches, did not say 500 tons a day in accordance with the printed form. He did not. The agreement with the charterers has the words "working hatch," which is not a very common form of expression.

The charterers contend that "working hatch" means something more than cargo hatch and has reference to the actual working of the ship; that it denotes a hatch which can be worked because there is cargo underneath it waiting to be discharged. The charterers recognise an obligation to take delivery at 500 tons while all four holds can discharge, but if when working at the rate of 125 tons per hatch per day one hold is emptied, and the hatch can no longer be worked, then the charterers contend that the obligation to take by the other hatches is not increased but remains at the same rate: 125 tons per hatch.

I think that is a sound contention. Test it in this way. Suppose the discharge began at the beginning of the lay days at all four hatches and continued at 125 tons per hatch per day, then in this particular case before the sixth day was out No. 1 hatch would be emptied and before the seventh day was out No. 4 hatch would be emptied, and from that time forward the ship cannot deliver at the rate of 125 tons,

or, at any rate by hatches No. 1 and No. 4, because they have no cargo under these hatches which they can get out. The ship in such case seems to have become, and in fact is, incapable of giving delivery by those hatches. Those hatches have ceased to be working hatches, but the obligation to take delivery still remains an obligation to take delivery at the rate of 125 tons per working hatch. The fact that two of the hatches No. 2 and No. 3, can still work while No. 1 and No. 4 cannot work does not seem to me to convert the obligation from an obligation to take 125 tons per hatch into an obligation to take 250 tons per hatch. In the same way, on the eleventh day, I think it is, or the beginning of the twelfth day in this case, working at 125 tons per day from the beginning of the lay days, No. 3 was emptied, the shipowner could not deliver any more coal by No. 3, but there was still some coal left in No. 2. It does not seem to me that that fact converted the obligation to take 125 tons per No. 2 working hatch into an obligation to take either 250 or 375. The obligation continued to take 125 until it was emptied, and then the lay days expired. That seems to me to be the business of this thing, and the only way to give any force to the use of the word "working" before "hatch."

It is said that the proviso limiting the obligation of the charterer to take a maximum of 500 tons a day was somehow inconsistent with that. I cannot see it in the least. The shipowner knows how many hatches he has got; it may be that the charterer does not know how many hatches; and he says: "You say you want four hatches; at any rate "I must not be called upon to take more than 500 tons a day." Nor do the words in the dispatch clause about "lay days in this connection to be calculated on bill of lading quantity without deductions" really affect this question. It seems pretty clear what the object of that is. "Freight payable by bill of lading per quantity delivered or at charterer's option on bill of lading quantity less 2 per cent." This only applies if instead of ascertaining your lay days either upon quantity delivered or upon bill of lading quantity less 2 per cent., you are to take the actual bill of lading quantity. As to the suggested difficulty of the shipowner in knowing what the lay days are going to be, there is nothing in it at all, because it appears from the charter-party that a bill of lading was to be issued and presumably was issued specifying the quantity of tons in each of the respective holds. I suppose worked out most accurately you would take these several quantities and start with 500 and go on reducing to 375, reducing to 250 and finally to 125; but you get exactly the same result, and the shipowner would have no difficulty in doing the arithmetic; if he took the quantity in the hold which contains the largest quantity and divided that by 125, then that would give you the period in which the discharge had to be carried out, and you would then take into account Sundays and holidays.

I think the learned judge was right.

The appellants appealed.

Clement Davies, K.C. and *W. R. Howard*, for the appellants.

Raeburn, K.C. and *G. St. C. Pilcher* for the respondents.

SCRUTTON, L.J.—We need not trouble you, Mr. Raeburn. The appellants have to satisfy us that the court below are wrong in their opinion of an ambiguous and mysterious clause. It may be that that puts a considerable burden on the appellants when it is difficult to say what the clause means, but I think I have come to a conclusion as to what the clause means. Whether the parties meant it, I do not know, but they have used certain words.

From the freight due by them the charterers have deducted a certain sum for dispatch money, nearly four days. The shipowner says they were not entitled to deduct so much for dispatch money—they were only entitled to deduct, I think, five-and-a-half hours. To find out what dispatch money is due you must find out what time was allowed for discharging the ship, because dispatch money is generally due because the ship is discharged sooner than the time allowed for under the provisions of the charter. The clause as to the time for discharging is this: "The cargo to be taken from alongside by consignees at port of discharge, free of expense and risk to the vessel, and at the average rate of 125 tons per working hatch per day weather permitting," with a marginal clause: "Consignees shall not be obliged to take cargo from alongside as per clause 7 at a higher rate than 500 tons per day." Mr. Clement Davies, in addressing his captivating argument to us, said that means that the ship is to be dispatched at the rate of 500 tons a day. If it is so it is a great pity that the parties did not use that very simple and well-known clause. What they do say is this: "Shall not be obliged to take cargo from alongside . . . at a higher rate than 500 tons per day," which is not the same as saying that they must take cargo from alongside at the rate of 500 tons a day. Instead of putting it in the very simple way that Mr. Clement Davies suggests that they should have put it, they do this: First of all they do not say it is to be done in so many days—apparently that will not suit them, though that would be a simple way of doing it—but they do not say that the cargo is to be taken out in so many days. They do not say that the cargo is to be discharged at a certain rate per day—that apparently does not suit them. They do not want to say so much each day is to be discharged, and so they put in the word "average," by which more may be discharged one day and less another day, so long as you get an average rate. Then, apparently, that still will not do. They do not want to say at an average rate of so much per day. They do say "at the average rate of 125 tons per working hatch per day," and Mr. Clement Davies says to us there

are always the same number of working hatches whether there is coal in them or not. But if so there was no need to put in this roundabout phrase of "per working hatch per day," because the hatches being the same every day you could, by putting in a rate per day, have calculated on the same number of hatches every day. They put in something different to that. They say "at the average rate of 125 tons per working hatch per day." That appears to me to assume that there may be a different number of working hatches on one day than what there is on another. If one considers why there may be a different number of working hatches on one day as compared with another, the answer may be that the hatch is not a working hatch if there is no coal in it to work, but the hatch may be a working hatch if there is coal in it and you do not work it. In the original form in which it came into charter-parties, the definition of a working day was a day on which ships in the port ordinarily worked, although a particular ship did not work on that day. A working hatch in the same way, it seems to me, is a hatch with coal in it on that day, and the fact that you do not happen to work it on that day does not prevent it being a working hatch which you ought to have worked, and which must be taken into account on the average.

I come to the conclusion, therefore, that you cannot read this roundabout form as a roundabout way of saying what might have been said quite simply: "I will discharge 500 tons per day out of four cargo hatches, 125 tons for each hatch." What it does mean is to assume that the amount may vary per day, according as there is a working hatch—a hatch which you can work because there is coal in it. Whether it was a reasonable agreement to make or not, it is not for me to say. The parties have made it in that form and not in the simple form in which they would have made it if Mr. Clement Davies' construction had been right.

For these reasons I think that the two courts below came to the correct view of what this phrase means. If shipowners do not like it the obvious course for them is not to go on putting into the form of charter the additional words "working hatch," but to leave the charter as it was originally—so many tons per day, weather permitting. The appeal must be dismissed with costs.

LAWRENCE, L.J.—I agree. Mr. Clement Davies has not satisfied me that the decision of the learned judge in the Mayor's and City of London Court, or the decisions of the learned judges in the Divisional Court were wrong, and, in these circumstances, I think that the appeal fails and should be dismissed.

GREER, L.J.—I agree with the decision of the learned judge in the Mayor's and City of London Court; I agree with the two judgments that have been delivered in the court below, and with the two judgments that have been delivered in this court, and as the sixth judge who has to exercise what he pleases to call his mind on this subject, I do not think it necessary to add anything to what the other five judges have said.

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

Solicitors for the respondents, *Ballantyne, Clifford*, and *Co.*

Dec. 4, 5, *and* 6, 1929.

(Before SCRUTTON, LAWRENCE and GREER, L.JJ., assisted by Nautical Assessors).

THE TOVARISCH. (*a*)

Sailing vessel — Lights — Green pyrotechnic light shown to a steamship — "Flare-up" light—Whether green pyrotechnic light authorised by the regulations—Regulations for preventing Collisions at Sea 1910, *arts.* 1, 12.

Article 1 *of the Regulations for Preventing Collisions at Sea*, 1910, *provides that no lights which may be mistaken for the prescribed lights shall be exhibited. Art.* 12 *provides that a vessel may if necessary in order to attract attention, in addition to the lights which she is by the rules required to carry, show a flare-up light.*

Held, that a green pyrotechnic light, of the type which is held in the hand of the person exhibiting it, displayed upon the starboard side of a sailing vessel, is not a light which can be mistaken for a prescribed light; that the flare-up lights, the use of which is authorised by art. 12, *are not limited to white lights, but may include a green light; and that there had been no breach of the regulations.*

APPEAL from a judgment of Hill, J. assisted by Elder Brethren (*ante*, p. 58; 141 L. T. Rep. 611; (1929) P. 293), holding the appellants, owners of the Russian sailing vessel *Tovarisch*, who were defendants in the court below, to blame for a collision between the *Tovarisch* and the respondents' steamship *Alcantara*, which took place in the English Channel on the night of the 24th Feb. 1928.

The collision took place in the following circumstances: When first sighted both side lights of the *Alcantara* were seen by those on board the *Tovarisch*, but subsequently the red light of the *Alcantara* closed, and although the vessels were then in a position to pass each other all clear starboard to starboard, those on board the *Tovarisch* exhibited on the starboard side of the bridge a green pyrotechnic flare-up light. The light was not exhibited in a lantern or screened but was of the type which is held in the hand of the person exhibiting it, and shows an "all-round" light. The *Tovarisch* at the same time that the flare was exhibited,

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

commenced to starboard. Upon seeing the green "flare-up" light, the *Alcantara* apparently ported or hard-a-ported, bringing the two vessels into collision.

The Regulations for Preventing Collisions at Sea 1910, provide as follows:

Rules Concerning Lights.—Art. 1. These rules concerning lights shall be complied with in all weathers from sunset to sunrise, and during such time no other lights which may be mistaken for the prescribed lights shall be exhibited. . . .

Art. 12. Every vessel may, if necessary in order to attract attention, in addition to the lights which she is by these rules required to carry, show a flare-up light. . . .

Hill, J. held that Art. 12 did not authorise the use of a green or red pyrotechnic light, and that a "flare-up" light meant an ordinary light, and not a specially coloured flame. He held further, upon the answers of the Elder Brethren, that those on board the *Alcantara* must have been deceived by the flare-up light exhibited by the *Tovarisch*, and that the *Tovarisch* was alone to blame for the collision.

The owners of the *Tovarisch* appealed.

Dunlop, K.C., *Stranger* and *Krougliakoff* for the appellants.—The learned judge was wrong in holding that the *Alcantara* was deceived by the light exhibited by the *Tovarisch*. The light was not forbidden by the Regulations. There is nothing to restrict the use of "flare-up" lights to white lights. A coloured flare-up light may be used, provided that it cannot be mistaken for any of the prescribed lights. The light used by the *Tovarisch* could not have been mistaken for anything but a prescribed light. The collision was solely caused by the action taken by the *Alcantara*.

Langton, K.C., *Digby*, K.C., and *Cyril Miller*.—The regulations only permit the use of a flare-up light when "necessary to attract attention." The vessels in the present case were green to green, and there was therefore no necessity for the *Tovarisch* to attract the attention of the *Alcantara*. The *Tovarisch* was rightly held alone to blame.

Dunlop, K.C. replied.

SCRUTTON, L.J.—This case is one of some difficulty owing to two rather unusual features. In the first place, unfortunately, the whole of the people—or almost the whole of the people—who could give evidence as to the proceedings on one of the ships, as being on board that ship, are drowned. Consequently, with the exception of one man from the engine room who ran up on deck and caught the bowsprit of the other ship as it stuck over his deck, everyone else on board the Italian steamer went to the bottom and was drowned, and the court has to make up its mind as to what happened with only the evidence of one side. To one side that may be some advantage, inasmuch as it is the unfortunate position in the Admiralty Court that you do not always get the whole truth from every witness, but, on the other hand, undoubtedly the steamer that is lost is at a disadvantage in not having anybody to contradict the story told by the witnesses on the other side, who, unfortunately, can feel that they have a free hand. The other somewhat unusual feature is this, that very great importance is attached in the judgment below, both by the judge and the assessors, to the somewhat unusual incident, in my experience, of a green flare being burnt in the course of the proceedings on the ship that survived, and the questions as to the right to burn a green flare, and the effect which ought to be produced on anybody seeing a green flare, are undoubtedly somewhat novel in the practice of the Admiralty Court.

The learned judge, as I read his judgment, has not said that he accepts the whole story of the surviving ship. He has said what the story of the surviving ship was, and he has drawn certain inferences from it, but he has not, as I follow his judgment, said expressly or explicitly, "I accept all the story of the surviving ship."

The collision takes place on a hazy, dark night in the English Channel, off Dungeness, between a four-masted sailing ship which is being used as a training ship for cadets by the merchant marine of the Soviet Government and an Italian steamer, the *Alcantara*. The *Tovarisch*, a four-masted sailing ship, nearly 300ft. long, on the night in question, not carrying any sails on her aft mast, is coming down Channel on a course of S. 60° W. The *Alcantara*, bound up Channel to Calais, and very likely having made a course to pass south of the Varne light, is coming on a course of N. 80° E., and, I think, the learned judge accepts the view that the *Alcantara* is seen, when she is seen by those on the *Tovarisch*, about three-quarters of a mile distant—but of course the distances must be always a matter of guess work—showing her masthead light and her two side lights to the *Tovarisch*. Shortly afterwards she shuts in her red. That may be due either to her changing her course by starboarding, or it may be due to the *Tovarisch* proceeding on her course, and working ahead on the line of course of the *Alcantara*, or it may be due to both. But I think the learned judge has accepted that that is what happened. Having shut in her red, the two boats become green to green, and at that stage the *Tovarisch* does what the learned judge, I think, regards as the vital point in the case, the *Tovarisch's* green screened light being comparatively near her bows, the officer on deck of the *Tovarisch*—who was on a bridge which had been erected somewhere near her third mast (what he calls the second main mast)—burns, on her starboard side, a green flare, so that if the *Tovarisch's* green forward light was showing there are two green lights burning on her starboard side (the lamp and the green flare), and there is, undoubtedly, a question as to exactly how the green flare would show on the sails of her main mast and second main mast—her second and third masts. The learned judge has

obviously been very interested in the appearance and disappearance of various flares from the regulations, and he has devoted some two or three pages of his judgment to a very careful and industrious—and I have no doubt accurate —history of the appearance and disappearance of various flares and various colours, from the regulations. I am more concerned with the position of the regulations as they stood at the time the *Tovarisch* did exhibit her green flare. One of the most relevant regulations appears to me to be the first, which is the first rule of the group relating to lights. "Rules concerning lights shall be complied with in all weathers from sunset to sunrise, and during such time no other light which may be mistaken for the prescribed lights shall be exhibited." In my view that is only a prohibition of lights which may be mistaken for the prescribed lights. When one comes to think of it it must be so. Look at a liner coming down the channel, how many hundred lights does she exhibit? A light in every port hole, lights from every deck cabin, all sorts of lights besides the prescribed lights, and she is not breaking any regulation, because they cannot be mistaken for the prescribed lights—the green and red side lights and the one or two masthead lights, according to her length—and I am unable to read art. 1 as being a rule prohibiting all lights other than the prescribed lights—it does not say so.

It does prohibit all other lights which may be mistaken for the prescribed lights, and I asked myself this—for what prescribed light is a green flare, exhibited on the starboard side, likely to be mistaken? After listening to the various ingenious speculations that counsel, from their knowledge of the matter, have provided, my answer is none—I do not see any—any prescribed lights for which a green flare aft on the starboard side can be mistaken. I am told to look on further, and to look at reg. 12: "Every vessel may, if necessary, in order to attract attention, in addition to the lights which she is by these rules required to carry, show a flare-up light or use any detonating signal that cannot be mistaken for a distress signal." The article, therefore, contemplates that if it is necessary to attract attention a flare-up light may be used—which must be read with art. 1, which prescribes that you must not use a flare-up light which may be mistaken for one of the prescribed lights. The learned judge asked the Trinity Masters to advise him: "What was the *Alcantara*—the Italian steamer that is—to think of it?" I have asked the Elder Brethren. They say they would have regarded it as an imperative demand to take action—a warning to the *Alcantara* that she was doing something dangerous, and "an urgent call to her to do something different." We are not treating this case as an appeal from assessors to assessors. Our superior authority—the House of Lords—has told us we must not do so. We are endeavouring to follow the instructions of the House of Lords in *The Australia* (17 Asp. Mar. Law Cas. 86; 135 L. T. Rep. 576; (1927) A. C. 145) and the group of cases in the same volume; that we are the judges, and we are to regard the gentlemen who assist us—and the gentlemen who assisted the judge below—as witnesses, and we are to form our opinion, as judges, on the combined evidence of the four witnesses, and not take the view that because the two witnesses whom we see in the flesh contradict the two witnesses whom we have not seen in the flesh, that, therefore, we should follow the witnesses whom we see rather than the witnesses whom we do not see. Of course, it is necessary to point out—and indeed it is obvious—that the four assessors are a very funny sort of witnesses. The judge in the Admiralty Court talks to them, and gets information from them. The parties do not know what the witnesses are saying; they do not know what they are telling the judge; they have no opportunity of cross-examining the so-called witnesses. Indeed, in the Admiralty Court, the practice is not followed which we—in obedience to the direction of the House of Lords—follow, the practice of asking questions in writing, and obtaining answers in writing, and sending them up to the superior court. We do not know the terms of the question except from what the learned judge says in his judgment. So that we start with two witnesses whose evidence the parties do not hear, and whom the parties have no opportunity of cross-examining, and then come to this court, and we have to decide the case with two witnesses whom the judge below did not hear.

We do in this court—since the House of Lords has requested us to do so, put a question in writing and obtain an answer in writing—which is available for the parties and for the House of Lords, but, again, the parties have no opportunity of cross-examining these so-called witnesses, and it appears to me to be very odd that we are dependent on the evidence of witnesses whose evidence is not given to the parties, and whom the parties have no opportunity of cross-examining. However, we endeavour to follow the instructions of the House of Lords, and treat them as witnesses, and form our judgment on the evidence they give between them.

As to showing the green flare we have asked our particular witnesses, whom we have the opportunity of asking, "what information, if any, would a reasonably skilful seaman obtain from the *Tovarisch* burning a green flare aft to a steamer then green to green." And the gentlemen who assist us answer "He"—that is the reasonably skilful seaman—"ought to grasp that here was a ship that wished to direct special attention to herself, and was using the best available method of showing her character." We read that answer as meaning that she is showing her character by showing that she is a long sailing ship possibly by being lit aft, directing more light on the sails than the green forward-side light would do. I cannot see in that—in view of art. 12—any breach of any regulation, and I, therefore, start with a green light—green flare—

shown to call attention, in the best available way to the character of the *Tovarisch*, which character, as I say, I take to be that of a long sailing ship. Then comes the next, and to my view, the cardinal statement in the case, that when the green flare was burnt the *Alcantara* ported, hard-a-ported, and did not, at that time, take any action with her engines. She stopped later, she never reversed. Now the learned judge in his judgment, having uttered the passage that I have read, says "in these circumstances the Elder Brethren would have regarded the green flare as 'an urgent call to her to do something different,'" from what she was doing, and what she was doing at that time was passing green to green. "In these circumstances they are of opinion that the *Alcantara* could not be blamed for porting or hard-a-porting; so also with regard to the engines, they think the *Alcantara* cannot be blamed for stopping instead of reversing. The master of the *Alcantara* would be right if he thought 'I may be wrong if I keep ahead; I may be wrong if I go astern; I will stop and see.' What the *Alcantara* did in fact contributed to the collision, but it was not the fault of the *Alcantara* that she did it. The burning of the green light was the cause and was negligent and the *Tovarisch* is to blame." That I understand to be the statement of the learned judge, having heard the witnesses who sat beside him, showing a green flare tells you to do something that you are not doing at present, and it is because of your porting, and crossing the bows of the sailing ship, which you are forbidden by the regulations to do, and, therefore, you, the *Tovarisch*, are to blame. Without any more witnesses I am quite unable to understand that. I cannot understand, having listened, with all the intelligence I can, to the illuminating addresses of counsel, I cannot understand why burning a green flare, tells you to break a regulation by coming ahead of a sailing ship. I can understand the suggesting that burning a green flare may tell you not to go astern of the green light, you see too close, because I am a long sailing ship. I can understand that, but I cannot understand—I have been quite unable to understand—how burning a green flare tells you to cross the bows of an approaching sailing ship. However, I have to attend to the witnesses rather than use my own nautical skill, and we, accordingly, asked the gentlemen who advise us: "Was the *Alcantara* guilty of any, and what, breach of reasonably skilful seamanship when, green to green, she saw the green flare, and (1) ported," and they answer "yes"; "(2) did not reverse at all or stop engines till just before the collision," and they answer again "yes." Considering the four witnesses, and the view of the judge below, I come to the conclusion—which I had already come to before my witnesses answered that question—that the *Alcantara*, in porting, was guilty—as indeed, the judge says—of something that was the cause of the collision, and had no excuse, as a matter of seamanship, for porting in front of the advancing sailing ship. Then there remains the question, the *Alcantara*, being thus to blame, what about the *Tovarisch*? The *Tovarisch* at the time she lighted the green flare hard-a-starboarded. That is to say she did not keep her course, and when the red opened again on the *Alcantara*, and the one blast was blown, showing that the *Alcantara* was crossing the bows, she, instead of continuing her hard-a-starboard movement, put her helm hard-a-port. It is suggested, and it may be so, that she altered about half a point under her hard-a-starboard helm, and about a point back under her hard-a-port helm, and the collision which actually happened was at an angle of 45 degrees pointing aft. So that if her hard-a-port helm had worked a little longer possibly she might have escaped the collision. On the other hand, it is suggested that if, instead of hard-a-porting, she had kept on with her hard-a-starboard helm she might have got through just parallel with the boat that was crossing her bows. It does not seem to me—and I am advised—that the hard-a-starboarding had anything to do with the collision. I have had doubts, left to myself, whether the hard-a-porting was right, or whether its absence would have avoided the collision, but again, we have asked the witnesses whom we have here this question: "Was the *Tovarisch* guilty of any breach of reasonably skilful seamanship (1) in not keeping her course, but putting the helm hard-a-starboard and showing a green flare, when the vessels were green to green?" and they answer, "No." "(2) When she saw the *Alcantara* porting, and her red light opening again a minute before the collision, or a little more, in hard-a-porting, and not continuing her hard-a-starboarding?" Again they answer "No." The witnesses below had answered the question in this way: "Whether the *Tovarisch* was justified in starboarding immediately she lost the red light depends on whether the risk was finally at an end." The position was similar to that of steamships on crossing courses where the duty of the stand-on ship to keep course and speed continues until the ships have definitely passed out of the phase of crossing ships: (See *The Orduna*, 14 Asp. Mar. Law Cas. 574; 122 L. T. Rep. 510; (1919) P. 381). The Elder Brethren are of opinion that it was not right for the *Tovarisch* to starboard as soon as she did. It is a difficult question, and I need not decide it. So that the two witnesses below were giving one opinion, and the two witnesses above giving another opinion. The judge himself did not decide the question at all. What he would have done if he had heard the two witnesses above I do not know, but he did not decide the question. I, having heard the four witnesses, on a matter on which I should hardly feel myself competent to form a very decided opinion, adopt the view of the two witnesses who are here advising us. Then the judgment goes on: "As to the hard-a-porting of the *Tovarisch* the Elder Brethren advise me, and I entirely agree, that it was the worst thing the *Tovarisch* could have done." The

learned judge accepts their view. If by hard-a-starboarding the *Tovarisch* would have got parallel with the *Alcantara*—if that were the fact—then, of course, it seems to me that hard-a-porting was the wrong thing to do, but, considering in the best way I can, the contradictory opinions I have received I am not satisfied that the hard-a-starboarding by itself would have avoided the collision. I think it is much more likely that it would have produced either a right-angle blow or a blow leading aft at very nearly a right-angle, and, if so, the collision would have been just as bad as it was, in the result that happened, namely, the vessel would have gone to the bottom in the same way.

Having given the best consideration I can to the evidence of the cloud of witnesses with which I am encompassed, I come to the conclusion that the *Tovarisch* is not to blame, and the *Alcantara* is to blame. The result, therefore, is that the claim fails, the counterclaim succeeds, and there must be judgment for the *Tovarisch* on the claim and the counterclaim.

I only want to say one thing more. Mr. Dunlop, for the *Tovarisch*, began his address to us by an appeal, or suggestion, that his clients had been unjustly condemned for not taking sufficient action after the collision to save the lives of the people who were lost on board the *Alcantara*, and he was proceeding to investigate, with great care—his usual care—what had happened after the collision, when we stopped him, and we said—as I say now—that we are not going to express any opinion on the conduct of the *Tovarisch* after the collision for the reason that it is irrelevant to the issues we have to decide. Before the Maritime Conventions Act 1911, it would have been relevant, because then failure to take steps to save lives by helping the other ship after a collision was *primâ facie* proof of a breach of the regulations. That was abolished by the Maritime Conventions Act 1911, and since then, in my view, what the ship that has sunk the other does after the collision in the way of saving life, or does not do after the collision in the way of saving life, is quite irrelevant to any question which the court has to decide, and, therefore, I do not express any opinion—we do not express any opinion—on the conduct of the *Tovarisch* after the collision. I only say this, that if the *Tovarisch* should be unfortunate enough to have another collision, no doubt what has happened in this case would lead her master, and those in charge of her, to be particularly careful that they did nothing which might lead to unpleasant remarks being made about them in the way they have been made in this case. As I say, we express no opinion as to the justice or injustice of any such remarks that have been made.

LAWRENCE, L.J.—I agree, and but for the fact that we are differing from the decision of the learned judge in the court below I should have contented myself with simply expressing my concurrence with the judgment of my Lord. Out of respect, however, for the learned judge I will add a few words of my own.

The first question which calls for determination is whether the regulations prohibit the showing of a green flare-up light. The answer to this question depends upon the true meaning of arts. 1 and 12. Art. 1 provides that the rules concerning lights shall be complied with in all weathers from sunset to sunrise and during such time no other lights, which may be mistaken for the prescribed lights, shall be exhibited. I read that, not as a prohibition against showing any lights other than the prescribed lights but only as a prohibition against the exhibition of such other lights as might be mistaken for the prescribed lights, thus impliedly authorising the exhibition of any lights which might not be so mistaken. Art. 12 expressly authorises the showing of a flare-up light or the use of any detonating signal that cannot be mistaken for a distress signal, if necessary, in order to attract attention and in addition to the lights which, by the rules, are required to be carried. Hill, J. has held that the only flare-up light authorised by this article is a white (or possibly a blue) flare-up light, and consequently that the *Tovarisch* committed a breach of the regulations by showing a green flare-up light. In arriving at this conclusion the learned judge has founded himself upon a review of the relevant earlier regulations from the year 1863 down to the present time.

In my judgment that course, however interesting from the student's point of view, is not the proper way of construing the Regulations of 1910 which, it must be borne in mind, were the only regulations governing at the time, and have to be observed not only by British but also by foreign seamen. I think it is too much to expect from either a British or foreign seaman that he should have all the earlier regulations in mind. His only duty is to study and observe the present regulations, and to act according to the directions which on their true construction are thereby given. It is to be observed that art. 12 imposes no condition as to the colour of the flare-up light which may be used. Whenever a light of a particular colour is required to be shown, the regulations indicate that colour. For instance, in art. 2 the colours of the side lights, and the colour of the masthead light are definitely prescribed. The learned judge held that with regard to flare-up lights there was no necessity to prescribe the colour because such lights must necessarily be of a white (or blue) colour. That view is in my opinion mistaken, and moreover is negatived by the provision in art. 9 (*d*), par. 2, that, in certain events, a sailing vessel is to show a white flare-up light or torch, thus indicating that the regulations contemplate that there may be flare-up lights of other colours than white.

The conclusion I have come to is that, on the true construction of the regulations there is no prohibition against showing a flare-up light of any colour always bearing in mind that under reg. 1 every light shown must be of such a character as not to be mistaken for one of the prescribed lights. In the present case there is no evidence, or even suggestion, that the green

flare displayed by the *Tovarisch* was, or could be, mistaken for one of the prescribed lights, and I have, therefore, come to the conclusion that the *Tovarisch* did not commit a breach of the regulations in so far as the colour of the flare-up light is concerned.

The other questions in this case are questions which relate to the conduct of the respective officers in charge of the two ships, and to the navigation of those ships, and I confess to having felt considerable hesitation in differing, on matters of that kind, from the judgment of the experienced judge in the court below, arrived at with the assistance of the Elder Brethren. But having had the assistance of counsel and assessors, I am encouraged to express my own views especially as the judgment which has just been delivered by my Lord agrees entirely with the opinion which I formed during the progress of the case in this court.

In the first place, dealing with the flare-up light exhibited by the *Tovarisch*, Mr. Langton has argued that the *Tovarisch* ought not to have exhibited any flare-up light at all as, at the time when it was exhibited, there was no necessity to call attention of the *Alcantara* to the *Tovarisch*. The officer in charge of the *Tovarisch* who showed the flare justified his action on the ground that as the *Alcantara* was approaching somewhat close to the *Tovarisch* he desired to call attention to the length and character of his ship in case the *Alcantara* might attempt to pass too close under her stern. We have had advice on that matter, and it seems to me that it cannot properly be said that in the circumstances the showing of a flare was an unreasonable act on the part of the officer in charge of the *Tovarisch*. It may not have been absolutely necessary at the time, because the vessels were green to green, but the action was one which in my opinion an officer, in charge of such a vessel, might reasonably have taken. That being so, I have come to the conclusion that the action of the officer in charge of the *Tovarisch* in showing a green flare-up light at the time when he did was justified.

As to the action taken by the *Alcantara*, she immediately on seeing the green flare-up light on the *Tovarisch*, hard-a-ported, keeping her speed. I confess that I have throughout been, and still am, totally at a loss to understand how such action could be justified. She was green to green with a sailing ship close on her starboard bow. That sailing ship showed a green flare. Assuming that the flare puzzled her, or was treated as a demand to take some immediate action, I cannot think that it justified her in steering straight into, or right across the bows of, the sailing ship. At most it could only properly be taken as a demand on her to stop or reverse, or possibly to sheer off by starboarding. It is suggested by Mr. Langton that the flare-up light might have indicated to the *Alcantara* that there were nets ahead which she ought to avoid. That suggestion seems to me far-fetched, and somewhat fantastical. In the result I am of opinion that the *Alcantara* was to blame for the action she took on seeing the flare.

As to the *Tovarisch*, simultaneously with showing the green flare-up light she hard-a-starboarded. At that time, as I have stated before, the vessels were green to green, and I think there is a good deal in Mr. Dunlop's contention that the vessels never were crossing vessels within the definition of the rule, and that if they had at any time been crossing vessels, that phase had passed when the *Tovarisch* hard-a-starboarded. Be that as it may, however, we have been advised, and it seems to me common sense, that the *Tovarisch* in hard-a-starboarding, was not in any way endangering her own safety, or the safety of the vessel on her starboard bow. By starboarding she was sheering away from that vessel, and even if they were crossing vessels and the crossing phase were not quite over, her helm action would in no way embarrass the approaching ship; on the contrary, it would give her more room than she had before. In my opinion, therefore, no blame attaches to the *Tovarisch* for her helm action at that stage, nor can that helm action be made use of, as Mr. Langton sought to do, for his contention that it subsequently prevented the *Tovarisch* from coming over to starboard on the port helm as quickly as she would otherwise have been able to do.

The learned judge has held the *Tovarisch* to blame for not continuing on her hard-a-starboard course when the *Alcantara* hard-a-ported and was coming into her or across her bows. Mr. Langton has frankly stated that that was not a point which he made at the trial, and that his contentions throughout were, first, that the *Tovarisch* ought not to have hard-a-starboarded in the first instance; and, secondly, that when the collision was imminent she ported too soon. In other words, his point was that she ought to have kept her course in the first instance and not hard-a-starboarded, and, secondly, that she ought to have kept her course when the critical moment came, and not then hard-a-ported.

On the advice that we have received it seems to me that whatever action the *Tovarisch* might have taken or omitted to take, after the *Alcantara* hard-a-ported would not have avoided the collision. No doubt if the *Tovarisch* had taken one or other of the courses suggested by counsel for the respondents or by the learned judge the collision would have been different in character as she would either have been run into by the *Alcantara* or would have struck the *Alcantara* at a different angle and in a different place, but it is quite plain to my mind on the evidence that a collision was inevitable after the helm action taken by the *Alcantara*.

Personally I am not sufficiently versed in these matters to say what was the best action that the *Tovarisch* could have taken, when the red light of the *Alcantara* opened up, and she heard the blast which signalled to her that that vessel was hard-a-porting, but we have been

advised (and I think rightly) that the *Tovarisch*, in the circumstances, was not to blame for hard-a-porting instead of keeping her course or continuing her hard-a-starboarding.

In the result for the reasons stated, I agree with the judgment of my Lord that the *Alcantara* was alone to blame and that this appeal ought to be allowed.

Greer, L.J.—I also have come to the conclusion that this appeal ought to be allowed and a declaration made, with its usual consequences, that the *Alcantara* was solely to blame for the collision between her and the *Tovarisch*. The allegations against the conduct of the *Tovarisch* seem to me to have been four. First of all, it is said she showed a green flare-up light when, if she ought to have shown a light at all it ought to have been a white flare-up light; secondly, it is said that, whether green or white, she ought not to have shown a flare at all; thirdly, it is said that she was guilty of bad seamanship in starboarding when she did; and lastly, she was guilty of bad seamanship in porting when she did.

I have come to a conclusion unfavourable to these contentions independently of the answers given to the questions which have been put in writing to our assessors, if those answers confirm the view that I had taken upon the evidence and the arguments presented to this court.

First of all, with regard to the colour of the flare, I cannot help thinking that the learned judge was somewhat misled by his investigations into the history of the regulations so far as they were concerned with flares, and did not, therefore, give adequate attention to the wording of the regulations themselves. The regulations material to this question are regs. No. 1, No. 9, and No. 12. No. 1 provides that no lights shall be shown which are capable of being mistaken for the prescribed lights. No. 9 provides what the lights are to be for fishing vessels and, in sub-sect. 2 of art. 9, we find these words, "Sailing vessels"—that is to say, fishing vessels if they are sailing vessels—"shall carry a white light in a lantern, so constructed as to show a clear, uniform, and unbroken light all round the horizon, and shall also, on the approach of or to other vessels, show where it can best be seen a white flare-up light or torch in sufficient time to prevent collision." Art. 12 provides that "Every vessel may, if necessary in order to attract attention, in addition to the lights which she is by these rules required to carry, show a flare-up light, or use any detonating signal that cannot be mistaken for a distress signal." Now I can conceive that if this vessel, the *Tovarisch*, had burnt a white flare it would have been at once alleged "you have broken reg. No. 1 because you have led those on the look-out for you to think that you are a fishing vessel and are showing a flare under the provisions of art. 9." So much for the colour of the light. I cannot help thinking that only where the articles provide what the colour of the light is to be, is there any prescribed colour. There is no prescribed colour in art. 12 unless, by reason of the other two articles, you read art. 12 as prescribing that, at any rate, it must not be a white light because, otherwise, it might be mistaken for the flare of a fishing vessel. Then it is said that they should not have shown a flare of any sort. I read art. 12 as meaning this—not that they are only to show such a light if a collision is inevitable in the absence of their showing such a light, but only if, to those on board it appears—quite rightly appears—reasonably necessary to call attention to their presence, or to their character. It cannot be that the master of a vessel is to be under an obligation to act, and to act only where it is absolutely necessary, to avoid collision, that he should so act. The words must be read as meaning "every vessel may, if reasonably necessary, in order to attract attention." In taking that view, one must not forget of course, that the whole object of these regulations is by their title, the prevention of collisions at sea, and a vessel must not, where there is no risk whatever of collision, take it that it is necessary for it to exhibit a flare light. But if there is a possibility that its position and character may not be understood, then, it seems to me, it may be deemed reasonably necessary to show the flare provided for by art. 12, and I agree with the view expressed by our assessors that, in this case, it was necessary in order to indicate, to the approaching steamer, that the vessel was not one of the short sailing vessels—short in length—that it may well have been from the mere observation of the green light, but that it was a long vessel, which had, in addition to the part of her which was forward of the green light, a very large part of her behind the green light which it was as desirable to protect from collision as that which was forward of the position of the green light.

The next matter to consider is the starboarding. I agree with the argument presented by Mr. Dunlop that, at the time of the starboarding, there was nothing wrong with the starboarding. If both vessels kept their course there was, at that time, no risk of collision whatever, and the sailing vessel was entitled to starboard there just as she was—if she had been half a mile away—entitled to starboard for any purposes she considered desirable in her own interests. It may have made a collision with the other vessel less likely, but it was not an improper manœuvre. With regard to the porting, I am considerably influenced by the course which this trial took. I look at the statement of claim on behalf of the *Alcantara* and there I find what is complained of is this: "Having starboarded, improperly failed and neglected to port their helm in due time or at all." I understand that as covering two allegations. (1) That she did not port at all, and, secondly, that she did not port soon enough, in due time. I do not understand it as containing any allegation that she ought not to have ported at all; the complaint that she did not port cannot be a complaint that she

ought not to have ported at all. It is a complaint that she neglected to port at all, or if she did port she did not do it soon enough, and I gather that no question in the course of the hearing was put to the master to indicate to him that he was charged with improper conduct in not holding on to his starboard helm. But be that as it may, I am satisfied by the way in which this case has been presented to us, and the evidence that has been given, and the opinions which we have received from the assessors, that failing to port and keeping on the starboard helm, would not have prevented this collision. It would have happened, perhaps, in a different way, and, possibly, with different results as to the damages, but it would have happened. I am also satisfied that the porting of the *Tovarisch* when it took place, was a reasonable step to prevent the collision being as damaging to the *Tovarisch* as it might have been if the vessel had not ported at all.

For these reasons I think the appeal should be allowed.

SCRUTTON, L.J.—The judgments of my brothers have recalled to my mind that I did not say what I had meant to say when I started my judgment on the question of porting. In my view, porting was not alleged as a breach originally. It is clear that no amendment was ever made to formally include such a breach. It is also clear to me, having looked at the notes, that Mr. Langton having opened the case for the *Alcantara* never alleged it as a breach. It is also clear to me that it was never put to the master in such a way as to get his defence on the point. Under these circumstances, I do not think the judge ought to have dealt with it. I do not think the judge ought to find a vessel in fault for a matter which was never alleged by the parties alleging fault, unless the pleading has been amended, and a clear opportunity has been given to those affected of dealing with the charge.

Solicitors, *Richards*, *Butler*, *Stokes* and *Woodham Smith*; Messrs. *Middleton*, *Lewis*, and *Clarke*.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Tuesday, Dec. 3, 1929.

(Before ROCHE, J.)

GULF AND SOUTHERN STEAMSHIP COMPANY (INCORPORATED) v. BRITISH TRADERS INSURANCE COMPANY LIMITED. (a)

Insurance (marine)—Insurance by shipowners on cargo and "upon any charges of assured upon said cargo"—Total loss of vessel and cargo—Claim by shipowners against underwriters for loss of freight—Whether "freight" included in term "charges upon cargo."

The plaintiffs were shipowners. The defendants issued a policy of insurance in respect of one of the plaintiffs' steamships "on cargo as per form attached." In the form attached the term cargo was defined as including (inter alia) *"charges of said assured upon said cargo or any portion thereof." During the currency of the policy the plaintiffs' steamship became a total loss with all her cargo, and the plaintiffs lost their right to recover freight which was in process of being earned at the time of the loss. They claimed to recover the lost freight from the defendant company under the terms of the policy.*

Held, that the words "any charges of said assured upon said cargo" included and were intended to cover the freight that was in process of being earned by the ship, and the plaintiffs were entitled to recover.

ACTION tried before Roche, J. in the Commercial List.

By order pleadings were dispensed with and the action proceeded to trial on an agreed statement of facts, which was as follows:

1. The plaintiffs, the Gulf and Southern Steamship Company (Incorporated) were a subsidiary company of the Eastern Steamship Lines (Incorporated). They were at all material times the owners of the steamship *Louisiana*, and ran that steamer and other steamers for the purposes of lines maintained by them between (*inter alia*) New Orleans and Key West and Miami. They were entitled to sue on the policy hereinafter mentioned.

2. By a policy of insurance dated the 2nd Nov. 1926, a copy of which was attached to the statement of facts, and which was admitted to be valid, the defendants, the British Traders Insurance Company Limited, insured the plaintiffs in respect of (*inter alia*) the said steamer as therein mentioned. The policy was described as an insurance for $7965, part of a total similar insurance of $150,000 from noon on the 15th Aug. 1926 to noon on the 1st July 1927, "on cargo (first interest) as per form attached including and subject to the clauses and conditions of the form attached." The form attached provided that the insurance was:

On cargo of any kind owned by the assured, and on the assured's liability to others in respect to cargo of any kind, covering same from time said assured becomes responsible therefor, and until its responsibility ceases, wheresoever the same may be, including risks while on docks, in and (or) on cars on docks, piers, wharves, lighters, and (or) craft, transfers, and all land conveyances, and also to cover upon any advances made by and payment of back charges made by or due from said assured, and upon any charges of said assured upon said cargo or any portion thereof, including risk of transhipment. It is agreed that the term "cargo" as used in this policy includes goods, wares, merchandise . . . and where used in this form it includes also all advances made by and payment of back charges made by or due from said assured and (or) charges of said assured upon said cargo or any portion thereof.

(a) Reported by R. A. YULE, Esq., Barrister-at-Law.

It is agreed between the parties hereto that said steamers are to be employed in carrying cargo, or cargo and passengers, in and on said steamers as aforesaid, the assured taking upon themselves as to said cargo, or parts thereof, all the risks, perils, and liabilities which by law a common carrier by land or water assumes, and also the insurance on such cargo as may be carried under "insured" rates of freight against perils of the seas and fire, jettisons, barratry, and all other acts, perils, or misfortunes that have or shall come to the hurt, detriment, damage to or loss of the said cargo or any part thereof; and the said assurers agree and undertake to indemnify and hold harmless the said assured against hurt, detriment, damage to or loss of such cargo from any and all such risks, perils, acts or misfortunes, to the extent which the assured may be held by the owners thereof under any liability the assured shall have assumed as common carriers, insurers, or otherwise, and for any and all claims which said cargo may be called upon to contribute in general average, and (or) for salvage, landing, warehousing and (or) special charges, and to cover in like manner any cargo owned by the assured, and also all advances made by and payment of back charges made by or due from said assured and (or) charges of said assured upon said cargo or any portion thereof.

3. The following facts as to the plaintiffs' course of business were at all material times well known to the defendants :

(i) Goods carried by the plaintiffs were frequently carried with all charges "collect," *i.e.*, payable by the consignees at their ultimate destination. In such cases, in the event of loss, no charges were payable by the consignee.

(ii) The plaintiffs might either carry the goods over the whole of their transit, or they might be one of a succession of carriers, the first of whom issued a through bill of lading to the consignor covering the whole of the transit. In such cases the freight or other charges of each carrier of goods being carried with charges "collect" were considered as earned on the safe termination of such portion of the whole transit as that carrier might be responsible for, and were paid by the carrier next in the series, who added them to his own charges and collected them from the next carrier or the consignee as the case might be. Such charges so paid to previous carriers were known and referred to in the policy as "back charges." They were at the risk of any carrier who had paid them in so far as if the goods were lost while in the charge of such carrier, he could not recover them from the previous carriers or from the carrier who would have taken on the goods from him or from the consignor or consignee.

(iii) The plaintiff on being paid at an appropriate rate frequently took upon themselves in respect of goods carried by them the full liability of a common carrier and (or) of an insurer against divers maritime perils (*inter alia*) perils of the sea. Goods carried on the terms that the plaintiffs should thus take upon themselves the insurance of the goods were said to be carried under "insured" rates of freight.

4. On the 27th Oct. 1926, the steamship *Louisiana* left New Orleans for Miami and Key West with a general cargo. On the next day she was sunk in a collision and became a total loss with all her cargo. It was admitted that the loss gave rise to claim on the policy, the question for the court being what classes of loss were covered by the policy.

5. The loss of the said steamer and her cargo produced (*inter alia*) the following classes of loss to the plaintiffs :

(i) They became liable to pay to the owners of goods accepted at "insured" rates of freight on board the steamer divers sums.

(ii) They lost their right to recover from the consignees of certain of the goods certain "back charges" paid by them amounting to $2974.22.

(iii) They also lost their right to recover from the different consignees the freight which was in process of being earned by them at the time of the particular casualty, and which only became payable, together with the said back charges, on right and true delivery by the plaintiffs of the goods in question at their destination. The freight so lost amounted to $7366.33.

6. No question arose in respect of the classes (i) and (ii) mentioned in the preceding paragraph, the defendants having admitted liability in respect thereof.

The question for the opinion of the court was whether the loss mentioned under (iii) of the said paragraph was covered by the policy or not. If the court should be of opinion that they were so covered, the defendants' proportion amounted to 113*l.* 4*s.* 7*d.*

J. Dickinson for the plaintiffs.

David Davies for the defendants.

ROCHE, J.—This case raises a short, neat, and interesting point on the construction of a policy of marine insurance.

The parties have very wisely agreed to try it upon an agreed statement of facts, which is clear and to the point, and leaves the matter, having explained the terms which are used in the insurance documents, as one of construction, but the explanations contained in the statement of facts were necessary having regard to the nature of the trade in which the assured were engaged.

The matter may be summarised in the following way. The plaintiffs were shipowners engaged in one part of a venture which is often conducted by through bills of lading, and the policy which was effected may be stated to be one which was intended to cover the goods which they were carrying in the part of the transit with which they were concerned. They might be concerned in the whole of the transit, or only with part of a larger transit. The policy is described as an insurance for "7965 dollars part of 150,000 dollars" on "cargo (first interest) as per form attached including and subject to the clauses and conditions of the form attached." Therefore one is referred to the attached form to see what it was that was covered.

The real question in this case is whether, when one has read that form, the court is satisfied that the assured's freight, which was or might be at risk, was covered. The most material words in the form are as follows : " On cargo of any kind owned by the assured " that is the first point ; and it is to be noticed that primarily the assured are not cargo owners, but if they do own cargo on board the ship then that is covered. But there are other classes which are covered, and no one of those classes consists of the actual ownership of cargo. In respect of the other matters mentioned in the other parts of this clause the assured are not cargo owners. The next thing is : " On the assured's liability to others in respect to cargo of any kind, covering same from time said assured becomes responsible therefor, and until its responsibility ceases, wheresoever the same may be, including the risks while on docks, in and (or) on cars on docks, piers, wharves, lighters and (or) craft, transfers, and all land conveyances." The next thing, therefore, is liability. Then the third thing is : " also to cover upon any advances made and payment of back charges, made by or due from the said assured." What that means is explained in the statement of facts ; it is to cover anything which the assured may have paid other parties concerned in this transit when they took over the goods, but which they could only recover upon completion of the voyage by delivery of the goods. That is the third thing, what they have paid other people, but which they have paid at their own risk because it could only be earned by them on completion of the voyage. The clause which gives rise to the controversy in this case is : " And upon any charges of said assured upon said cargo or any portion thereof including risk of transhipment." Now the next paragraph contains very much the same provisions as to certain matters which I have already dealt with. Then there is a further clause to the effect that the term " cargo " in this form includes all advances made by and payment of back charges made by or due from the assured and (or) charges of said assured upon said cargo or any portion thereof.

I read that stipulation as meaning this, whereas the policy is described as one on cargo, yet it is agreed that it is something much more. The question is : Does that something more include freight ? In my opinion it does. It is true that Arnould on Marine Insurance says at par. 233 of the 11th edit. that freight must be insured *eo nomine* in the policy. Mr. David Davies quite wisely has not contended that that means that you can never insure freight unless you use the word " freight." Any apt wording indicating that freight is the thing covered or one of the things covered is sufficient to give the protection of the policy to freight.

Therefore, the question is, is the term " charges " or any " charges " used in this document sufficient to cover and include freight ? In my opinion it is. Lord Esher, M.R., in the course of his judgment in *The Bedouin* (7 Asp. Mar. Law Cas. 391, at p. 394 ; 69 L. T. Rep. 282, at p. 785 ; (1894) P. 1, at p. 12), says this : " Freight is the charge made by the shipowner for the carriage of goods on board his ship." The parties in these proceedings have in stating the facts used words—though they do not apply to freight itself—in much the same sense as they were used by Lord Esher. They say this : " Goods carried by the plaintiffs are frequently carried with all charges ' collect,' *i.e.*, payable by the consignee at their ultimate destination." I take that to mean that the word " collect " is used as meaning collectable or that all charges are to be collected and payable at their ultimate destination. There can be no doubt, I think, that in that connection and association the word " charges " must be intended to include freight. It is said that to make this plain, so as to support the plaintiffs' contention the words should have been " freight or other charges," phraseology which, no doubt, is often employed in documents relating to ships, but the very wording of that phrase, " freight or other charges," means and imports that freight is a charge. It is a charge, and, in my judgment, it falls within the sweeping and comprehensive phraseology of " any charges " employed in this form which I am considering.

It is not a matter which admits of any detailed argument or any very extensive judgment, but I may, perhaps, usefully refer to the next paragraph in the form which mentions a number of things which are covered by the policy. One of them is : " also the insurance on such cargo as may be carried under ' insured ' rates of freight." What " insured rates of freight " are is also explained by the statement of facts ; they are rates of freight which include both insurance and carriage. I do not gather, and it is not stated, that there is any apportionment between what is charged for insurance and what is charged for carriage, and I read that stipulation to mean that insured rates of freight are covered notwithstanding that part of the rates of freight is really charged for as a premium of insurance. I think the only reason why the freight is specifically provided for is because that is the first and most natural thing which the parties would think of as being a charge upon or in respect of the cargo.

Mr. David Davies makes the point that the phrase is not " charges in respect of the cargo." but " charges upon the cargo." I think myself that distinction is too fine and is an unreal one in a consideration of this document, but even if the word " upon " is to be pressed I think it would not be correct to say that freight is not a charge upon the cargo because the freight itself is not earned at the time of the loss. The truth is that the back charges also are only earned or recoverable when the voyage is accomplished, but the insurance is one directed to reimburse the assured against the contingency of the voyage not being accomplished. I think in using the words " charges upon the cargo " the parties have, for the reasons I have

already assigned, made it sufficiently plain that they intended to cover that which is the principal charge upon or in respect of the cargo, namely, the freight that is in process of being earned by the ship.

For these reasons I give judgment for the plaintiffs for the sum claimed, namely, 113*l.* 4*s.* 7*d.*, with the costs of the action.

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

Solicitors for the defendant, *Parker, Garrett and Co.*

Friday, Feb. 7, 1930.

(Before SCRUTTON and SLESSER, L.JJ., sitting as Additional Judges of the King's Bench Division).

STURLEY AND OTHERS *v.* POWELL. (*a*)

Fisherman — Agreement for share of profits of voyage — Extra payments by owners — Wages or money lent—Dispute between owners and fisherman—Jurisdiction of County Court to try action—Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), *s.* 387.

By the Merchant Shipping Act 1894, *s.* 387 : "*A superintendent shall inquire into, hear, and determine any dispute, either between the owner of a fishing boat and the skipper or a seaman of the boat, or between the skipper of a fishing boat and any seamen of the boat concerning* (1) *the skipper's or seaman's wages or his share in the profits of the voyage or trip or a fishing catch, or any deduction therefrom . . . If any party to the dispute calls on him to decide it, and his decision thereon shall be final and binding on all persons. . . .*"

The plaintiffs, who were the owners of a fishing vessel, claimed 100*l. from the defendant, who had been a member of the crew and chief engineer. Half-yearly running agreements providing for the distribution of the net profits of the sale of the fish caught on each voyage were signed by the skipper and each member of the crew. A practice had, however, arisen by which, in cases when voyages resulted in a loss or only in a very small profit, the owners paid each member of the crew a sum sufficient to bring his share of the remuneration up to* 3*l. per week. The defendant had during his period of employment drawn certain sums from the plaintiffs' agents, and the plaintiffs contended (and the County Court judge found) that the excess of those amounts over the amount due to the defendant as his share of profits had been advanced by way of loans. The defendant contended that there had been an agreement that he should be paid a minimum wage of* 3*l. per week, but the County Court judge rejected this contention. He further contended that the County Court judge had no jurisdiction to hear the dispute, by reason of the provisions of the above section.*

Held, the action being in reality one for money lent, which the County Court had always had jurisdiction to try, very clear words of exclusion would be required to deprive the County court judge of jurisdiction, and these were not to be found in the above section. The judge had, therefore, jurisdiction to hear and determine the action.

APPEAL from Haverfordwest County Court.

The plaintiffs, Sturley and others, were the owners of a steam fishing boat constructed as a drifter and used for the purpose of fishing by line. The defendant, Powell, was a member of the crew and chief engineer of the vessel from May 1924 to Nov. 1927. Half-yearly running agreements were signed by the skipper and each member of the crew. These provided, *inter alia*, that the net profits of the sale of the fish caught on each voyage should be divided, after deduction of expenses, into twelve and a half shares. Five of these shares were to be the owners', and seven and a half the crew's ; the crew's shares were to be divided in certain proportions, the defendant's proportion of the whole being one-and-one-eighth shares. A practice had arisen in cases, where voyages resulted in a loss or only in a very small profit, by which the owners paid each member of the crew a sum sufficient to bring his share of the remuneration up to 3*l.* per week. The defendant contended, on this point, that the agreement was that he should have 3*l.* per week as a minimum wage, plus a share of the profits, if these were sufficiently large. The plaintiffs, on the other hand, contended—and the judge accepted their contention at the trial—that the agreement was that the defendant's wages were to be his share of the profits only, but that in an unsuccessful trip they would help him by paying him 3*l.* per week, on the understanding that that sum, in so far as it exceeded the defendant's share of profits, was to be merely a loan, to be repaid to the plaintiffs out of the profits of a successful trip.

In Feb. 1929 the plaintiffs brought this action against the defendant alleging that the defendant during his period of employment had from time to time drawn certain sums from the plaintiffs through their agents on account of his share of the net profits of sale of the catches of fish, which sums on a settlement of accounts between the parties exceeded by 106*l.* 10*s.* 4*d.* the amount to which the defendant was entitled in respect of that share. They claimed from the defendant 100*l.* part of that sum, the excess of which they abandoned. The defendant in his defence said that he was not indebted to the plaintiffs in the sum claimed or at all ; that the agreement between the parties was that at the end of each voyage the accounts in respect of it should be settled ; that they had been settled

(*a*) Reported by T. R. F. BUTLER, Esq., Barrister-at-Law.

accordingly, and that all moneys due to the defendant, and no more, had been paid to him by the plaintiffs in complete discharge and satisfaction of his share of profits or wages for each voyage; and that by virtue of the Merchant Shipping Act 1894, s. 387, the court had no jurisdiction to hear the dispute.

The plaintiffs gave evidence at the trial in support of their contentions to the effect that the sums advanced in so far as they exceeded the defendant's share of profits were merely loans, and the County Court judge accepted this evidence. There remained for him to consider the question of his jurisdiction under sect. 387 of the Merchant Shipping Act 1894. He held that there was here no dispute within the provisions of the section for a superintendent to enquire into; that no party to any such dispute had called upon the superintendent to decide it; that the jurisdiction of the superintendent was not exclusive of that of the County Court, and that therefore the County Court had jurisdiction to hear and determine the action. He gave judgment for the plaintiffs for 100*l.* The defendant appealed on the ground that the County Court judge was wrong in holding that he had jurisdiction to try the action.

E. A. Digby, K.C. and *T. Jenkin Jones* for the appellant.

T. J. O'Connor, K.C. and *G. W. Williams* for the respondents.

Scrutton, L.J.—This case raises a question of some importance to fishermen who are remunerated by a share in the catch of fish. The agreement between the parties provided that the defendant was to have one-and-one-eighth share of the net profits of each catch. Now it is obvious that fishermen cannot rely on the amount of the catch as being in any degree constant, as they may return from a trip with a very poor catch, and, accordingly, a practice seems to have arisen by which the catches were averaged by the fisherman receiving 3*l.* a week. On this point there was a substantial dispute between the parties. The defendant said that the agreement was that the fisherman was to have 3*l.* a week as a minimum wage, plus a share of the catch, if the profits were sufficiently great. The plaintiffs said that the agreement was that the fisherman's wages should be his share of the catch only, but that they promised to help him in a poor trip by paying him 3*l.* a week, but part of that 3*l.* was to be merely a loan to be repaid out of the profits of a successful trip. The defendant was in a difficulty in regard to his contention that 3*l.* a week was to be a minimum wage, because he was trying to set up a claim to wages that is not to be found in the articles of agreement. The County Court judge found that the arrangement was as the plaintiffs stated it to be.

Before he entered on a discussion of the facts to enable him to arrive at that finding, a point in regard to his jurisdiction was taken. It was said on behalf of the defendant that sect. 387 of the Merchant Shipping Act 1894, which provides that a superintendent shall inquire into any dispute between the owner of a fishing boat and a seaman concerning the seaman's wages or share of profits of a trip or catch, excluded the jurisdiction of the County Court. As is said in Maxwell on the Interpretation of Statutes, 7th edit., c. 5, which was referred to by Slesser, L.J. during the argument, there is a presumption that the jurisdiction of the court is not excluded by a statute, if the court had jurisdiction before the statue which contains the provision relied upon as excluding jurisdiction, unless there are clear words of exclusion in the statute.

The County Court judge has taken the view that this is really a claim for money lent on trips where there was a poor catch, and that the plaintiffs lent the defendant money on the terms that it should be repaid out of the catches of profitable trips, when the defendant's share of profits amounted to more than 3*l.* per week. The County Court has always had jurisdiction to deal with actions for money lent. To exclude its jurisdiction, where money was lent in connection with a fishing trip, plain words of exclusion would be needed, and no such words are to be found in sect. 387 of the Merchant Shipping Act, though plain words of exclusion do occur in certain other Acts, as, for example, the Friendly Societies Acts. The County Court judge took the view that there are no words in sect. 387 excluding the jurisdiction of the County Court and I am of opinion that he was right in that view and that, therefore, the County Court had jurisdiction. It is not for us to decide whether he was right or wrong in the conclusion of fact to which he came, though, as I have pointed out, the fisherman was in a difficulty in regard to establishing his view of the facts, because he was asking for wages not provided for in the articles of agreement.

I do not decide, and do not intend to decide, what may happen in a case where a superintendent does inquire into a dispute and at the same time there is an action proceeding in the County Court. Very possibly, the reasons which induce the High Court to restrain or not to restrain arbitration proceedings, or to restrain or not to restrain High Court proceedings when there is an arbitration, might be applicable to such a case. That question does not arise here, as there has been no call on the superintendent to inquire into the dispute. I decide this case on the ground that there are no words in sect. 387 of the Merchant Shipping Act 1894, excluding the jurisdiction of the County Court in matters in which it previously had jurisdiction.

Slesser, L.J.—I agree. The sole question argued before us has been whether the County Court had or had not jurisdiction to entertain this claim by reason of sect. 387 of the Merchant

Shipping Act 1894. The County Court judge has found that the money sued for was a loan. He said: "The said advances were loans," and, in my judgment, on that view of the case, the matter does not in any event fall within the language of the section, which does not apply to an action for money lent. That is the first ground on which I think the objection in regard to jurisdiction ill-founded.

Secondly, the superintendent is required to hear and determine a dispute only when a party to the dispute calls upon him to decide it, and it is not suggested here that either party has so called upon him. If he had proceeded to hear and determine this case, he would have done so without authority under the statute, because his authority arises only when a party to a dispute calls upon him.

Thirdly, even had he been called upon to decide the dispute and had the subject-matter of it been one which fell within the section, I can find nothing in the section to prevent a proceeding started in the County Court in respect of the dispute being a valid proceeding, and the judgment given as a result of that proceeding being a valid judgment. The jurisdiction of the County Court to hear and determine a dispute in an action for money lent does not arise out of the Merchant Shipping Act, and therefore it is not necessary to have recourse to sect. 387 to give the County Court jurisdiction.

We have, therefore, a case where there is ordinary jurisdiction in the court altogether apart from sect. 387, and where there are no words in the section which preclude the County Court from exercising the jurisdiction of which it was otherwise possessed. For the reasons which my Lord has stated, and on the principles laid down in Maxwell's Interpretation of Statutes, I am of opinion that in this case there is no reason to suppose that the Legislature intended the County Court judge's jurisdiction to be excluded. The objection to jurisdiction therefore fails and the appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Berrymans*, agents for *J. Evan Rowlands*, Swansea.

Solicitors for the respondents, *Peacock* and *Goddard*, agents for *Eaton, Evans*, and *Williams*, Milford Haven.

Supreme Court of Judicature.

COURT OF APPEAL.

Dec. 3, 4, 1929, *and Jan.* 27, 1930.

(Before SCRUTTON, LAWRENCE and GREER, L.JJ., assisted by Nautical Assessors.)

THE OTRANTO. (a)

ON APPEAL FROM THE ADMIRALTY DIVISION.

Collision—Vessels on crossing courses—Failure of "give way" ship to take action — Action taken by the "stand on" ship—Starboarding without taking off way—Negligence—Regulations for Preventing Collisions at Sea, Arts. 18, 21 (*note*).

The appellant's steamship O. *sighted the respondents' steamship* K. M. *at a distance of about seven miles on her port bow. The* O. *accordingly kept her course and speed until about three minutes before the collision, when, the* K. M. *having taken no action to avoid her, the master of the* O. *determined that the* K. M. *could not avoid the* O. *by her own action alone, and he accordingly starboarded, and then hard-a-starboarded, and sounded two short blasts. The* K. M. *was then seen to be porting, and the* O. *thereupon went full speed astern on both engines. About a moment later the vessels came into collision.*

Hill, J. found both vessels to blame, holding that, although the O. *was not wrong in taking action to avoid the collision at the time when she did, she ought then to have taken off her way and not starboarded.*

Held (Scrutton, L.J. dissenting upon the ground that the O. *was to blame for not keeping her course), that the* O. *ought not to be held to blame for failing to take off her way. The relevant authorities establish no general rule that a vessel in taking action justified by the note to art.* 21 *must first take off her way. The* O. *was therefore bound to take such action as in the circumstances might appear best calculated to avoid the collision, and the master of the* O. *was not negligent in taking the action which he took, notwithstanding that if the* O. *had taken off her way the collision might in the circumstances have been avoided.*

APPEAL from judgment of Hill, J. in a damage action.

The plaintiffs, owners of the Japanese steamship *Kitano Maru* claimed damages from the defendants, owners of the steamship *Otranto* in respect of a collision between the *Kitano Maru* and the *Otranto* which took place at about 8.48 p.m., shortly after sunset, on the 11th Aug. 1928, in the North Sea, some miles from the mouth of the River Humber. The weather at the time was fine and clear. The *Kitano Maru*, a vessel of 7952 tons gross,

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

474ft. long, was in the course of a voyage from Middlesbrough to Antwerp with about 2000 tons of cargo. The *Otranto*, a vessel of 20,032 tons gross, 12,021 tons net, 658ft. in length, was on a voyage from Immingham to Copenhagen and other northern capitals with a large number of passengers.

The facts as found by Hill, J. were that the *Otranto* was travelling at about 16 knots and saw about seven miles distant the *Kitano Maru* on a bearing which was accurately taken by the officer on watch; that the bearing continued the same for about ten minutes; and that the officer then sent a message to the master who came on the bridge, and took charge from the second officer. Eight minutes before the collision the *Kitano Maru* was judged to be 2 or 2½ miles away, and about 3½ points on the port bow. The bearing continued almost the same, varying only by one degree. Three or four minutes before the collision, when the distance, as the master judged, was a quarter to half a mile, and was judged by the second officer to be hardly three-quarters of a mile, the *Kitano Maru* had not altered her course or her speed or given any signal. The master of the *Otranto* therefore recognised that the position was very dangerous, and he decided to take action, and approximately about three minutes before the collision he gave an order, "starboard," and immediately "hard-a-starboard." That order was carried out, and he gave two short blasts. He brought the *Kitano Maru* a little on the port bow and then the *Kitano Maru* began to turn to starboard, and gave a short blast. Immediately upon that he gave an order hard-a-port, but before it could be carried out he countermanded it, and repeated "hard-a-starboard," and followed that by full astern on both engines about a minute before the collision. The learned judge rejected the evidence from the *Kitano Maru*, and accepted the evidence from the *Otranto*.

Upon these facts Hill, J. found both vessels equally to blame, holding that the *Otranto*, although not wrong in taking action to avoid the *Kitano Maru* when she did, ought to have followed what the learned judge described as the "golden rule" in such circumstances, namely, to take off way, and not to take starboard helm action.

The owners of the *Otranto* appealed.

The Regulations for Preventing Collisions at Sea 1910, so far as material, are as follows:

"Art. 18: Where two steam vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

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

"*Note.*—When in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving way vessel alone, she shall also take such action as shall best aid to avert collision (see arts. 27, 29)."

A. T. Miller, K.C. and *Dumas* for the appellants.

Dunlop, K.C. and *Hayward* for the respondents.

The arguments of counsel and authorities cited fully appear from the judgments.

Cur. adv. vult.

Scrutton, L.J.—This appeal raises again the perplexing problem of the give-way ship which seems likely not to give way, but in fact does give way, and the stand-on ship in consequence does not stand-on, with the resultant collision.

The *Otranto*, a large Orient liner, 658ft. long, was starting from the Humber on a pleasure cruise to Norway, and was a little before 8.45 p.m. on the 11th Aug., proceeding at 16 knots on a course N.59.E. true. The *Kitano Maru*, a large Japanese steamer, 474ft. long, was proceeding from Middlesbrough to Antwerp, partly laden, on a course S.40.E. true. The courses were crossing courses at nearly a right angle; the Japanese boat was the give-way ship, and the Orient liner the stand-on ship.

The two ships came into collision, the *Otranto* striking the port bow of the Japanese boat a right angled blow. The judge finds that each boat had altered about eight points from her course, the *Otranto* having starboarded, the *Kitano Maru* having ported.

The Japanese boat came into court with an impossible story of porting when three miles off and after an interval hard-a-porting. It became clear that if this story were true, the two boats would never have got near each other, and the judge rejects it as a concocted invented story. He accepts the story of those on board the *Otranto*, which is that the *Kitano Maru*, seen seven miles off, was carefully watched, her bearing never altering, three-and-a-half points on the *Otranto's* port bow, till she was under three-quarters of a mile distant, the point of intersection of these courses being about half-a-mile from the *Kitano Maru*, and a little more from the *Otranto*, and as the *Kitano Maru* showed no sign of giving way that the captain of the *Otranto* then decided that he must act, at a time about three minutes before the actual collision, and that he then hard-a-starboarded and blew two blasts. Very shortly afterwards, within twenty or thirty seconds, that is to say, two-and-a-half minutes before the collision, he saw the Japanese boat porting and heard her blow one blast. The *Otranto* gave the order hard-a-port, but altered it almost directly before the helm had got amidships to hard-a-starboard, and the two boats came into collision at right angles, the *Otranto's* stem striking the port bow of the *Kitano Maru*, each of the headings having altered about eight points on a right angle. Each boat went astern shortly before the collision.

The trial judge, with the concurrence of the Trinity Masters, has condemned the *Kitano Maru* for giving way too late, for hard-a-porting, and not going astern when the *Otranto* blew her whistle. As to the *Otranto* he has found, again with the concurrence of the Trinity Masters, that, not mathematically, as a matter of practical seamanship, a distinction I will refer to later, the time had come when the *Otranto* was entitled to act, but that she took wrong action in starboarding, as he and the higher courts had frequently decided; she should have followed the golden rule, to take off her way and keep her course. He therefore found the *Otranto* to blame, and, being unable to distinguish the blame, found each ship equally to blame.

The *Otranto* appeals, contending (1) That she was not to blame at all; (2) that if to blame, the greater proportion of blame was on the *Kitano Maru.* The latter boat originally appealed but abandoned her appeal, which was hopeless. She was obviously keeping a bad look-out, and only awoke to danger when the *Otranto* blew her two blasts.

The rules which apply, which seamen navigating ships have by statute to obey unless they can find sufficient excuse, are Rules 19, 21, and 22. I summarised them in the case of *The Orduna* (14 Asp. Mar. Law Cas. 574; 122 L. T. Rep. 510; (1919) P. 381); thus, at 14 Asp. Mar. Law Cas. 574; 122 L. T. Rep., pp. 514, 515; (1919) P. 329: "There are three rules concerned when two steam vessels are crossing so as to involve the risk of collision; the vessel which has the other on her starboard side should keep out of the way; where one of two vessels is to keep out of the way, the other should keep her course and speed; and every vessel which is directed by the rules to keep out of the way of another vessel should, if the circumstances admit, avoid crossing ahead of the other. I entirely agree and wish to emphasise, if it were necessary, the importance of these rules being strictly observed. The position of ships crossing with a risk of collision is a difficult one. It has been thought right to tell one of the ships to keep her course and speed and the other ship to keep out of the way. The give-way ship can act with much greater certainty if she knows that the stand-on ship is going to do exactly what she is doing when seen. If the stand-on ship acts too soon she may easily put the give-way ship in a great difficulty; and, hard as it is, she ought to keep her course and speed until the last possible moment." I add to that summary the note to rule 21: "When in consequence of thick weather or other cause such vessel finds herself so close that collision cannot be avoided by the action of the give-way vessel alone, she"—that is the stand-on ship—"also shall take such action as will best aid to avert collision." Those rules are to be applied strictly.

Lord Atkin, in *The Ulrikka* (13 Ll. L. Rep. 368), says: "I desire to say, as has already been said over and over again here and in the Admiralty Court, that it is of extreme importance strictly to maintain the enforcement of arts. 19 and 21. These two rules are a bright light to navigators, and I suppose day by day and hour by hour they operate to prevent collisions at sea. It appears to me of the highest importance to enforce them and enforce them strictly. In doing that, one does not differ from the views expressed that in the stress of collision there is a margin which may be allowed to navigators. But that margin is a very narrow one." The excuse for the stand-on ship's not keeping its course does not begin to operate till the give-way ship cannot avoid a collision by any action of its own if the stand-on ship keeps its course and speed. Now, in the present case when the stand-on ship acted otherwise than by keeping its course and speed, the give-way ship was still three-and-a-half points on the port bow of the stand-on ship; the intersecting courses were such that the give-way ship was over half a mile, say 2600ft., from the point of intersection if the stand-on ship kept its course and speed and nearly three-quarters of a mile from the stand-on ship; the turning circle of the give-way ship hard-a-porting even without any assistance from reversing its starboard engine was such that in 900ft. radius it would have completed a quadrant of its circle, that is to say, she would have only got 900ft. nearer the stand-on ship's course, originally 2600ft. distant from its starting point; and that in the three minutes which elapsed between the stand-on ship's taking action and the collision, the two ships had altered their heading eight points each and collided with a right-angled blow. The stand-on ship hard-a-starboarded three minutes before the collision, blowing the appropriate blast, and twenty to thirty seconds later the give-way ship hard-a-ported, blowing the appropriate blasts. Under those circumstances it occurred to me, before we consulted the assessors, that both when the stand-on ship acted and when the give-way ship acted, collision could in fact have been averted by the action of the give-way ship alone. We asked our assessors two questions. Question 1 is: "Assuming the *Otranto* had not altered her course and speed, would the action of the *Kitano Maru*, taken two-and-a-half minutes before the collision, have avoided collision?" They answered to that, "Yes." Then we also asked question 2: "Assuming the *Otranto* had altered speed but not course, would the action of the *Kitano Maru*, taken two-and-a-half minutes before the collision, have avoided collision?" They answered: "Yes, assuming the *Otranto* to be on the original track."

Counsel for the stand-on ship, after consultation, also agreed that, as a matter of fact, not of judgment at the time, they could not dispute this. We have, then, that the *Otranto* acted at a time when collision could have been avoided by the action of the give-way ship alone, because she erroneously thought that the give-way ship could not then avoid the collision by her own action, when in fact the give-way ship could then avoid the collision by her own

action, and did take action which would have avoided the collision if the stand-on ship had kept her course and speed.

A difficult question then arises on which there have been different opinions since and perhaps before. Lord Esher, in *The Vorwaerts* and *The Khedive* (see 43 L. T. Rep. 610; 5 App. Cas., at p. 877), asked the assessors: "If this order which he gave was not absolutely right under the circumstances, was it such an order as a captain of ordinary care, skill, and nerve might be fairly, as a seaman, excused for giving under the circumstances in which the captain was placed," and the assessors having answered in the affirmative, freed the *Khedive* from blame, only to be reversed by the House of Lords. Lord Blackburn gave an account of the statutory legislation up to that time at pp. 892–894 of his judgment.

The Court of Appeal had then to consider the subject again in *The Benares* (5 Asp. Mar. Law Cas. 171; 9 Prob. Div. 16; 49 L. T. Rep. 702), where Bowen, L.J. said: "As to the law, *The Khedive* (*sup.*) decided that it was no answer when the rules had been infringed to say that a master had acted from the best of motives, and according to the best of his ideas, for the law says, not that the master is to do what he believes to be best, but that the regulations are to be obeyed." The court then held that the joint effect of all the regulations had not been disobeyed. In *The Memnon* (6 Asp. Mar. Law Cas. 488; 1889, 62 L. T. Rep. 84), where the stand-on vessel did not stop and reverse, there being risk of collision, the House of Lords, while commenting unfavourably on the language of the Court of Appeal, held the master to blame for not stopping and reversing. The effect of this was that in 1897 by a change in the regulation, the stand-on vessel was required to keep her speed as well as her course till the moment when collision could not be avoided by the action of the give-way ship alone; that is to say, the obligation of the stand-on ship was made stricter. She was not to alter her speed merely because there was risk of collision with the give-way ship. In 1894 the statutory obligation to obey the regulations was repeated (see Merchant Shipping Act 1894), as was the presumption of fault if the regulations were broken. In 1911, by the Maritime Convention Act, the latter presumption was repeated, the statutory obligation remaining, but the owner was only liable if the fault of his servants, *e.g.*, the breach of regulations, caused the collision. The question what happened if the master in fact broke the regulations but reasonably thought he was taking the seamanlike course in so doing, still remained.

In 1913, in *The Olympic and H.M.S. Hawke* (12 Asp. Mar. Law Cas. 580; 112 L. T. Rep. 49; (1913) P. 214; (1915) A. C. 385), which, if the rules applied, was the case of a crossing stand-on ship, where the give-way ship was proceeding in the same direction, it having been argued that the stand-on ship should have altered her course because there was risk of the give-way ship not doing so, Vaughan Williams, L.J. said, at p. 245 of (1913) P.: "It seems uncertain on the cases whether the exception to the rule only arises when a collision is inevitable unless averted by the ship which has to keep her course and speed, or whether the exception applies when the collision is so probable that good seamanship, if there were no rule, would justify action by the ship, bound to keep her course, to avert collision." And Lord Parker, on p. 279, said: "A vessel which under the crossing rule has to keep out of the way of another vessel must act before there be actual danger. If she allows the time for acting to go by, she may lead the other vessel to suppose that she cannot or does not intend to act. In such a case the latter vessel may be relieved from the reciprocal obligation of maintaining her own course and speed. I accept Captain Blunt's evidence that he ported as soon as the Old Castle buoy was clear, because he felt uncomfortable at the close proximity of the *Olympic*, and I think under the circumstances he was justified in so doing, though the cases are not quite consistent on the point. At any rate, it is, I think, quite impossible to suggest that the *Hawke's* action in porting was, apart from the rules, in any way a breach of good seamanship or in any way contributed to the causes of the collision. The *Hawke*, being a King's ship, cannot, therefore, be held liable for porting her helm when she did." The *Hawke*, being a King's ship, was "apart from the rules."

In 1919, in *The Orduna* (*sup.*), the facts of which I refer to later, Bankes, L.J. commented on the language of Lord Parker in *The Olympic and H.M.S. Hawke* (*sup.*), and said it might have to be reconsidered; that there might be cases where the stand-on ship might act when she was misled by the other ship, but that it was important that the rules should be strictly observed, and that any such excuse must be scrutinised with the very greatest care. Lord Phillimore in *The Karamea* (15 Asp. Mar. Law Cas. 430; 126 L. T. Rep. 417; (1922) 1 A. C. 68), declined to express an opinion. He said at p. 79: "It might be thought as a matter of law that all that the ship which has to get out of the way has to do is to take just sufficiently effective steps in just sufficient time, and it might be thought that she so doing ought not to be found to blame, even if the insufficiency and delay of the proper manœuvre has puzzled the other ship and led her to do something which she should not. I pronounce no opinion." Hill, J. in the present case took the view apparently taken by the two judges in *The Olympic and H.M.S. Hawke* (*sup.*). He said: "Mr. Dunlop argued that he acted before he was called upon to act at all under the rule. I do not think so. I have asked the Elder Brethren about that as a matter of seamanship, having regard to the terms of the rule, and they agree with me that the time had come when he was called upon to do something. The rule must be interpreted, not mathematically but reasonably, with

regard to the position as it presented itself to the commander of the *Otranto*. It may be, now we have worked out everything—the turning circles, the precise distances, the precise courses, and all the rest of it—it may be that it can be shown that starboarding about three minutes before the collision was starboarding at a time when, mathematically, it was possible for the *Kitano Maru* by her own unaided action to avoid the collision. It may be so, and in that sense the time had not arrived which entitled the master of the *Otranto* to act. But that is not the way we must look at it. Looking at it all round, was the man, as a seaman, entitled to say to himself, as a reasonable prudent man, 'has the time come when I cannot avoid acting?' I think that time had come, and that he was entitled to act. I cannot, therefore, say that he acted too soon." The Trinity Masters agreed with him, and our assessors take the same view. We asked them: "Given the pleaded courses and speeds and the vessels approaching on bearings which do not change and assuming that the *Kitano Maru*, the give-way ship, did not act until after the *Otranto*, at a time of about three minutes before the collision and a distance of under three-quarters of a mile, had hard-a-starboarded and blown two blasts, (1) Had the time come when as a matter of good seamanship the *Otranto* might reasonably believe that collision could not be averted by the action of the *Kitano Maru* alone?" and they answer: "Submitted—assuming the question refers to the moment before *Kitano Maru* had altered course or sounded any helm signal and the *Otranto* had sounded two blasts, we think that (1) the master was justified in taking action to avoid risk of collision." I confess I have the gravest doubt about the correctness of this view.

"I take Mr. Justice Hills's distinction between "mathematically" and "reasonably" to mean that though in fact it is seen afterwards that the "give-way" ship could and would by its own action have avoided the collision if the stand-on ship had kept its course, yet if the stand-on ship might reasonably think that the "give-way" ship was not going to act, the "stand-on" ship might alter its course or speed. This is I think contrary to Dr. Lushington's view as expressed in *The Test* (1847, 5 Not. of Cas., 276), where he says (at p. 278) "I cannot conceive that anything would be more likely to lead to mischievous consequences, than to suppose that a vessel, whose duty it is to keep her course, should anticipate that another vessel will not give way, and so give way herself. The consequence would be, that there would be no certainty; whereas, the doctrine I have upheld, supported by the nautical assessors' authority, is that, in cases of this description, you ought always to follow the general rule. The certainty which results from an adherence to general rules is, in my opinion, absolutely essential to the safety of navigation." And it appears to me to alter the language of the rule from "shall act when collision cannot be avoided by the action of the give-way ship alone," to "when the captain thinks reasonably but wrongly that it cannot be avoided by the action of the give-way ship alone."

Further, I think, such a view of the facts in the present case is inconsistent with the view taken by the House of Lords in the cases where the give-way ship held on till she was ahead of the stand-on ship, and would, if she continued her course, pass clear to port, but then ported. One of such cases is *The Norman Monarch* (*The Times* Dec. 10, 1918). Another and a very striking case is *The Orduna* (*sup.*). In that case the give-way ship, the *Konakry*, on a course of 17 degrees different from that of the stand-on ship the *Orduna*, kept on her course till she was ahead of the latter and a quarter of a mile off. The *Orduna* thinking that the *Konakry* was going to cross ahead, starboarded to give her room, but at the same time the *Konakry* ported and would have gone clear astern of the *Orduna* but for the *Orduna's* starboarding. The *Orduna* was held to blame by all six assessors and by the Court of Appeal and the House of Lords. It is said that was because the *Orduna* said it was clear that there was no risk of collision because the *Konakry* was going to pass ahead. But it is startling that where a give-way ship has got so far in her crossing course that she is ahead of the stand-on ship, and the latter thinks the give-way ship is certain to go clear, the stand-on ship should be condemned for starboarding; but that when the give-way ship is three-and-a-half points on the port bow and half a mile from the intersecting lines of the original courses and the stand-on ship is merely doubtful what the give-way ship is going to do, it should be excused. Similarly in *The Athena* and *The War Bahadur* (14 Ll. L. Rep. 516) where the give-way ship got right ahead of the stand-on ship and then ported and continued to port though the stand-on ship blew a starboard helm whistle the stand-on ship was held to blame as having acted too early, and Lord Sumner explained that there was nothing new in the judgments in the House of Lords in *The Orduna*, but merely the old and correct interpretation of the crossing rule. A similar view was taken by this court in *The Ulrikka* (*sup.*) when the stand-on ship acted when the give-way ship was one and a half to two points on the port bow of the stand-on ship and showing no signs of giving way, and the stand-on ship was held to blame for starboarding. Decisions of the House of Lords on fact are not strictly binding on this court, but when the House of Lords has three times held that a particular set of facts, the give-way ship practically ahead and showing no signs of giving way, does not justify the stand-on ship in altering course, I think it would not be becoming in the Court of Appeal to hold that a set of facts much less favourable to the stand-on ship, that is the give-way ship well on the port bow and at such a distance that she can in fact

avoid the collision by passing astern of the stand-on ship, excuses the stand-on ship for altering course.

My judgment in *The Orduna* (*sup.*) I hope shows that I appreciate the difficulties of the stand-on ship, but in view of the authorities, and treating the assessors as witnesses, as I am told to do in *The Australia* (17 Asp. Mar. Law Cas. 86; 135 L. T. Rep. 576; (1927) A. C. 145), and paying due respect to the experience of Hill, J., I should have great difficulty in accepting his conclusion that the stand-on ship was justified in not keeping her course and speed. But I have no difficulty in accepting his conclusion, with the concurrence of his assessors, that the stand-on ship was not justified in starboarding. Our assessors took an opposite view to the judge, and the assessors below on this point. We asked them, question B, reciting the previous facts I have already read, "If so, was hard-a-starboarding, without reversing engines, good seamanship under the circumstances?" and they replied "that hard-a-starboarding, without decreasing speed was good seamanship." We are, therefore, in the position discussed in *The Australia* (*sup.*), and have to form our own opinion on the conflicting evidence. I agree with the view taken by Hill, J., and the Trinity Masters. The give-way ship, if it obeys the rule, is to port and pass under the stern of the stand-on ship. In the present case, it acted in time to do this, and would have avoided the collision by its own action alone, if the stand-on ship had kept its course and speed. For the stand-on ship to starboard is to go into the water which the give-way ship will be traversing, if it obeys the rule. This seems to me, as it did to Hill, J., the worst thing the stand-on ship can do, and I agree with him the action the stand-on ship should take generally is to slacken speed, giving more time to the give-way ship to take action to obey the rule. Starboarding to a ship ahead was condemned in the three House of Lords decisions I have mentioned. It was condemned by this court in *The Ulrikka* (*sup.*), where the give-way ship was one-and-a-half to two points on the port bow, showing a green light, the courses about 30 degrees apart and the ships 600yds. apart. It has been repeatedly condemned by the judge below, (see *The Clyne Rock*, 17 Ll. L. Rep. 311, and *The Landport*, 25 Ll. L. Rep. 16), in which latter case, Hill, J. said: "It is the plaintiffs' case which I accept that the *Mathilda* ported very late, but it is plaintiffs' pleaded case that when the *Landport* hard-a-starboarded the *Mathilda's* bow was still on the *Landport's* port bow. I have not to consider whether starboarding would have been justified if the *Landport* had starboarded after the *Mathilda* had crossed to starboard of the *Landport*. The master of the *Landport* was put in a position of great difficulty by the *Mathilda's* failure to give way and open her red. But so is every stand-on ship when the give-way ship is apparently taking no action; and in such cases, when ships are on crossing courses, if the time for action by the stand-on ship has come, the action called for is to take off way. To take helm action at the same time may or may not be justified, according to the circumstances of the case. In my own view, it is in general not justified in a crossing course, but to take helm without engine action is certainly wrong. If the give-way ship does act, though too late, then the stand-on ship by starboarding defeats that action. If the give-way ship persists in crossing ahead, the stand-on ship by reversing gives the give-way ship more time to get across. One always sympathises with the man in charge of a stand-on ship, who is bound to keep his course and speed up to a point, and must then act so as best to avoid a collision; but starboarding without reversing is to take the worst possible action." I entirely agree with this. In my view, to hold that a stand-on ship may starboard, when she does not know what a give-way ship on her port bow is going to do, and when the distances are such that the give-way ship, by her own action, can in fact, by porting, avoid the collision, though the stand-on ship, by error of judgment, thinks she cannot, will create hopeless confusion at sea.

I do not think the case is made any better by the stand-on ship's signalling "I am going to break the rule by starboarding." The only case I have found in which starboarding by the stand-on ship has been excused, is *The Rayford* (10 Ll. L. Rep. 743), in which the Court of Appeal took the view that the starboarding was so slight it did not affect the collision. My judgment in that case shows, I hope, that I appreciate the difficulties of the stand-on ship and am desirous of helping her, if I can. But I think the remedy is altering the rule by legislation, not whittling it away by judicial decision. I, therefore, agree with the learned judge below that the *Otranto* was to blame for not keeping her course.

It was, however, argued that we should vary the apportionment by the judge below, who had found equal proportions of blame. I think the effect of the decisions in *The Peter Benoit* (13 Asp. Mar Law Cas. 203; 114 L. T. Rep. 147), and *The Karamoa* (*sup.*) is that the superior courts will not alter the apportionment of the trial judge, unless they disagree with him on a question of fact or law substantially affecting the result. In the present case, the only difference I have with the learned judge is that I doubt his view that the *Otranto*, though mistaken mathematically in thinking that the collision could not be avoided by the give-way ship alone, was justified as a matter of seamanship in not keeping course and speed. This difference is against the *Otranto* rather than in her favour. I am unable, therefore, to alter the apportionment.

I shall be delighted if this case gives an opportunity to the House of Lords to give clearer guidance to the crossing ships as to their respective duties. But in this case, on the view I take, the appeal must be dismissed. As, however, my brothers do not take this

view, judgment must be entered as proposed by them.

LAWRENCE, L.J.—Hill, J. has held "both to blame" for the collision which took place between the *Otranto* and the *Kitano Maru* in the North Sea off the mouth of the Humber on the evening of the 11th Aug. 1928, resulting in damage to both vessels.

The *Otranto* has appealed on the ground that the learned judge was wrong in attributing any, or in the alternative as much as one half, of the blame to her.

The *Kitano Maru* served a notice of cross appeal, but this was subsequently withdrawn and the findings of fact in the court below as to the negligent manner in which that vessel was navigated were not challenged in this court.

It is common ground that the two vessels concerned were crossing vessels involving the risk of collision and that arts. 19, 21, 22, 23, and 27 of the regulations of 1910 contain the material directions which had to be observed by them respectively. The *Kitano Maru* was the give-way ship. She was very badly navigated and committed breaches of arts. 19 and 23 by not keeping out of the way of the *Otranto* and by not slackening her speed or stopping or reversing on approaching the *Otranto*.

The learned judge has acquitted the *Otranto* of any breach of the duty imposed on her by art. 21, as the stand-on ship, to keep her course and speed, but has held that in the position in which she found herself hard-a-starboarding was an act of negligence. The first question which it is material to consider is whether the learned judge was right in holding that the time had come when the *Otranto* was called upon to depart from her *primâ facie* duty of keeping her course and speed and to take action in order to avoid collision. The answer to this question depends partly upon the construction of art. 21 and partly upon the particular facts of this case. The learned judge has held that on the true construction of art. 21 the master of the stand-on vessel is allowed some latitude in determining when the time has arrived to take action under the note. In my judgment this conclusion is right and in accordance with the authorities. It is clear, however, that the allowable margin is very narrow and that the onus of proving that action is taken within that margin rests heavily on the stand-on ship. Atkin, L.J. (as he then was) in *The Ulrikka* (13 Ll. L. Rep. at p. 368) says with great force that arts. 19 and 21 are a bright light to navigators; that he supposes day by day and hour by hour they operate to prevent collisions at sea, and that it appears to him of the highest importance to enforce them strictly.

Cases such as *The Orduna* (*sup.*), *The Norman Monarch* (*sup.*), and *The Athena* (14 Ll. L. Rep. 516), to which I shall have occasion to refer again later, are striking examples of the strictness with which art. 21 has been enforced by the court. This article, when read in its proper setting, is plainly directed to the avoidance of the risk of collision as well as to the prevention of collision. The first and main direction is that the stand-on ship shall keep her course and speed and the second direction, which, although only contained in the note, is framed in equally imperative language, is that the stand-on ship shall take such action as will best aid to avert collision when she finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone. The joint effect of these two directions is that the first duty of the stand-on ship is to keep her course and speed up to the point when the give-way ship is no longer able to keep out of the way; when that point is reached her second duty is to take such action as will best aid to avert collision (see *The Ranza* 79 L. J. 21 (*n*)). These directions are addressed to practical seamen and they must be construed so that they may reasonably be acted upon. The nature of the event upon the happening of which the stand-on ship is to take action shows that the rule cannot reasonably be construed as referring to the precise moment of time when on a mathematical calculation the give-way ship could in fact no longer avoid collision, which in most cases would depend in some measure upon factors then unknown to the navigator of the stand-on ship, such as, for instance, the turning circle of the give-way ship. Unless some latitude be allowed to the stand-on ship her navigator would be placed in the unreasonable position of committing a breach of one or other of the duties imposed upon him by this article unless he should happen by some lucky accident to hit off the exact mathematical moment of time when the give-way ship in fact first became unable to avoid collision—a matter which could not be ascertained until after the collision and after the relevant circumstances had been investigated. The following authorities, in my opinion, support the learned judge's construction. In *The Ranza* (*sup.*), where it was contended that the stand-on ship had kept her course and speed too long, Gorell Barnes, J. says at p. 22: "What is the duty of a vessel in the position of the *Gloamin*"—the stand-on ship—"with regard to a vessel in the position of the *Ranza*"—the give-way ship. "The *Ranza* had to keep out of the way and the *Gloamin* had to keep her course and speed obviously up to a certain point. It is quite impossible to be absolutely certain where that point is, mathematically speaking, but these rules"—namely, arts. 21 and 27—"have to be construed so that men may act reasonably upon them." The learned judge in that case, no doubt, had his mind directed to the margin of time which should be allowed to the stand-on ship after the moment had arrived when that ship found herself so close that collision could not be avoided by the action of the give-way ship alone, but the same reasoning applies to the margin of time which should be allowed to the stand-on ship before that point has been reached.

In *The Albano* (10 Asp. Mar. Law Cas. 365; 96 L. T. Rep. 335; (1907) A. C. 193) the Privy Council had to consider the Canadian regulations which so far as material are identical with the regulations of 1910 and in the judgment of the board (delivered by Sir Gorell Barnes) after a reference to the difficulty in which the master of a stand-on ship is placed in determining when the time has arrived for him to take action there is the following passage: "Therefore he must keep his course and speed up to some point, and then act, but the precise point must necessarily be difficult to determine, and some little latitude has to be allowed to the master in determining this." In *The Olympic and H.M.S. Hawke* (*sup.*), Vaughan Williams, L.J. says (1913, P. at p. 245): "I am inclined to think that in a case where good seamanship would assume that collision cannot be avoided by the action of the giving-away vessel alone, the case falls within the exception," namely, the exception to the rule to keep course and speed, "even though in fact the giving-way vessel could by her own action have averted collision," and in the same case Lord Parker at p. 279 says: "A vessel which under the crossing rule has to keep out of the way of another vessel must act before there be actual danger. If she allows the time for acting to go by she may lead the other vessel to suppose that she cannot or does not intend to act. In such a case the latter vessel may be relieved from the reciprocal obligation of maintaining her own course and speed." Bankes, L.J., in *The Orduna* comments (1919) P. at p. 390) on this latter statement and observes that such a case ought to be scrutinised with the greatest care and that a person must make it abundantly plain that he was justified in taking up the exceptional position to which Lord Parker refers, but adds that it is largely a question of seamanship. I agree with the view so expressed by Bankes, L.J.

In *The Huntsman* (1911) 104 L. T. Rep. 466: 11 Asp. Mar. Law Cas. 606) Bargrave Deane, J., after referring to the difficult position in which the navigator of the stand-on ship is placed under art. 21 and stating that if the officer is carefully watching the give-way ship and endeavouring to do his best to judge when he ought to act, it ought not to be made a complaint against him that he waited too long or acted too soon, proceeds as follows: "It is difficult to determine the critical moment, and some latitude must be allowed to the officer of a stand-on ship who is clearly doing his utmost in a position of difficulty caused by bad navigation by those in charge of a giving-way ship."

In *The Gulf of Suez* (15 Asp. Mar. Law Cas. 328; 125 L. T. Rep. 653; (1921) P. 331), the Master of the Rolls, Lord Sterndale, approves of the passages which I have cited from *The Ranza* (*sup.*) and *The Huntsman* (*sup.*). Although the cases which I have mentioned relate mainly to the duty imposed by the note to art. 21 on the stand-on ship to take action, I am of opinion that the same principle applies to any action taken by the stand-on ship in order to avoid immediate danger under art. 27. The necessity referred to in that article must, I think, be judged by good seamanship and not by a subsequent mathematical ascertainment of the exact moment of time when in fact the necessity first arose.

The next matter to be considered on this branch of the case is whether the *Otranto* has discharged the onus of proving that when she starboarded the time had arrived for her to take action either under the note to art. 21 in order to aid to avert collision or under art. 27 in order to avoid immediate danger. On the assumption that the master is allowed some latitude under art. 21 this question resolves itself into whether the master of the *Otranto* when he took action was justified as a matter of good seamanship in concluding that the *Kitano Maru* was so close as no longer to be able to avoid collision by her own action alone and consequently that it had become his duty to take action. The learned judge, with the advice of the Elder Brethren, found as a fact that when the *Otranto* starboarded the time had come for her to take action. This finding was arrived at notwithstanding that it was demonstrated at the trial that, as a mathematical proposition, the *Kitano Maru* could have passed under the stern of the *Otranto* if she had ported when the *Otranto* starboarded, and that she could have done so whether the *Otranto* had kept her course and speed or had merely taken off her way. As to this the learned judge remarked in the course of the trial: "That is quite obvious as a mathematical proposition, but as a practical rule of navigation it is not obvious at all," an observation with which I agree. The advice given to us by our assessors on this point agrees with the advice given by the Elder Brethren in the court below. To the best of my judgment, after having carefully considered the evidence and the arguments of counsel, the view taken by the learned judge and by all four assessors was right. The *Otranto* had been carefully watching the *Kitano Maru* ever since she was first sighted some seven miles away and had taken frequent bearings. She did not act until three minutes before the collision at a time when the vessels were under three-quarters of a mile apart and about half a mile from the point of intersection of their courses. Up to that time the *Kitano Maru* had not shown any signs of altering either her course or her speed—she was making slightly over 13 knots and the *Otranto* slightly over 16 knots. The courses were nearly at right angles. It was admitted by Mr. Harry Gray, who was called by the respondents, that a minute later there would have been a position of extreme danger if both vessels had kept their respective courses and speeds. This admission was based on the mathematical calculations which had been made since the collision. Accepting this opinion as correct and looking at the position from the point of view of a practical navigator, this margin does not in the circumstances seem to me to be too wide, especially considering that,

owing to the time of day, the light was deceptive for judging distances with great accuracy. Having regard to all the circumstances and to the advice given by all four assessors I agree with the learned judge's finding that the time had come when as a matter of good seamanship the master of the *Otranto* was justified in assuming that collision could not be averted by the action of the *Kitana Maru* alone, and consequently that he was not only entitled but was bound to take action and to exercise his best judgment to avoid the threatened collision.

There remains the question whether the learned judge was right in condemning the *Otranto*, not for infringing any express direction contained in the regulations, but because in his opinion, when the time for action had arrived, her master exhibited a want of reasonable care and skill. The onus of proving that the action then taken by the *Otranto* was negligent rests on the *Kitano Maru*. It was the latter's negligence which had placed the master of the *Otranto* in the difficult position of having to judge not only when to take action but also what that action should be. Lord Morris, in *The Tasmania* (6 Asp. Mar. Law Cas, at p. 521 ; 63 L. T. Rep., at p. 5 ; 15 App. Cas., at p. 238), points out that when a collision is caused by the misconduct of the party complaining there should be very clear proof of contributory negligence.

Now what are the facts here ? The master of the *Otranto* was a competent and experienced navigator. For twenty years before the collision he had been in the service of the appellants as master and for two years he had been commander of the *Otranto*. His skill, care and nerve as a navigator, apart from the particular action taken in this case, were not called in question. He was summoned on to the bridge and took personal charge of the navigation of the *Otranto* at 8.39, being nine minutes before the collision. From that time forward he carefully watched the *Kitano Maru*. At 8.45 he came to the conclusion that the moment had arrived when it was his duty to take action and he then gave the order "starboard fifteen" followed immediately by the order "hard-a-starboard," making one continuous movement of helm action. At the same time he gave an order for two short blasts on the whistle. Up to the time of giving these orders the *Kitano Maru* was keeping her course and speed and had shown no signs of keeping out of the way. He thought that she was trying to cross his bows and came to the conclusion that the best action he could take to aid in averting collision was to hard-a-starboard with the object of passing under her stern. In his evidence he explained that he did not port because that would have opened up the whole of his port side and that he did not slacken speed or stop or reverse because he could not say how long it would have taken him to take the way off his ship at the speed she was then making ; moreover he thought that if he had taken off way he would have lost more than half of his manœuvring power and that, if the *Kitano Maru* had held on, she might have struck the *Otranto* amidships.

The learned judge in giving judgment said : "To starboard in such a position cannot be right. I have said so in many cases and what is more important, I think the Court of Appeal and the House of Lords have said the same. I agree that every case has to be decided on its own facts, but I can see nothing to distinguish this case from other cases in which I have decided that for the stand-on ship to starboard in such a position cannot be right. It can only assist to avoid the collision if the give-way ship continues to keep her course and speed. If though too late the give-way ship ports then the starboarding of the stand-on ship makes collision almost inevitable. And the stand-on ship has no right to assume that the give-way ship will not port.

The golden rule in such cases is to take off your way. If you take off your way you are very unlikely to make a collision. You are giving more time for the give-way ship if she persists in her wrong-doing to cross ahead of you, or if she repents too late or acts too late—well, you give her more time to act and it may avoid collision altogether, and it is almost certain to reduce the damage." . . . "I am advised—and I quite agree—that hard-a-starboarding was wrong."

Later on in his judgment the learned judge states that he is not going to say that anybody ought in the circumstances to hard-a-port, therefore the question is reduced to whether the *Otranto* was negligent in hard-a-starboarding, instead of taking off her way and keeping her course. Our assessors have advised us that in the circumstances hard-a-starboarding without decreasing speed was good seamanship. Thus we are faced with opposite opinions expressed by the two sets of assessors, who, presumably, are equally competent to advise on such a technical question. The duty of the court in such circumstances is pointed out in clear and unmistakable terms by Lord Sumner in *The Australia* (17 Asp. Mar. Law Cas., at p. 88 ; 135 L. T. Rep., at p. 579 ; (1927) A. C., at p. 151 and 153) as follows : "The court must exercise its function of deciding and find consolation in a consciousness at any rate of blank impartiality. . . . The technical advice given in the court below is advice available for the consideration of the appellate tribunal, as well as that given by its own assessors. The latter are not substituted for those previously consulted ; they are additional to them, and if one adviser or two advisers are to be preferred, it is because in the judgment of the court the advice given is such as in itself is the more acceptable. . . . If, as may happen, a judge cannot decide in his own mind whether or not the advice he receives is sound, his position is simply that the point is not proven and the loss falls on the party who bears the burden of proof on that issue." My duty, therefore, is to exercise my own judgment, paying due regard to the advice given by the Elder Brethren in

the court below as well as to that given to us by our assessors.

The learned judge seems to me to have founded his judgment to a great extent upon a rule which he calls "the golden rule to take off way." With the utmost respect for the opinion of the very experienced judge, I cannot think it right for the court to lay down a rule prescribing the particular action to be taken by the stand-on ship when she finds herself in the predicament indicated in the note to art. 21. Under the regulations the action, which it then becomes her duty to take, is left to the judgment of her navigator, as such action must necessarily depend upon and vary with the circumstances. To take any action before the critical moment has arrived is, of course, entirely wrong, and to starboard in that case is the worst possible action that could be taken because it means entering the water which should be left free to enable the give-way ship to pass under the stern of the stand-on ship is she is so minded. But the position is different when the give-way ship has let the time go by and she is so close that she cannot any longer safely take any port helm action in order to keep out of the way. In such circumstances the master of the stand-on ship must be free to exercise his best judgment as to the appropriate action to be taken and the only requirement is that the action should be such as might reasonably be taken by a competent navigator. To hold that any action other than taking off way is *primâ facie* an act of negligence would in many cases operate to relieve the give-way ship which had caused the difficulty from the burden of proving contributory negligence, and cast the burden of proving that the action taken by the stand-on ship was not negligent on that ship, which in my opinion would be contrary to what was said by the House of Lords in *The Tasmania* (*sup.*). With regard to the statement made by the learned judge that the *Otranto* had no right to assume that the *Kitano Maru*, although too late, would not port, this is contrary to the opinion expressed by Bowen, L.J. in *The Memnon* (6 Asp. Mar. Law Cas., at p. 320; 1888, 59 L. T. Rep., at p. 291). In that case the stand-on ship was held to blame for not having taken off her way soon enough in breach of art. 18 of the Regulations of 1884, and the Lord Justice says: "It seems to me contrary to common sense to maintain that when you are watching a person who is doing something wrong and unreasonable you have a right to assume that at some given moment he will cease that course of conduct and adopt another."

The same reason which led the master of the *Otranto* to conclude that the time for taking action had arrived, namely, his assumption (which has been held to have been justified) that the *Kitano Maru* was trying to cross his bows and would, therefore, keep her course and speed, led him to hard-a-starboard in order to pass under her stern, which to the best of his judgment was the safest course to adopt in the circumstances. He did not lose his nerve, nor was he acting in the agony of collision without any time for reflection. He states in his evidence that he considered the various courses open to him and gave his reasons for starboarding. At the trial he adhered to his opinion that this action was in the circumstances the best he could have taken to avoid collision without unduly endangering his ship and the lives he had on board, an opinion which was emphatically endorsed by our assessors. He cannot, I think, reasonably be held to be negligent for not anticipating that, after the *Otranto* had given the proper signal indicating that she was directing her course to port, the *Kitano Maru* would take port-helm action, with the inevitable result that she would bring herself across the *Otranto's* bows. The obvious inference to be drawn from the action taken by the *Kitano Maru* is that at the critical time she was not keeping a proper look-out and was being navigated by an incompetent person, who only woke up to the fact that the *Otranto* was in close proximity when he heard her signal, and then, either through ignorance or loss of nerve, took the wrong action—an action which could not and in this court was not attempted to be justified. If on hearing the *Otranto's* signal the *Kitano Maru* had acted in a reasonable manner, and either had gone full speed astern, or had starboarded, it is plain that, with the aid of the *Otranto's* action, the threatened collision would have been averted. Even if she had then kept her course and speed it now turns out as a mathematical proposition that the *Otranto's* action would have avoided a collision and the latter would have passed safely under her stern.

Taking all the circumstances into consideration and exercising my judgment on such a technical question to the best of my ability, I prefer the opinion of our assessors to that of the assessors in the court below. The question, however, is not whether the *Otranto* has proved that she acted rightly in starboarding, but whether the *Kitano Maru* has proved that the action taken by the *Otranto* was wrong in the circumstances. The *Kitano Maru* came into court with a concocted story; she has therefore only herself to blame that the court is unable to say what action she would have taken, or what would have happened if the *Otranto* had taken off way instead of starboarding. The learned judge, as I understand his judgment, has condemned the *Otranto* not because he had arrived at the conclusion that if she had taken off way the collision would have been avoided, or the damage reduced, but because by starboarding she broke the golden rule he refers to. If I am right that there is no such rule, it follows that the *Kitano Maru* has not discharged the onus which, according to the decision of the House of Lords in *The Tasmania* (*sup.*), rests on her. Even if, however, in the opinion of the court, it would have been wiser to have taken off way instead of hard-a-starboarding, I think that the master, who acted according to the best of his judgment in the difficult position in which he found himself

was at most guilty of an error of judgment, and that his action cannot justly be held to have been negligent. The observations made by the President (Sir John Bigham) in *The Tryst* (11 Asp. Mar. Law Cas. 33; 101 L. T. Rep. 716; (1909) P. 333) are in my opinion much to the point on this question. There the *Ortona* was the stand-on ship, and when she found herself so close to the give-way ship that action by the latter alone could not avoid a collision, she hard-a-ported, keeping her speed. The give-way ship was held to blame for the collision which ensued, but it was contended by her that the *Ortona* was also to blame as she ought not to have ported at all, and in any event she ought to have taken off her way. The *President* (11 Asp. Mar. Law Cas., at p. 335; 101 L. T. Rep., at p. 718; (1909) P., at pp. 336, 337) said: "Then it is said that the *Ortona* should be held partly to blame because she might and ought to have reduced her speed, and it is pointed out that according to the engineer's evidence an interval of three minutes elapsed between the order from the bridge to stand by and the collision; but, in my opinion, those in charge of the *Ortona* acted all through for the best. There may have been some error of judgment—something might have been done which would seem wiser when considered after the event—but there was in my opinion nothing which could be described as negligence of those in charge of the *Ortona*.

Further, if contrary to my opinion, the *Otranto* was negligent in starboarding, I am of opinion that the port-helm action taken by the *Kitano Maru*, after the *Otranto* had given the prescribed signal indicating that she was starboarding, was a subsequent and separate act of negligence on her part, and that it was this act which was the proximate cause of the collision. If that be so, then the *Otranto* is entitled to recover in full: (see *The Volute*, 15 Asp. Mar. Law Cas., at pp. 534, 535; 126 L. T. Rep., at pp. 429, 430; (1922) A. C., at p. 136).

Lastly, if there be any real doubt whether the action taken by the *Otranto* was negligent or not the finding of this court ought to be that the *Kitano Maru* has not discharged the onus of proof which rests on her, and that therefore the whole loss falls on her.

Before parting with the case, however, I desire to say a few words about the authorities relied upon by the respondents' counsel. The learned judge did not state which of the cases he had in mind when he said that he thought the Court of Appeal and House of Lords had said that starboarding in circumstances similar to those prevailing in the present case could not be right. Counsel have, however, referred us to several cases decided in these courts, all of which are, in my opinion, distinguishable from the present case on the ground that it was held in each that the stand-on ship was to blame because she had disregarded some express direction contained in the regulations.

In *The Khedive* (*sup.*) the House of Lords decided that the stand-on ship by starboarding had disregarded the express direction contained in art. 16 of the Regulations of 1863 requiring her to stop and reverse her engines, and that, as no discretion had been left to her by that article, she was to blame, although her master possibly rightly thought that his helm action would prevent or greatly mitigate the collision. This case shows clearly that, where the regulations have been broken, the question of the expediency of the action taken is irrelevant, and the fact that the master honestly thought that in the circumstances it would be better seamanship to take action, instead of adhering to the Regulations, affords no excuse.

In *The Memnon* (*sup.*), pp. 317 and 488, the Court of Appeal and the House of Lords held that the stand-on ship, in keeping her speed, had broken art. 18 of Regulations of 1884, which required her (as well as the give-way ship) when approaching another ship so as to involve risk of collision, to slacken her speed, or stop and reverse, if necessary, and that, therefore, she was partly to blame for the collision.

In *The Orduna* (*sup.*) the Court of Appeal and the House of Lords held that, although the give-way ship had not ported in time, yet the stand-on ship by starboarding had disregarded her duty under art. 21 to keep her course and speed. Lord Sumner puts the case in a nutshell, as follows: "The evidence of the officer of the watch that, at the moment when he took helm action he judged the position to be a safe one, leaves him without excuse."

The Norman Monarch (*sup.*) is a very similar case to that of *The Orduna*. It was there held by the Court of Appeal and the House of Lords that the stand-on ship by starboarding had broken the rule which required her to keep her course and speed, and was, therefore, to blame, although the give-way ship was also to blame for having acted too late.

Again, in *The Athena* (*sup.*), the Court of Appeal and the House of Lords held that the stand-on ship had not succeeded in discharging the onus which lay upon her of justifying her departure from her duty to keep her course and speed. These three last-mentioned cases are authorities for the proposition (which I understood the appellants not to dispute) that the duty imposed on the stand-on ship, under the note to art. 21, to take action does not arise merely because the give-way ship does not take action to keep out of the way soon enough. They are most material on the question when and in what circumstances it becomes the duty of the stand-on ship to take action, but they do not support the proposition that when that time has arrived starboarding is necessarily or even *primâ facie* an act of negligence. All the authorities to which our attention has been called show that if the stand-on ship departs from the rule to keep her course and speed before the crucial moment has arrived when it becomes her duty to take action, she will be held to blame because she committed a breach of the regulations unless she can clearly show that the action so taken did not cause or contribute to the collision, and such a breach will

not be excused because the master considered it good seamanship under the circumstances to depart from the regulations. But where, as here, the regulations have not been broken, the question whether a ship has been navigated negligently or not must be determined on ordinary principles apart from the regulations. The party alleging negligence must prove that the navigator exhibited a want of reasonable care and skill. In such a case the competency of the navigator, his reasons for taking the particular action complained of, and the expediency of taking such action, are most relevant.

In view of my opinion that the appellants are right on the main question it becomes unnecessary for me to deal with the subsidiary question as to whether the learned judge was right in apportioning the blame equally between the two vessels and I prefer not to express any opinion on that point. In the result for the reasons stated, I am of opinion that this appeal succeeds and that the judgment pronounced in the court below should be varied by pronouncing that the collision was solely caused by the fault of the owners, master and crew of the *Kitano Maru* or some or one of them and by condemning the respondents in the whole of the appellants' counterclaim and by condemning the respondents in the appellants' costs of the claim and counter claim in the court below and in the costs of this appeal.

GREER, L.J.—If it had not been that I am differing from the judgment of Hill, J. and the judgment of Scrutton, L.J., I probably would have contented myself by saying that I agree with the judgment that has just been delivered by Lawrence, L.J. for the reasons stated by him, but having regard to the difference of judicial opinion, I regret to say that I deem it necessary to inflict another somewhat long judgment upon the court and upon the patience of the law reporters.

At or about 8.48 p.m. on the 11th Aug. 1928, a collision took place between the defendants' steamer, the *Otranto* and the plaintiffs' steamer, the *Kitano Maru*. The owners of the *Kitano Maru* brought this action in the Admiralty Court, alleging that the *Otranto* was alone to blame for the collision. The owners of the *Otranto* put in a defence and counterclaim alleging that the *Kitano Maru* was alone to blame for the collision. Hill, J., who tried this action with Trinity Masters, has decided that both were to blame and has apportioned the damage equally. Originally, both parties appealed, but the plaintiffs have withdrawn their appeal, and the only matters for this court to consider are those which are involved in the defendants' appeal.

The defendants, by their counsel, contend that the learned judge was wrong in deciding that the *Otranto* was to blame at all, and secondly, that even if she be held to blame, a larger portion of the blame should be attached to the plaintiffs' vessel than to the defendants', and the judgment of the learned judge, so far as it deals with the apportionment, should be varied by attributing a larger portion of the damages to the plaintiffs. Hill, J. disbelieved the evidence given by the plaintiffs' witnesses, but came to the conclusion that, notwithstanding this false evidence, the *Otranto* was equally to blame with the *Kitano Maru* for the damage occasioned by the collision.

The *Kitano Maru* is a twin screw steamship of 7,952 tons gross and 474ft. long. At the time of the collision, she was laden with about 2,000 tons of cargo, with a draught of 19ft. 11in. forward and 22ft. aft. The *Otranto* is a twin screw turbine steamship of 20,032 tons gross, and 658ft. long. She was in ballast, with a large number of passengers and numerous crew, and her draught was 24ft. forward and 26ft. 10in. aft. The *Kitano Maru* was bound south from Middlesbrough to Antwerp, and the *Otranto* was bound east from the Humber for a Norwegian cruise. They came into collision, the port bow of the *Kitano Maru* and the stem of the *Otranto*, at nearly a right angle. They had originally been on crossing courses nearly at right angles, the *Kitano Maru* heading a course S.E. by S. ¾ S. magnetic, and the *Otranto* a course N.E. by E. ¼ E. magnetic. As they were approaching each other the *Kitano Maru* had the *Otranto* on her starboard side. She was, therefore, the give-way ship under art. 19, and as soon as they became near enough to be described as crossing vessels, it was her duty to keep out of the way of the *Otranto*, and under art. 21 it was the corresponding duty of the *Otranto* to keep her course and speed, unless the facts were such as to bring the case within the note appended to that article, which is as follows: 'When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision": (See arts. 27 and 29). It is to be observed that the words are not "is so close that collision cannot be avoided," or "becomes so close" or "gets so close," "that collision cannot be avoided," but the words are "finds herself so close that collision cannot be avoided," words which, in my view, leave room for the exercise of a reasonable finding or judgment by the navigator of the stand-on ship. The learned judge states his findings on the evidence as follows: "I accept the evidence from the *Otranto* that the *Kitano Maru* made no alteration till she was at the very outside three-quarters of a mile away, and probably less. I do not believe the *Kitano Maru* hard-a-ported more than once or gave a short blast more than once. The fact that the action taken was hard-a-port, and not port, confirms the conclusion that it was taken at very close quarters. If taken earlier a slight porting would have been sufficient. The fact that the starboard engines were reversed before the port engine also points to the engines being used to assist rapid action of the helm. On the other hand, the defendants' case I accept.

It tells very much against themselves as well as against the plaintiffs. I accept it as an honest case. I believe the evidence of the defendants' witnesses. Their case is that the *Otranto* was travelling at about sixteen knots and saw at about seven miles distance the *Kitano Maru* on a bearing which was accurately taken by the second officer; that the bearing continued the same for about ten minutes; that the second officer then sent a message to the master, who came to the bridge. Then the master takes up the story (confirmed by the second officer). Eight minutes before the collision the *Kitano Maru* was judged to be two to two-and-a-half miles away, and about three-and-a-half points on the port bow. The bearing continued almost the same, varying only by one degree. Three or four minutes before the collision, when the distance, as the master judged, was a quarter to half-a-mile, and was judged by the second officer to be hardly three-quarters of a mile—up to that time the *Kitano Maru* had not altered her course or her speed or given any signal. Upon that the commander recognised that the position was very dangerous, and decided to take action, and about three minutes before the collision he gave an order "Starboard 15," and immediately "Hard-a-starboard." That order was carried out and he gave two short blasts. He brought the *Kitano Maru* a little on the port bow, and then—and not until then—the *Kitano Maru* began to turn to starboard and gave a short blast. Immediately upon that he gave an order hard-a-port, and before it could be carried out he countermanded it, and repeated hard-a-starboard, and followed that by full astern on both engines about a minute before the collision. At the collision the *Kitano Maru* was swinging to starboard, and the *Otranto* to port. I accept this evidence. I find in fact that the two blasts of the *Otranto* preceded the one blast of the *Kitano Maru*. But, accepting it, I cannot do otherwise than find that the *Otranto* hard-a-starboarded, and did not take engine action and reverse until a very short time before the collision." Lower down the learned judge finds that, at the time that the *Otranto* starboarded, the time had come when the *Otranto* was entitled to act in accordance with the directions contained in the note to art. 21. He held that some latitude must be allowed to the master of the stand-on vessel in making his decision as to whether a collision can or cannot be avoided by the action of the give-way vessel alone, and that, in the case under consideration, the time had come when the *Otranto* was entitled to act, and that it could not be said that her master acted too soon. The *Otranto* was, therefore, not in the wrong in failing to keep her course and speed. If the time had arrived for her to act under the note, I will assume for the time being that this finding of Hill, J. in this respect was correct, reserving the point for consideration after dealing with the case on this assumption. Hill, J. decided that, though the time had come for her to take such action as the best aid to avert collision, she had taken the wrong action and, by doing so, she was negligent or blameworthy. The first question to be determined is, whether the learned judge was right in this view.

A great many authorities have been cited to us upon this question, but, after all, the question in every case is a question of fact to be determined on the proved facts of each case, and is not a question of law to be determined on authority. Assuming that the learned judge was right in coming to the conclusion that when the *Otranto* starboarded the time had come for her to take some action, which in the judgment of a careful and skilful navigator was likely to best avert collision, I am of opinion that the master of the *Otranto* did not act negligently or in any way inconsistent with skilful seamanship. Judged by what in fact happened, her master took the wrong course and one which, having regard to the subsequent navigation of the *Kitano Maru* resulted in the collision, but the reasonableness or skilfulness of the course adopted by the master of the *Otranto* is not to be determined by the event, but by the facts that were present to his mind at the time that he exercised his judgment. It was plain to him, from the bearings that had been carefully taken from time to time, that the *Kitano Maru* was not in fact taking any proper steps to keep out of his way. It was reasonable for him to conclude that she was not keeping a proper look-out and that she was not going to take any steps in sufficient time to avoid colliding with him if he did nothing. If he was right in his judgment as to what the *Kitano Maru* was likely to do, it followed that he would be right in his conclusion that a collision would be avoided if he hard-a-starboarded. If he hard-a-starboarded he, therefore, enabled the *Kitano Maru*, by continuing her course, to keep out of his way. After giving the order hard-a-starboard, the appropriate signal was given to the *Kitano Maru* that the *Otranto* was directing her course to port, whereupon the master of the *Kitano Maru* gave an order which, under the circumstances, was, in my judgment, bound to lead to a collision. Instead of keeping out of the way of the *Otranto* by continuing straight on, so that the vessels would pass starboard to starboard, he ported, thereby, in my judgment, making it inevitable that the two vessels would come into collision. The master of the *Otranto*, when he saw what the other vessel was doing, gave a momentary order to port, which he immediately rescinded before it had had time to check the direction of his vessel to port. At that time I do not think he could have saved the situation by porting, though possibly the collision would have happened in a way different from the way in which it did happen.

The learned judge, however, held, following his own decisions in many cases where the facts were similar though not identical, that to starboard in such a position could not be right, and that the golden rule to be observed was that she should take off her way. In my

judgment, though the rule may be a golden one, it is not an absolute one and it is not a rule of law. As it happened, in the present case, if the master had adopted engine action and reversed his engines, it is probable, but by no means certain, that a collision would not have taken place at all, but in any case he had to act without any knowledge as to when, if at all, the master of the *Kitano Maru* was likely to give an order hard-a-port. I think he was entitled to assume that if he starboarded and gave notice to the *Kitano Maru* that he was doing so, the *Kitano Maru* would then see that the only reasonable course for him to take would be for him to keep out of the way of the *Otranto* in which he was. I cannot think that it was negligent or blameworthy on the part of the master of the *Otranto* to assume that the master of the *Kitano Maru* would, after noticing that the *Otranto* was directing his course to port, take the course which was obviously the most dangerous and which would not keep the *Kitano Maru* out of the way of the *Otranto*, but would put her into the way of the *Otranto* and make a collision certain. Under these circumstances, without the assistance of the assessors, I should have come to the conclusion that the learned judge was wrong in holding the *Otranto* partly to blame for the collision, but my judgment in this case is confirmed by the judgment of the very experienced assessors who assisted us in this court.

In this case questions have been put to our assessors, and their answers seem to me to show that they agree with the view that I have expressed, but great reliance was placed by Mr. Dunlop, for the respondents, on a number of cases which he cited, especially on *The Orduna* (*sup.*). In that case the *Orduna* and the *Konakry* were crossing vessels at a very obtuse angle, there being only a difference of 17 degrees from opposite courses. It is obvious, under these circumstances, that it might be quite safe for the give-way vessel to postpone porting until she was very close to the other vessel, as a very slight porting would have kept her out of the way of the *Orduna*, and the *Orduna* was held to blame because she starboarded, according to her own evidence, at a time when those on board the *Orduna* thought that the vessels would pass safely on the course on which they were, but that it was desirable to give a wider course to the *Konakry* and they starboarded for that purpose. It was there held that the note to art. 21 had no application to the case, as the action of the *Orduna* in starboarding was not required to avoid collision, and, therefore, it was not justified by the note: (See the speech of Lord Finlay at (1921) A. C., at pp. 255, 256, and the short judgment of Lord Sumner at (1921) A. C. 260). That case has no similarity, in my judgment, to the present case where the vessels were approaching on almost perpendicular courses.

A number of other cases were cited by Mr. Dunlop in which it was decided that starboarding was a wrong manœuvre. The decision in each case must depend on the special facts proved in each case, and in my judgment there is no rule of law or good sense to the effect that it is never right for a stand-on vessel to starboard or that it is always negligent navigation for him to do so. Art. 21 puts a severe burden upon him, but it does not prevent him from saying that "under the circumstances as I saw them at the moment I was called upon to act it appeared reasonably safe for me to take the action that I did, and, *therefore*, I was not negligent." Though this is not a case of action taken by a master who lost his head in the agony of collision, the circumstances which called for action on his part were not dissimilar to those which call for action in the agony of collision. He was put into a position of difficulty by the initial fault of the *Kitano Maru*, and he had to do that which appeared to be reasonably safe at the time he acted. The action that he took would have been reasonably safe if, after notice, the *Kitano Maru* had done what she ought to have done, and for my part I cannot hold the *Otranto* to blame for what happened, because her master acted upon the assumption that when the master of the *Kitano Maru* knew that he was starboarding he would have made a correspondingly safe move by starboarding himself, or, would have continued on his course. I cannot help thinking that the learned judge allowed himself to be too much under the influence of his decisions in other cases, and has stated as an absolute rule of navigation a rule which, though usually right, still admits of exceptions.

For these reasons, on the assumption above made, I think that the *Kitano Maru* should have been held solely to blame for the collision on the ground that there was no negligent navigation on the part of the *Otranto*; and, secondly, on the ground that even assuming the *Otranto* to have been negligent in starboarding, still the real cause of the collision was the subsequent negligence of the *Kitano Maru* in porting when, if she had acted with reasonable care, she would either have starboarded, or kept straight on.

I have hitherto assumed that the learned judge was right in his view that the time had arrived when the master of the *Otranto* was entitled to act by altering his course or speed, but it was contended before us that inasmuch as at the time he did alter his course, and if the other vessel immediately ported, a collision would have been avoided, the *Otranto* should be held to blame because she committed a breach of art. 21. We have been advised, and I think rightly advised, that if the *Otranto* had kept her course and speed and the *Kitano Maru* had ported at the time she did the vessels would have passed clear of one another and there would have been no collision. It was argued that upon these facts the first part of art. 21 was still in operation and that the circumstances which under the note to that article made it the duty

of the *Otranto* to take such action as would best aid to avert collision had not happened. Art. 21 and the note thereto must be read along with art. 27 which says: "In obeying and construing these rules, due regard shall be had to all dangers of navigation and collision and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger." I think the true principle upon which these two rules are to be applied to the facts of any particular case is that which was stated by Lord Herschell in *The Tasmania* (6 Asp. Mar. Law Cas. at p. 518; 63 L. T. Rep. at p. 2; 15 App. Cas. at p. 226), where he says: "As soon then as it was, or ought to a master of reasonable skill and prudence to have been, obvious that to keep his course would involve immediate danger, it was no longer the duty of the master of the *Tasmania* to adhere to the 22nd rule"—the 22nd rule at the time of this decision was the rule under which the stand-on ship had to keep her course—"He was not only justified in departing from it, but bound to do so, and to exercise his best judgment to avoid the danger which threatened."

In *The Albano* (10 Asp. Mar. Law Cas. 370; 96 L. T. Rep. at p. 339; (1907) App. Cas. at p. 207), Sir Gorell Barnes, in giving the judgment of the Privy Council, says this: "It must always be a matter of some difficulty for the master of a vessel which has to keep her course and speed with regard to another vessel which has to keep out of her way, to determine when the time has arrived for him to take action for if he act too soon he may disconcert any action which the other vessel may be about to avoid his vessel, and might be blamed for so doing, and yet the time may come at which he must take action. Therefore he must keep his course and speed up to some point, but the precise point must necessarily be difficult to determine, and some little latitude has to be allowed to the master in determining this." In that case the suggestion against the master was that he had acted too late, but I do not see why the same latitude should not be allowed to him when the question is whether he acted too soon. Indeed it seems to me more important to see that the regulations should not be so interrupted as to render it next to impossible for the stand-on ship to act in time than that he should be allowed a little latitude in acting too late because acting in time may save the collision, but acting too late can never save a collision. If he is obliged to wait until the last moment, when it in fact becomes impossible for the give-way ship to avoid a collision by her act alone, in ninety-nine cases out of a hundred that moment will be allowed to pass, and a collision will often become inevitable. The possible consequences of such an interpretation of the rules seem to me quite appalling in a case like the present, where the master of the *Otranto* was faced with the reasonable probability of a disaster to both ships, involving the loss of many valuable lives, if he did nothing, and, on the other hand, a high probability that if he starboarded and gave the appropriate signal the officer in charge of the other ship would do what a careful and observant officer would do; that is to say turn away from him, and not into him. Unless I am forced by the regulations, or the decisions of this court, or the House of Lords, to hold that the *Otranto* broke the regulations, and was, therefore, partly to blame, I am not inclined so to hold.

In the case of *The Olympic and H.M.S. Hawke*, Lord Parker uses these words (1913) P. at p. 217): "A vessel which under the crossing rule has to keep out of the way of another vessel must act before there be actual danger. If she allows the time for acting to go by, she may lead the other vessel to suppose that she cannot, or does not intend to act. In such a case the latter vessel may be relieved from the reciprocal obligation of maintaining her own course and speed." In the same case (1913) P. at p. 245), Vaughan Williams, L.J. cites a statement with regard to the rules in Marsden on Collisions, as follows: "The rule requiring a ship to keep her course and speed must be observed strictly. So long as there is a possibility of the other ship clearing her, she must stand on. Thus Sir James Hannen refused to find a sailing ship to blame for taking no step, until the last moment, to avoid collision with a steamer which she saw was taking no measures to keep out of the way. The guide of the steamer's action is the presumption that the sailing vessel will keep her course. With reference to the same rule under a previous Act, Dr. Lushington said: 'I wholly deny that danger would be averted, or that infinitely greater danger would not occur, if a vessel close-hauled on the larboard tack, on descrying a steamer, were to take upon herself to deviate from her course for the purpose of getting out of the way; because I am of opinion that by so doing it would lead to the chance of infinitely more collisions than at the present.'" The Lord Justice then went on to say: "It seems uncertain on the cases whether the exception to the rule only arises when a collision is inevitable unless averted by the ship which has to keep her course and speed, or whether the exception applies when the collision is so probable that good seamanship, if there were no rule, would justify action by the ship, bound to keep her course, to avert collision."

I prefer to follow the latter alternative suggested by the Lord Justice's comment to the statement in Marsden, or the expression of Dr. Lushington's views on rules which were differently framed from those at present in operation, and I prefer to follow the opinions of Lord Herschell in *The Tasmania* (*sup.*), of Sir Gorell Barnes in *The Albano* (*sup.*), and of Lord Justice Vaughan Williams and Lord Parker in *The Olympic and H.M.S. Hawke* (*sup.*) rather than what I conceive to be the too

rigid statements of the effect of the regulations in Marsden and by Dr. Lushington in the older cases.

At first sight the decision of *The Khedive* (*sup.*) seems to be contrary to the view I am expressing, but that was a decision under art. 16 of the Regulations of 1863, which says that every steamship when approaching another ship so as to involve risk of collision shall slacken speed, or, if necessary, stop and reverse. It was there held that this applied to the stand-on ship, and was an express order to slacken her speed, and she could not escape responsibility of a breach of the rules by saying that she starboarded in a manner that was not negligent under the circumstances. That rule has been altered, the present rule being: "Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed, or stop or reverse." This applies to the give-way ship, and not expressly to the stand-on ship. The note to art. 21 was not added until 1897, and, therefore, was not in operation at the time of the decision in *The Khedive* (*sup.*). I think the note justifies reference to art. 27 as bearing on the interpretation of the note.

Some useful observations on this subject are to be found in the judgment of Bargrave Deane, J. in *The Huntsman* (11 Asp. Mar. Law Cas. at p. 608; 104 L. T. Rep. at p. 466) where he says this: "Upon this question as to altering her speed by a vessel whose duty it is to keep it under art. 21, it is almost impossible to lay down any fixed rule. Good seamanship requires that in any case a time may come when the course or speed or both of a stand-on ship may and ought to be altered. The difficulty in such a case is to decide at what exact time such alteration not only may be but ought to be made. It is impossible, mathematically speaking, to fix that time—various ingredients come into the matter—the light or clearness of the atmosphere by which a fair judgment of distances may be formed—the speed and course of the other vessel from which an accurate estimate may be formed of the point where the two intersecting courses will meet if both vessels continue their course and speed—and the further almost insuperable difficulty of detecting, as in this case, at one o'clock in the morning, the precise moment when the giving-way vessel may be altering her course and the precise moment when if she does not alter her course a prudent officer in charge of the stand-on vessel feels it to be his duty to do something, and if something what that something is to be. The burden of taking action and departing from the rule is cast upon that officer, who has to determine when that point of departure occurs. It must not be pressed too severely in any case. If the officer is carefully watching the movements of the other vessel and endeavouring to do his best to judge when the time shall arrive for him to act, it ought not to be made a complaint against him that he waited too long or he acted too soon. If he acts too soon he may disconcert any action which the other vessel may be about to take to avoid his vessel. It is difficult to determine the critical moment, and some latitude must be allowed to the officer of a stand-on ship who is clearly doing his utmost in a position of difficulty caused by bad navigation by those in charge of a giving-way ship." I agree with all those observations. Similar considerations influenced Bigham, J. in *The Tryst* (*sup.*). I agree with the opinions expressed by Bargrave Deane, J. which I have read. In my view, it is not the law that, if the stand-on ship is proved to have altered her course or speed, before the last moment at which it is possible for the give-way ship by her own action alone to avoid collision, the stand-on ship must be held to blame. Some reasonable margin of time must be allowed to the stand-on ship both before and after the last possible moment. I also think that in this case Hill, J., advised by the Trinity Masters, with whose opinion our assessors agreed, was right in holding that the *Otranto* did not act outside that margin of time. I do not feel compelled to give the rules a construction which would involve an obligation on the master of the stand-on ship to do that which no human being could possibly be expected to do. The last moment at which the give-way ship can, by its own act, avoid a collision is a point of time infinitesimal in extent. It passes almost at the moment when it arrives. I cannot think that the rules mean that the stand-on ship must stand-on and fail to take measures to avoid an impending danger until the exact mathematical point of time has arrived when the give-way ship cannot, by anything she does, avoid a collision. I think the note to art. 21, with its reference to art. 27, enables us to give a wider construction to art. 21, and allow some latitude to the stand-on ship to act before the exact mathematical point of time, to which I have referred, has arrived.

The learned judge in this case, his two assessors and our assessors, have come to the conclusion that when the *Otranto* starboarded, it was sufficiently near the time at which it was necessary to do something to avoid the risk of a collision that the *Otranto* must be held not to have acted too soon.

It is said to be impossible to take this view, having regard to the decisions of the House of Lords in *The Orduna* (*sup.*), *The Athena* (*sup.*), and *The Norman Monarch* (*sup.*). In my judgment, there is nothing in any of these decisions to prevent the court from holding that, in the present case, the *Otranto* did not act too soon. In *The Norman Monarch* (*sup.*), it does not appear to have been contended that, on the evidence accepted by the court, the *Thrigia* did not act too soon. She appears to have starboarded twice, once, under the impression that the *Norman Monarch* was a sailing vessel. I think the case was decided on

questions of fact, and I can extract no rule of law from it. The same is true of the *Athena*. It is to be observed that, both in the *Norman Monarch* and in the *Athena*, as in the *Orduna*, the vessels were approaching at a fine angle, and, therefore, a very little porting at a late moment by the give-way vessels would have been sufficient to prevent a collision. The main contention in the *Athena* was the same as in the *Orduna*, " that at the time when the stand-on ship starboarded, the vessels were no longer crossing vessels, and the risk of collision had ceased." On the facts, Hill, J. found against this contention. It appears from the report in the Court of Appeal (10 Ll. L. Rep. 729), in the judgment of Bankes, L.J., at p. 731, that the point that was argued in the present case was also argued in *The Athena*. What Bankes, L.J. says about it is this : " Now the other point is this : Mr. Bateson seeks to bring his case within the reasoning which underlay the decisions in the cases of *The Albano* (*sup.*), *The Huntsman* (*sup.*), and *The Ranza* (*sup.*). Those were all cases where a man, though not acting, perhaps, in the agony of collision, acted under the fear of collision in the sense of something having to be done immediately because of the fear of collision ; but it seems to me quite impossible to bring this case within that class of authority because the case of *The War Bahadur* is this : That when I took the action I did take by starboarding the helm, I was under no fear of collision at all ; I thought that all danger of collision had passed, I acted as I did because the vessels had ceased to be crossing vessels, and I merely did it as a matter of precaution in order that I might not cause inconvenience by the two vessels passing too close to each other." I understand these observations of the Lord Justice as leaving open the question whether the navigator of a stand-on ship can be excused if he ceases to keep his course and speed at a time when it would seem reasonable to a skilful navigator that it was necessary for him to act in order to avoid immediate danger, though that time may be before the exact moment when the give-way ship could not, by her own act, avoid a collision. The judgments of Hill, J. and the Court of Appeal in *The Athena* (*sup.*) were affirmed in the House of Lords, as I read the report, on the ground that the House of Lords were not prepared to interfere with the findings of fact of the trial judge and of the Court of Appeal.

I have already dealt with the decision in *The Orduna* (*sup.*), which appears to me to be almost exactly similar to that in *The Athena* (*sup.*). In my judgment, there is no rule of law established by these cases which prevents this court from accepting the finding of Hill, J., who saw and heard the witnesses, that the time had come when it was reasonably necessary for the master of the *Otranto* to act in order to avoid immediate danger. Some margin of time must be allowed to the stand-on ship before and after the last moment has arrived. It has still to be considered in every case whether the stand-on ship has acted within that margin. I am not myself disposed to place great reliance on estimates of time and position made by observers on a rapidly moving vessel, or on calculations based on mathematical estimates of the course of a vessel, determined by its theoretical turning circle. I think more weight should be attached to the judgment of an experienced and trustworthy navigator, whose evidence the judge who saw and heard him accepts. I think Hill, J., the Trinity Masters, and our two assessors, were right in the view they have taken that the time had come for the master of the *Otranto* to make some alteration in his course or speed to avoid immediate danger, and that, in starboarding, he took action that was not either negligent or unseamanlike.

In my judgment, this appeal ought to be allowed on two grounds : (1) that the *Otranto* was not, to any extent, to blame for the collision ; (2) that in any event, the proximate, effective, substantial or real cause (whichever be the right word) was the negligence of the *Kitano Maru* in porting after the *Otranto* had signalled saying that she, the *Otranto*, was starboarding. I agree that the order of this court should be as stated in Lawrence's, L.J. judgment.

Solicitors : for the appellants, Messrs. *Parker, Garrett*, and *Co.*; for the respondents, Messrs. *Walton* and *Co.*

Friday, Jan. 31, 1930.

(Before SCRUTTON, SLESSER, and ROMER, L.JJ.)

DIXON v. STEAMSHIP AYRESOME (Owners). (*a*)

APPEAL UNDER THE WORKMEN'S COMPENSATION ACT.

Workmen's compensation — Accident — Arising out of and in the course of the employment—Workman employed on a ship as coal trimmer—Leaving the ship in the wrong way—Not outside employment—Workmen's Compensation Act 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 1.

The dependant, Dixon, an infant, appealed from an award of the County Court judge, who held that an accident did not arise within the scope of the employment where the deceased workman, Chambers, a coal trimmer employed on the respondents' ship, was killed on leaving the ship in the following circumstances : The respondents' ship, going to load coal, was lying alongside a wharf ; the ship was 2ft. from the wharf. The bulwark was about the level of a handrail on the side of the wharf, each being about 3ft. 6in. high and there was about 2ft. between them. The foreman of the trimmers and a trimmer, whom he described as employed under him, went down to the ship to place the chute in position, so that the coal could be shot into the hold. They got on board, the

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

foreman by stooping under the handrail and then just jumping or stepping on to the edge of the bulwark, and there was no evidence whether the dead man got over the handrail or under the handrail when he went over the bulwark. They arranged the chute in about ten minutes and then, as there was nothing to trim until some coal had been shot into the hold, they both left the ship. The foreman on that occasion stepped on to the bulwark, and then on on to the top of the rail, and then hopped down on to the staith. The deceased man followed, and when he got his weight on the handrail he slipped and fell on his right side. The evidence was not clear whether the dead man slipped in his jump on the bulwark and then slipped again as he got on to the handrail, whether he made an ineffective jump because he slipped on the bulwark and consequently did not land square on the handrail, or whether he got a firm jump from the bulwark and slipped when he touched the handrail. In any event the result was that he was killed. The bulwark was the ship's bulwark. The handrail was on the quay and the quay did not belong to the ship. If the deceased had landed on the handrail and then fell, it was a question whether the accident happened on the ship's premises at all, and if he was not on the ship's premises when the accident happened, it was a question whether the employment had ceased. The County Court judge did not, however, deal with that point in his award, but he said that the question in dispute in this case was whether the action of the deceased in leaving the vessel as he did was an act done in the course of the employment. The witness had said definitely that it was not the right way of leaving the ship ; a ladder or gangway was provided whereby men could leave the ship. The County Court judge made an award in favour of the employers.

Held, that there was no evidence on which the County Court judge could have come to the conclusion that getting off the ship by stepping from the bulwark to the quay or to the handrail was so far removed from anything contemplated by either party that it would not be held to be within the employment at all ; nor had the workman, when he slipped and fell and was killed, left the ship's premises so as to bring him outside the employment of the ship when the accident happened. Therefore the accident in this case happened within the scope of the workman's employment and the award of the County Court judge in favour of the employers must be set aside.

APPEAL from an award of the judge of the North Shields County Court, sitting as an arbitrator under the Workmen's Compensation Acts.

The appellant, Frances Dixon, claimed as next friend of James Dixon, an infant, aged eleven years, of Perry Main, North Shields, the sum of 100*l.* 16*s.* compensation in respect of the death by accident arising out of and in the course of his employment, of one James Chambers. The infant, James Dixon, was an illegitimate son of the deceased workman, Chambers.

The respondents denied liability on the grounds that the infant was not a dependant of the deceased workman, and that the workman's death was not caused by accident arising out of and in the course of the employment.

His Honour Judge Sir Francis Greenwell held that the accident to Chambers did not arise out of and in the course of his employment.

The facts relating to the accident were as follows :

On the 25th June 1929, the respondents' steamship *Ayresome* was lying alongside a wharf at Northumberland Dock, ready to load coal. The ship was 2ft. from the wharf, the bulwark of the ship being level with the handrail on the side of the wharf, and each being 3ft. 6in. high. The deceased workman, James Chambers, was a coal trimmer employed on that ship. In coming off the ship on that day, Chambers stepped off the bulwark of the ship on to the handrail on the side of the quay, slipped and fell. He suffered injuries from which he died on the 5th July 1929.

Robert Reay, under whom Chambers worked, said that he and Chambers were leaving the ship, he himself stepped on to the bulwark, then on to the top of the handrail, and then hopped down to the staith. He looked back and saw Chambers hanging on the handrail. It looked as if he had slipped when getting on to the handrail. He did not notice any other means of getting off the ship, but he afterwards saw an 18ft. ladder. It was across the two-foot space between the bulwark and the handrail. In cross-examination he admitted that stepping across the handrail was not the right way to leave the ship. Another witness, Samuel Miller, a fitter, said that he saw Reay and Chambers leaving the ship, and that when Chambers got his weight on to the handrail, he slipped and fell on his right side.

The County Court judge said that the question was whether the action of the deceased, in leaving the ship as he did, was an act done in the course of the employment. The witness Reay said definitely that it was not the right way of leaving, and also that, though he did not know it at the time, a way by means of a ladder bridging the space between the vessel and the staith was provided. In those circumstances, it appeared to the County Court judge to be clear on the cases cited that the accident by which the deceased lost his life did not happen in the course of his employment, and he therefore made his award for the respondents.

The dependant appealed on the grounds that the accident to the workman arose out of and in the course of his employment, and that there was no evidence on which the County Court judge could find that the accident did not happen in the course of the employment ; that he misdirected himself by considering that because the workman left the ship in a

way that was not the right way, he necessarily went outside the scope of his employment; that the evidence showed that in leaving a ship on which he was engaged the workman was killed in doing an act for the purposes of his employers' trade or business, and there was no evidence of any prohibition against his leaving the ship in the way he did; that there was no evidence on which the County Court judge could find that the workman knew that the way he left the ship was not the right way; and that the workman's act in so leaving the ship was no more than a deviation from the prescribed method of leaving the ship: that the judge failed to direct himself with regard to the distinction between acts different in kind from those which the workman was employed to do and acts which merely amounted to misconduct in performing work which the workman was employed to do; that as the workman was killed while doing an act for the purposes of and in connection with his employers' trade or business while he was about his employment, and at the time when and at the place where he was carrying out his employment, and as such an act was not and was not alleged to be an "added peril," it did not disentitle the dependant to compensation in respect of the workman's death.

William Shakespeare and *J. Charlesworth* for the appellant, the dependant.—There was no evidence to justify the decision of the County Court judge that the fatal accident to James Chambers did not arise out of and in the course of his employment. The judge thought that if a workman did not act in the right way, that prevented the accident from arising out of and in the course of the employment. The question is whether the judge misdirected himself. On the evidence the deceased workman was doing what he was employed to do, but not in the right way, and according to the authorities, that does not take the accident outside the scope of the employment.

The following authorities were referred to: *Davidson (Charles R.) and Co.* v. *M'Robb or Officer* (118 L. T. Rep. 451; (1918) A. C. 304), *Gallant* v. *steamship Gabir (Owners of)* (12 Asp. Mar. Law Cas. 284; 108 L. T. Rep. 50), *Guest* v. *Gaston and Co.* (135 L. T. Rep. 400; (1927) 1 K. B. 1), *Howells* v. *Great Western Railway* (132 L. T. Rep. 544), *Kearon* v. *Kearon* (1911, 45 Ir. L. T. 96; 4 B. W. C. C. 435), *Keyser* v. *Burdrick and Co.* (1910, 4 B. W. C. C. 87), *Lashbrook* v. *The Times Shipping Company* (16 Asp. Mar. Law Cas. 209; 1923, 129 L. T. Rep. 403), *Morrison* v. *steamship Aboukir (Owners of)* (1928, W. C. & Ins. Rep. 293; 21 B. W. C. C. 163), *Stewart (John) and Son Limited* v. *Longhurst* (116 L. T. Rep. 763; (1917) A. C. 249).

W. H. Duckworth and *P. J. Sykes* for the respondents, the employers.—The question was one for the County Court judge. At the time of the accident the deceased workman had ceased to be in the employ of the respondents. His employment ceased when he left the ship, and the respondents were not liable: (see *Cook* v. *Steamship Montreal (Owners)* (1913, 108 L. T. Rep. 164; 6 B. W. C. C. 220).

Scrutton, L.J.—This is a point of some considerable difficulty, partly owing to the course which was taken at the trial and owing, to some extent, to an agreement which has been made between the parties. A ship going to load coal was lying alongside a wharf; the ship was 2ft. from the wharf. The bulwark, I gather, was about the level of a handrail on the side of the wharf, each being about 3ft. 6in. high, and there was about 2ft. between them. The foreman of the trimmers and a trimmer whom he describes as employed under him, went down to the ship to place the chute in position, so that the coal could be shot into the hold. They got on board, the foreman by stooping under the handrail and then just jumping or stepping on to the edge of the bulwark, and it is not stated whether Chambers, the dead man, got over the handrail or under the handrail when he went over the bulwark. They arranged the chute in about ten minutes, and then, as there was nothing to trim until some coal had been shot into the hold, they both left the ship, the foreman on that occasion stepped on to the bulwark and then on to the top of the rail, and then, as he describes it, hopped down on to the staith.

The evidence about Chambers is this: The man who saw him says: "I saw Reay leave the ship as he has stated, Chambers followed; when he got his weight on the handrail he slipped and fell on his right side." Reay himself says: "I looked back and saw Chambers hanging on the handrail; it looked as if he had slipped coming on the handrail." It is not, of course, clear from that—it is left in complete doubt—whether the dead man, Chambers, slipped in his jump on the bulwark and then slipped again as he got on to the handrail, whether he made an ineffective jump because he slipped on the bulwark, and, consequently, did not land square on the handrail, or whether he got a firm jump from the bulwark and slipped when he touched the handrail. However, unfortunately, the result of the slip was that he was killed.

When one reads the evidence of the foreman it will be seen that he said: "I am employed by the Hartley Main Colliery Company, and Chambers was employed under me as a trimmer." One expects to find that the defendants are the Hartley Main Colliery Company, but the defendants are not the Hartley Main Colliery Company; the defendants are the owners of the ship, and it appears that the union who deals with these trimmers, and the shipping federation who deal with the ship have a sort of agreement that a trimmer shall be treated as being in the employ of the ship, so that the owners of the ship are put as the defendants. That may raise a question—a very troublesome one in some cases—because

trimmers very often work two or three ships at a time, going from one to the other. In whose employ is the trimmer when he is going from ship A to ship B on the wharf? That is one of those interesting questions that the people who made this agreement never thought about, and which will be fought out, I suppose, some day.

But the fact of the possibility of such an agreement at once may raise this question. The ship is the ship, and its bulwark is the ship's bulwark. The handrail is on the quay, and the quay does not belong to the ship. If a man has landed on the handrail and then falls, is he on the ship's premises at all, and, if he is not on the ship's premises, has his employment ceased? Counsel who were present at the trial both told us that that point was raised in argument. One said that, although it was raised, it was not pressed very forcibly, and the learned County Court judge takes no notice of it, and does not refer to it at all in his award, and nobody asked him to refer to it when it was found that his judgment was blank on the subject, although, as counsel for the respondents says: "Why should I ask him to deal with it when I had got a decision in my favour on the other point? If I had asked him to deal with it I might have got a decision against me on that point, which would not have helped me at all." The learned judge not dealing with that point at all—I will say what I have to say about it in a moment—does deal with this other point. His award, which I understand expresses the judgment which he gave at the time, says: "The question in dispute in this case was whether the action of the deceased in leaving the vessel as he did was an act done in the course of his employment. The witness Reay says definitely it was not the right way of leaving," and he also adds a point about the ladder, with which I will deal in a moment.

There has been a series of cases in which judges have endeavoured to lay down with more or less success the distinction which exists. Without adding a further version I had better repeat the language which I used myself, and repeated afterwards, first of all in the case of *Wardle* v. *Enthoven and Sons* (116 L. T. Rep. 103), and then in the case of *Guest* v. *Gaston and Co.* (135 L. T. Rep. 400; (1927) 1 K. B. 1). In the case of *Wardle* v. *Enthoven and Sons* I said this (116 L. T. Rep. 103; (1917) W. C. & Ins. Rep., at p. 22): "If a man is doing the work he was employed to do, but doing it negligently, and meets with an accident, it is not therefore necessarily outside his employment; the accident may still arise out of his employment. A very good illustration of that is the case of *Blair and Co. Limited* v. *Chilton* (113 L. T. Rep. 514; (1915) 8 B. W. C. C. 324), where a man was employed to work a machine standing; and he worked it sitting down, and because of his working it sitting, which was a negligent way of doing it, an accident happened. There it was held that the accident arose out of his employment. You may have cases, on the other hand, where a man is doing something different from what he is employed to do, which has been expressed in various ways, such as being outside the sphere of his employment, outside the scope of his employment, or in another territory to that in which he was employed to work; then the accident does not arise out of his employment. But there is the more difficult class of case in which the man is doing what he was employed to do, but is doing it in such an extraordinary and unusual way that the courts find that the accident does not arise out of his employment, because he was not employed to do the work in the peculiar way in which he was doing it. An illustration of that is the case of *Russell* v. *A. G. Murray Limited* (1915, W. C. & Ins. Rep. 532; 5 B. W. C. C. 81), where a workman was employed to attend to belting, and had the duty of replacing the belting if it slipped off the shafting. In the room in which he worked there were ladders which he could use to get to the belting; but he chose not to get a ladder, but to climb on to a sloping window-ledge in order from that sloping window-ledge to put on the belting, and he fell and sustained injuries, from which he died. The court held, in that case, that the risk he was undertaking arose from such an unusual way of performing the work that the accident did not arise out of his employment, because the way in which he did what he was employed to do was not within the scope of the work that he was employed to do. That principle or statement is also expressed by Pickford, L.J., in the case of *Pepper* v. *Sayer* (1914, W. C. & Ins. Rep., at p. 427): 'It is possible to imagine cases in which the workman has acted in such an unreasonable way that, even though he were doing something within his employment, the manner of doing it would be so far removed from anything contemplated by either party that it would not be held to be within the employment at all.'"

That statement I referred to and repeated in the case of *Guest* v. *Gaston and Co.* (*sup.*), and it has been repeated with approval in a number of other cases by other judges. So that the question which the learned County Court judge had here, assuming he had those cases in his mind, was: There being a ladder by which the man could get off the ship—every ship is bound to have something of that sort by which a man can get off it—either a ladder or a gangway or planks—was the getting on and off the ship by way of stepping from the quay to the top of the bulwark and from there to the top of the handrail, in the language of Pickford, L.J. (1914, W. C. & Ins. Rep., at p. 427): "so far removed from anything contemplated by either party that it would not be held to be within the employment at all"?

If there was evidence on which the learned County Court judge could find either way, that would be a matter for him, and we could not interfere. If he had not considered that distinction at all we might, as in the case of the

man getting on to the moving tram, send the case back to him to consider. The question is whether there was any evidence upon which, in the language of Pickford, L.J., he could have come to the conclusion that getting off the ship, which was a thing which the man had to do under his employment—he had to get on to the ship and get off it when he had done his work—by stepping from the bulwark to the quay or to the handrail was " so far removed from anything contemplated by either party that it would not be held to be within the employment at all."

Whether I am right or wrong in doing it, I am afraid I am deciding this case from what I know about docks, and I cannot think there is any evidence which justifies anybody in saying that to get off a ship by stepping from the bulwark to the quay when there is two feet between the two is so far removed from anything contemplated by either party that it is not within the scope of the employment. It is done, I should think, dozens of times a day in every dock on every ship. It is a risky way of doing it as appears from this case, but with great respect to those who thought a sloping ladder was a safe way of getting off the ship, so is coming down a sloping ladder an unsafe way of doing it, so far as my experience goes.

I come, therefore to the conclusion on that point that the decision of the learned County Court judge should be set aside, on the ground that there was no evidence on which he could arrive at that view.

There only remains the question which I personally think is an important and difficult one, namely, as to whether the point when the workman slipped on the handrail he had left the employers' premises, so that he was then no longer in the employ of the ship, should be submitted to the learned County Court judge. I have come to the conclusion, but with some doubt, that it should not be. In the first place, I think the course taken at the trial is not such as to distinctly raise it. It seems that there is no trace of it in the learned judge's judgment, and he was not asked to decide it when it was found that he was not in fact deciding it. Further, it appears to me that the facts are much too nebulous to raise, really, a specific case of the man being off the ship when the accident happened. The slip which brought him down may have begun on the bulwark, in which case he would have been on the employers' premises, and if the slip occurs in the course of one step—when one foot is on the ship and one on the shore—I think it is extremely difficult to say that the man ought to be deprived of his rights because, in the course of that one step, at one end of which he is on the ship and the other on the shore, an accident happened. I do not wish this case to be taken as a decision that an accident happening off the employers' premises is necessarily to be imputed to the employers. There are many cases in which getting off the employers' premises the employers' risk has ceased. I decide this case on the peculiar facts of this case, and the course taken at the trial.

For these reasons I think that the learned County Court judge's decision must be set aside. Is the amount of compensation agreed ?

Shakespeare.—No, my Lord. The matter will have to go back to the learned County Court judge to fix the compensation. It is a case of an infant.

Scrutton, L.J.—Very well. The case must be remitted to the learned County Court judge to decide the amount of compensation due to the infant.

Slesser, L.J.—I agree that this appeal must be allowed, for the reason that, in my judgment. there is no evidence on which the learned County Court judge could come to the conclusion that the accident by which the deceased lost his life did not happen in the course of his employment. The test which has been mentioned by my Lord, and which I also apply, which is mentioned in many cases, in various phrases, beginning with *Barnes* v. *Nunnery Colliery Company* (105 L. T. Rep. 961 ; (1912) A. C. 44), *Plumb* v. *Cobden Flour Mills Company* (109 L. T. Rep. 759 ; (1914) A. C. 62), and particularly in *Pepper* v. *Sayer* (7 B. W. C. C. 616), is : " Has the workman acted in such an unreasonable way that even though he was doing something within his employment, the manner of doing it would be so far removed from anything contemplated by either party that it would not be held to be within the employment at all ? "

That test has been applied to one or two cases, at any rate, which raise questions not unlike those in the present case. It has, for example, been held that where a proper gangway was provided, and a seaman chose to jump from the quay to the ship instead of using the proper gangway and fell into the water, the accident could not be said to arise out of the employment. That is the case of *Martin* v. *Fullerton and Co.* (1908, S. C. 1030). In that case there was evidence that there was a proper gangway provided. Had there been any evidence here of an authorised way of leaving the ship, and had the learned County Court judge based his finding on any such evidence, I do not think that it could have been disturbed ; but the evidence indicates to me that there was no authorised way which can properly be found on the evidence for leaving the ship at all. It is not suggested that the method of jumping was specifically authorised, and the only other method of leaving the ship which is suggested was by means of a long eighteen-foot ladder. Mr. Reay, who, it is true, was not employed by the ship even notionally for the purposes of this case, as apparently was the appellant here, but who was the foreman, said that Chambers, the deceased, was employed under him as a trimmer, and he also said that he afterwards saw a long

eighteen-foot ladder. That was his evidence, and it appears from that that certainly he, Mr. Reay, did not know of any ladder which could be used as an authorised means of leaving the ship. Of course, that is no evidence whatever that the deceased knew of any such authorised way. It is said against that, that in cross-examination, Mr. Reay said that stepping across the rail is not the right way, but that leaves the matter still in complete doubt as to whether any other method had been authorised for leaving the ship. But it does not follow because stepping across the rail is not the right way that using the ladder would have been the right way, or would not have been the right way.

Therefore, the case seems to me to be distinguishable from *Martin* v. *Fullerton and Co.* (*sup.*), which applied the doctrine of *Pepper* v. *Sayer* (*sup.*), *Plumb* v. *Cobden Flour Mills Company* (*sup.*), *Barnes* v. *Nunnery Colliery Company* (*sup.*), and the decision in *Kearon* v. *Kearon* (45 Ir. L. T. 96), where it was held that if there is no gangway, and no other means of access but to jump from the quay, the accident may arise out of the employment; and in *Keyser* v. *Burdick and Co.* (4 B. W. C. C. 87) it was similarly decided that if the only means of getting on shore is to slide down a rope, that is not such an unreasonable use as to bring the act of the workman outside the sphere of the employment.

In my judgment, differing, unfortunately, from my Lord in knowing nothing about docks, I think there is no evidence in this case that any authorised way was provided for leaving this ship. All we know is, that this man followed the example of the foreman in leaving this ship by jumping from the ship to the quay. In those circumstances, it appears to me, once it is conceded that it is necessary for the man, by the nature of his business, to leave the ship, there being no authorised way, there is no evidence that this was an unreasonable way of leaving the ship, and that would conclude the matter on the authorities, that this was a mere method which may or may not be a very ideal method, but is a method within the sphere of his employment, and he has not suffered or done anything which would produce any added peril to his employment not contemplated reasonably by both parties.

There remains only the further question whether anything can be said here with regard to the fact that it may be that the accident occurred outside the premises of the employers. I say "may be" because, on the evidence, it is extremely doubtful whether the actual accident was the slip or the grasping of the handrail, or whether the slip occurred on the premises, or whether it occurred on the handrail; the whole matter is left in some obscurity on that point. Although it has been said, and very frankly admitted by counsel for the appellant, that the matter was mentioned, I do not think any real contention was laid before the learned County Court judge on this issue. The evidence is not directed to the question of exactly where the accident took place, which would have been an essential point if this point was to be raised—as to whether it was or was not upon the employers' premises. The cases which were cited by counsel for the respondents have no reference to this particular issue, and counsel for the respondents called no evidence which might have been material on this point, and, finally, the award of the learned County Court judge obviously does not proceed on any question as to whether the accident happened or did not happen on the employers' premises. In those circumstances, I think it would be wrong to send this case back upon this point, because I do not think the point was really raised in such a manner as to call for the determination of it in the court below. I therefore prefer to say nothing about that point, and I base my view that the appeal should be allowed entirely on the fact that there is no evidence upon which the learned County Court judge could properly find that the accident by which the deceased lost his life did not happen in the course of his employment. Once it is conceded, and conceded as it must be, that it was part of the employment to go on to the ship and to leave it, it follows that the accident did happen in the course of the employment, and that the learned County Court judge came to a wrong conclusion, and, therefore, the appeal should be allowed.

Romer, L.J.—There are two questions which were really raised on this appeal. The first one is whether, assuming that the accident here occurred while the workman was getting over the rail on the quay, it occurred in the course of his employment. The other question is whether, assuming that question to be answered in the affirmative, the workman's manner of leaving the ship was of such a nature as to take him outside the scope of his employment. For the purposes of answering the first question I am entitled to assume that the method by which he left the ship was either the only one available to him or was, at any rate, one of the methods that was authorised. It has been held over and over again that a man's employment does not cease the moment he ceases to work; his employment generally lasts until he has left his employers' premises. If, therefore, in the present case, and on the assumption that I have made, the accident happened by the workman slipping as he took off from the ship in making this flying leap, it could not, I suppose, be doubted that the accident happened in the course of his employment. Does it make any difference that the accident occurred as he landed on the quay after the flying leap? In my opinion it does not.

Speaking for myself, I should have thought that the employment lasted until the workman had safely arrived on neutral territory, the neutral territory in this case being the surface

of the quay. I think that that conclusion is warranted by at least two authorities decided in this court. One of them is the case of *Webber* v. *Wansborough Paper Company* (111 L. T. Rep. 658; (1915) A. C. 51). That was a case of a seaman employed on a vessel, who left the ship for home at the end of his work, crossing to the quay by a plank to an iron ladder permanently fixed against the side of the quay. The ladder fixed against the side of the quay was not the property of the employer at all; it was the property of the owner of the quay. The workman using this means of obtaining access from the ship to the quay slipped while ascending the ladder, and it was held nevertheless that the accident arose in the course of his employment. He had not safely arrived on the neutral territory. The other case is the case of *Barbeary* v. *Chugg* (112 L. T. Rep. 797; 8 B. W. C. C. 37; 31 Times L. R. 153). That was the case of a man acting as a pilot, who had been piloting a ketch, and after doing his work, which consisted of piloting the ketch, he wished to get back to land, and so he took a flying leap from the ketch into a small dinghy that was being towed behind the ketch. The dinghy was his own property. The accident was described by the Master of the Rolls, Lord Cozens-Hardy, in this way. He said: " He jumped and alighted not in the best or most suitable position, but in the front of the boat, the result being that the boat went under water and became so nearly full that he was up to the thighs in water." Now he was using the only means of access open to him to the neutral territory which was the land, and the fact that the accident happened not indeed on the ketch, which was the property of the employer, but on the boat, which was the property of the employee, was not said to be a reason for holding that the accident occurred otherwise than in the course of his employment.

For these reasons, it appears to me, even on the assumption I have made, namely, that the accident did occur not while he was taking off on the ship, but as and when he landed on the quay and was trying to get over the rail, that the accident occurred in the course of his employment.

Upon the other point, as to whether, having regard to the manner in which he left the ship, he was acting outside the scope of his employment, I do not wish to add anything to what has fallen from the other members of the court, and I agree with the order that has been suggested.

Appeal allowed.

Solicitors for appellant (defendant), *Pattinson and Brewer*, agents for *Keenlyside* and *Foster*, Newcastle-on-Tyne.

Solicitors for respondents (employers), *Botterell* and *Roche*, agents for *Botterell, Roche,* and *Temperley*, Newcastle-on-Tyne.

Friday, May 2, 1930.

(Before SCRUTTON, GREER, and SLESSER, L.JJ.)

THE CROXTETH HALL; THE CELTIC. (*a*)

ON APPEAL FROM ADMIRALTY DIVISION.

Seamen's wages—Wreck—Right to receive wages during period of two months from the date of the wreck if unemployed—Voyage terminating within the period of two months—Payment of wages whilst unemployed during period subsequent to date when voyage was due to end—Merchant Shipping (International Labour Conventions) Act 1925 (15 & 16 *Geo.* 5, *c.* 42).

By the Merchant Shipping (International Labour Conventions) Act 1925, *s.* 1 (1), *it is provided that " where by reason of the wreck or loss of a ship on which a seaman is employed his service terminates before the date contemplated in the agreement, he shall, notwithstanding, be entitled in respect of each day on which he is in fact unemployed during a period of two months from the date of the termination of the service, to receive wages at the rate to which he was entitled at that date "; and by sub-sect.* (2) *it is further provided that " a seaman shall not be entitled to receive wages under this section if the owner shows that the unemployment was not due to the wreck or loss of the ship and shall not be entitled to receive wages under this section in respect of any day if the owner shows that the seaman was able to obtain suitable employment on that day."*

Held (Slesser, L. J. dissenting) that a seaman is entitled to wages for a period of two months from the date when his services terminate by reason of the wreck, notwithstanding that the voyage to which his agreement relates would have come to an end but for the wreck, within the period of two months.

APPEAL from judgments of Lord Merrivale, P., in two wages actions, referred to the Probate, Divorce and Admiralty Division by the stipendiary magistrate at Liverpool, and heard together.

The plaintiff in the first action (*Murray* v. *Ellerman Lines Limited; The Croxteth Hall*), signed articles as an able-bodied seaman and quartermaster on board the defendants' steamship *Croxteth Hall* for a voyage not exceeding two years' duration from the 29th Oct. 1928, terminating at such port in the United Kingdom or continent of Europe within home trade limits as might be required by the master. The *Croxteth Hall* was wrecked near Flushing on the 28th Feb. 1929, and the plaintiff was returned to Liverpool on the 4th March 1929 at the defendants' expense, and paid his wages up to the 4th March 1929. Had the *Croxteth Hall* not been wrecked, she would have completed the voyage in respect of which the plaintiff had engaged at Middlesbrough on the 11th March 1929. The plaintiff was unemployed for a period of two months from the 28th Feb. 1929. He claimed wages at the rate

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

provided for by the articles and subsistence allowance at the rate of 4*s.* per day.

In the second action (*Comerford* v. *White Star Line of Royal and United States Mail Steamers, Ocean Steam Navigation Company Limited; The Celtic*), the plaintiff was an able-bodied seaman on board the defendants' steamship *Celtic.* The voyage described in the articles under which the plaintiff served was from Liverpool to New York *via* Queenstown, Boston, and (or) if required to any ports within the North and South Atlantic Oceans trading, as may be required until the ship returns to a final port of discharge in the United Kingdom. On the 10th Dec. 1928, the *Celtic* was wrecked near Queenstown whilst homeward bound for Liverpool, which would have been her final port. Had the *Celtic* not been wrecked she would have reached Liverpool on the 11th Dec. 1928. The plaintiff, with the other members of the crew, was brought to Liverpool by the owners on the 13th Dec. 1928, and was paid his wages under the articles up to and including the 11th Dec. From the 11th Dec. the plaintiff, who was one of the regular crew of the *Celtic*, was unemployed. The plaintiff claimed wages for a period of two months from the 11th Dec. and subsistence allowance at the rate of 4*s.* per day.

The Merchant Shipping (International Conventions) Act 1925 (15 & 16 Geo. 5, c. 542), provides as follows:

Sect. 1. (1) Where by reason of the wreck or loss of a ship on which a seaman is employed his service terminates before the date contemplated in the agreement, he shall, notwithstanding anything in section one hundred and fifty-eight of the Merchant Shipping Act 1894, but subject to the provisions of this section, be entitled, in respect of each day on which he is in fact unemployed during a period of two months from the date of the termination of the service, to receive wages at the rate to which he was entitled at that date. (2) A seaman shall not be entitled to receive wages under this section if the owner shows that the unemployment was not due to the wreck or loss of the ship and shall not be entitled to receive wages under this section in respect of any day if the owner shows that the seaman was able to obtain suitable employment on that day. (3) In this section the expression "seaman" includes every person employed or engaged in any capacity on board any ship, but in the case of a ship which is a fishing boat, does not include any person who is entitled to be remunerated only by a share in the profits or the gross earnings of the working of the boat.

Langton, K.C. and *G. J. Lynskey* for the plaintiff, Murray.

Fraser Harrison for the plaintiff Comerford.

Dunlop, K.C. and *Cyril Miller* for the defendants.

Langton, K.C. replied. *Cur. adv. vult.*

Dec. 4, 1929.—Lord MERRIVALE, P., delivered the following considered judgment:

John Murray, who is the claimant in these proceedings, was shipped as an able seaman and quartermaster on the steamship *Croxteth Hall* for what is described in the articles as "a voyage of not exceeding two years duration to any ports within the limits of 75° N. and 60° S. latitude commencing at Manchester, proceeding thence to Persian Gulf and (or) any other ports within the above limits, trading in any rotation and to end at such port in the United Kingdom or continent of Europe within home trade limits as may be required by the master." The date of commencement of the voyage was the 29th Oct. 1928. It was in progress homeward when the *Croxteth Hall* was wrecked on the coast of Holland on the 28th Feb. 1929. With other members of the crew Murray was brought back at the owners' expense to Liverpool by the 4th March and paid off, wages being paid up to and including the 6th March.

Had the *Croxteth Hall* proceeded on her voyage without mishap she would have gone on to Middlesbrough, where she was due to arrive not later than the 11th March. There the voyage would have ended and subject to any new agreement or agreements, Murray and the other members of the crew would have been discharged from further service under the articles in question.

Murray's home address as shown by the articles was Rock Ferry. On being paid off he proceeded to Rock Ferry and was living there during several ensuing months, out of work and seeking in Liverpool and Birkenhead a like berth to that he had had on board the *Croxteth Hall.* He did not at that time secure employment.

On the 19th March the local secretary of the Transport and General Workers Union, of which Murray was a member, addressed to the defendants' manager an enquiry as to their readiness to indemnify him for loss of employment by reason of the wreck, indicating a probable claim under the Merchant Shipping (International Labour Conventions) Act 1925. This enquiry elicited a letter from the defendants' solicitors, in its material terms as follows:

We are instructed that your three members were paid off at Liverpool up to and including 4th ultimo. We are further instructed that in any event the services of your members would have terminated at Middlesbrough before 12th ultimo. In these circumstances it would appear to us that any unemployment of your members after 12th ultimo was not due to the wreck or loss of the ship, and the case falls within sub-sect. (2) of sect. 1 of the Merchant Shipping (International Labour Conventions) Act 1925. Our clients are therefore prepared to pay your members wages for the period 5th March to the 12th March inclusive, and we shall be glad to hear from you whether our clients are to send the amount in question to you or to your members direct. In the latter event you will no doubt furnish us with their addresses.

Reference was made in the solicitors' letter to a form of statutory release signed by the plaintiff when he was paid off on the 4th March. This, however, does not need to be set out. At the trial it was not relied upon.

Other correspondence ensued, and in May the plaintiffs' solicitors took proceedings before the stipendiary magistrate at Liverpool, claiming under the Act of 1925 two months' wages at the rate fixed by the articles, and subsistence money for the same period at 4*s.* a day. Murray's was not the only claim before the learned magistrate. As has appeared already members of the crew of the *Croxteth Hall* were members of the same union and were claimants. Concurrently with these claims, there had arisen claims of a very large body of seamen, members of the crew of the White Star Company's steamship *Celtic* wrecked near Queenstown in December 1928, of whom Joseph Comerford was one.

Murray's case, and Comerford's case, which must be specifically dealt with later, were brought to a hearing before the learned stipendiary magistrate. In both cases evidence was taken and arguments made, and both were eventually referred by the learned magistrate to this Division.

On the plaintiff Murray's part—by the pleadings which were delivered, and in the arguments advanced by his counsel—the main contention is that his service having terminated before the date contemplated in his agreement, his right to wages at the contract rate for each day on which he was unemployed, during two months from the termination of the service, is an absolute right by virtue of sect. 1 (1) of the statute, subject only to be displaced or reduced as to any day in respect of which under sub-sect. (2) the owners might show that he was on that day able to obtain suitable employment. A further contention is raised, to the effect that but for the loss of the *Croxteth Hall* Murray would have continued in the employment of the defendants for at least two months after March 4th, and indeed in all probability for a period not yet terminated, at wages of £9 10s. a month with keep when on board or subsistence allowance of 4*s.* a day during times when he should be "working by" the ship between voyages. Plaintiff was allowed to give some evidence *de bene esse* as to the footing on which he had been during some years a usual member of the ship's company of the *Croxteth Hall*, and in proof of an invitation to "stand by" the ship while in port at Middlesbrough given to him by the chief officer while they were homeward bound.

As to the main question the defendants assert that any unemployment of the plaintiff after the 10th March was not due to the loss of the ship. "On the 10th March," they say, "the *Croxteth Hall* would have arrived at Middlesbrough, and on that date the voyage in respect of which the agreement was made would have ended and the crew, including the plaintiff, would have been discharged." Alternatively, they contend that any claim under the Act of 1925 is by the Act limited to indemnity against unemployment resulting from the loss of the ship, and consequently could not exceed the amount of the wages the plaintiff might have earned in the period expiring with the date on which—the ship being safe—he would have been paid off. The defendants, I may mention now, produced a good deal of evidence as to vacancies for employment in steamers of like character to the *Croxteth Hall* at Liverpool and Birkenhead during the two months after the 4th March, and they claim to have shown that Murray had abundant opportunities of employment and could have secured it, at any rate for part of the time in question. As to this matter, however, I find against them. They did not satisfy me there were any days within the two months on which Murray was able to obtain suitable employment.

As to the plaintiff's subsidiary grounds of claim, defendants resist *in limine* the consideration of any claim arising outside the ship's articles, either from the course of dealing of the defendants with the plaintiff or upon any proposal made or expectation held out to him during the voyage in question.

These subsidiary claims can be concisely disposed of. As to employment other than that provided for by the articles, which Murray would probably have had if the *Croxteth Hall* had not been lost, the articles constitute the agreement with which the statute deals in sect. 1 (1) (2); the service terminated by the wreck was his service under the articles; and although the words "unemployment indemnity" occur in the title, preamble, and First Schedule of the Act, its operative effect is not by means of these words extended beyond the terms of the express provisions in sect. 1: The claim for subsistence allowance in addition to wages, on the ground that the seaman's remuneration under the articles included his "keep," was not seriously pressed, and, in my opinion, could not be sustained. The language of the section excludes the claim. The crew are to serve on board, and in consideration of their service, as the articles state, "the master . . . agrees to pay to the . . . crew as wages the sums against their names respectively expressed and to supply them with provisions according to the scale." "Wages" at the rate to which the seaman was entitled under the articles is what the section, within restricted limits, entitles him to receive during a possible two months of unavoidable unemployment.

As to the main controversy Mr. Dunlop argued for the defendants that what the statute gives the seaman is indemnity against unavoidable unemployment between the actual termination of the service and the date on which the service would have expired had there been no wreck. That contention he supported by reference to the terms of the title, preamble, and First Schedule of the statute, and, in particular, the use of the word "indemnity," in the view that a claim for indemnity could only take effect for the period provided for in the contract. The true meaning of the section, it was said, would be apparent if there were read into it after the word "unemployed" these words "before the date contemplated in the

agreement," so that the operative words would run thus: "he shall . . . be entitled in respect of each day during which he is in fact unemployed before the date contemplated in the agreement, during a period of two months from the date of the termination of the service to receive wages."

On grounds of construction, as well as on broader grounds which have regard to the scope and apparent intent of the statute, it seems to me impossible to construe the section as is proposed on behalf of the defendants. The words suggested by way of "elucidation" would, if inserted, transform the effect of the enactment. The plaintiff, being a man who was in fact unemployed during a period of two months from the date of the "termination of the service"—by reason of wreck or loss of the ship—instead of being entitled *primâ facie* to receive wages in case of unemployment during a period of two months from the date of the loss, would be given a *primâ facie* claim to wages for six days.

The broader considerations I have mentioned seem to me also to preclude the suggested limitation. In the present case the loss of the *Croxteth Hall* occurred when she was homeward bound and near the end of her voyage, so that there is reason for the observation that under the terms of the articles the seaman was at the time of the wreck within six or seven days of possible unemployment. But the statute deals by one process of relief with all the infinitely various cases in which a seaman's service may be prematurely terminated by loss of a ship. Given, side by side with this case, a case of some ship outward bound under articles signed for a long voyage, lost at a point so distant that return of the crew to the home port would occupy a period of weeks, reasons at once appear why a standard measure of possible relief based on some period other than that of the unemployment actually suffered under the articles may have been determined upon by the authors of the statute. "Indemnity" the section does not give either in the broad sense which some of the plaintiff's claims would require, or in the restricted sense which the defendants' construction would give. It gives not "indemnity" but a conditional safeguard. It enables the seaman to claim compensation for loss of wages if he is out of work through shipwreck, but it limits the maximum amount of the possible claim to a period of two months, and it cancels the claim for any part of the two months as to which it is shown that he could have had employment if he would, and was voluntarily unemployed.

The plaintiff's service was, before the date contemplated by his agreement, terminated by reason of the wreck of the *Croxteth Hall* on the 28th Feb. He was unemployed for two months and upwards from that date, and the unemployment was due to the wreck or loss of the ship. He was not able at any time in the two months to obtain suitable employment. Subject to deduction of wages already paid in respect of any of the days subsequent to the wreck he is entitled to recover wages for the two months of his unemployment.

THE CELTIC.

The steamship *Celtic* was on the 10th Dec. 1928 wrecked and lost on the Irish coast near Queenstown in course of a voyage described in the articles under which her crew served as "from Liverpool to New York via Queenstown, Boston, and (or) if required to any ports within the North and South Atlantic Oceans trading as may be required until the ship returns to "a final port of discharge in the United Kingdom." The vessel was homeward bound at the time of being lost, making for Liverpool, which would have been her "final port of discharge" under the articles. But for the wreck Comerford's services under the articles would have terminated on the 11th Dec., and he would have been paid off with wages up to and including that date. The crew were brought by tender from the wreck to Liverpool, and on the 13th Dec. Comerford was paid off. The wages paid him were wages up to and including the 11th Dec. He, together with some of his fellow seamen, received the wages so paid under protest, making this memorandum: "We each claim compensation under sect. 1 of the Merchant Shipping (International Labour Conventions) Act 1925."

Comerford had been for some years one of the usual crew of the *Celtic* in her successive voyages to and from the United States in the capacity of a refrigerating greaser and seaman, and if the vessel had not been lost would no doubt have continued to sign articles for further like voyages in the same capacity. His rate of pay was 10 guineas per month, and in case of his "working in articles by his vessel in port" without food and lodging found by the ship, he would have been entitled to a money allowance of 4*s*. a day in lieu thereof.

Claims on Comerford's behalf were put forward by his union on the ground that by reason of the wreck or loss of the *Celtic* his service was terminated before the date contemplated in the articles, and that he was as and from such termination of service unemployed during a period of two months, and, further, or alternatively on the ground that but for the wreck or loss he would have remained employed on the *Celtic* after her return from the voyage in question. He claims also in addition to two months' wages, subsistence money for two months at 4*s*. a day.

For reasons such as I have explained in *Murray's* case against the *Croxteth Hall* I hold that the statute in question does not give the plaintiff a right to indemnity or damages in respect of disappointed expectations of service other than the actual service provided for in the articles under which he was serving at the loss of the *Celtic*, and that any right he has under the statute for unemployment by reason of the wreck is a right to wages only, and cannot be made to include subsistence money.

The defendants adduced evidence to show that employment was available to Comerford on board various ships which signed on crews between the date of the wreck and the date three months later when he was next employed. As to this matter, however, I do not find the defendants to have established that on any day or days within two months of the wreck Comerford was able to obtain suitable employment.

The main questions in this case, as in *Murray's* case, are whether Comerford's service was by the wreck or loss of the *Celtic* terminated before the date contemplated in his agreement, and whether he was unemployed during two months from the termination of his service. Upon like grounds to these which I have stated in the case of the *Croxteth Hall*, both these questions must be answered in the affirmative. The fact that, with the *Celtic* safe in port in Liverpool, Comerford's service under his articles would apparently have terminated on the 11th Dec., the next day after the loss of the vessel, does not, in my judgment, deprive him of the benefit conferred by sect. 1 of the Act of 1925, and his claim must be allowed for two months from the actual termination of his service by the loss of the ship on the 10th Dec., less one day's wages already paid.

The defendants appealed.

Dunlop, K.C., and *A. J. Hodgson*, for the appellants.

Langton, K.C., and *Lynskey*, K.C., for the respondent Murray.

Fraser Harrison for the respondent Comerford.

Scrutton, L.J.—Until 1925 the wages of a seaman ceased on the wreck of his ship, but he was returned to the United Kingdom at the expense of the shipowner. On the 31st July 1925, there came into force an Act of Parliament (15 & 16 Geo. 5, c. 42) designed to give effect to certain International Conventions arrived at in 1920 and 1921. Such conventions have no effect in Great Britain until they are embodied in statutes, though if the language of the statute is ambiguous, the language of the Convention may be resorted to to assist in interpreting the statute. The title of this statute employs the phrase " an unemployment indemnity for seamen in the case of loss or foundering of a ship." The material section reads as follows: [the learned Lord Justice read sect. 1, sub-sect. (1) (2)] It is obvious that the wreck or loss of a ship on which a seaman is serving will always happen before the date contemplated for the termination of his service. The sub-section, therefore, gives him for two months after the wreck a right to receive wages at the rate mentioned in the agreement. If I understood correctly the argument of Mr. Dunlop for the shipowner, he contended that under this sub-section alone the seaman could not get wages for any period after the date at which, had there been no wreck, the agreement to serve would have terminated. I cannot obtain this result out of the language of sub-sect. (1), which appears to give wages for a fixed term of two months from the wreck, " subject to the provisions of the section." The relevant provision is sub-sect. (2) which I have just read. This puts the burden on the shipowner to prove certain facts which would displace the right to wages acquired by the seaman under sub-sect. (1). He may show that the unemployment was not due to the wreck or loss of the ship. The seaman is obviously unemployed on the ship in which he served because of its loss. But his actual unemployment on any ship at all may be primarily or proximately due to his own disability, as if he breaks his leg after he has safely landed, or after the same date gets sent to prison. Unemployment may also be directly due to the fact that he has made no attempt at all to obtain other employment, though vacancies on other ships were being offered, but simply gone on the " dole." In such a case, if proved by the shipowner, I think the unemployment would not be due to the wreck. The seaman may prove that at the time of the wreck he had either a promise of employment on the next voyage, or a reasonable expectation from past history of obtaining such employment. For instance, where for some years the seaman has been regularly re-engaged after the voyage, and his agreement terminates, I think the seaman would be entitled to say that he was unemployed as the result of the wreck. But the employer might still displace it by showing that the seaman has made no attempt at all to obtain substituted employment, though it was offering. I think a difficult question may arise, if the employer proves that the state of the labour market is such that if there had been no wreck the seaman on his engagement terminating would not have obtained employment either in the wrecked or any other ship. This is similar to the question on which there has been much discussion under the Workmen's Compensation Act. The question there arises in this way. By sect. 1 a workman suffering personal injury by accident is entitled to compensation from his employer, and, under sect. 9, sub-sect. 1, where partial incapacity for work results from the injury, a weekly payment calculated on certain rules, one item in which is the weekly amount he is able to earn after the accident. This is accompanied by a provision that if the workman proves he has taken reasonable steps to obtain employment and has failed, and that his failure is a consequence wholly or mainly of the injury, the judge may order his incapacity to be treated as total incapacity. On these provisions the question has arisen: " What is the position where, though the workman lost his employment through accident, on his recovery, a partial recovery, the condition of the labour market is such that even if the workman had never met with an accident he

would have been out of work, and could not get employment?" In such a state of facts the House of Lords has held that unemployment is not a consequence wholly or mainly of the accident or injury, but is a consequence of the state of the labour market, and that "able to earn" relates to physical capacity to earn, and not to the state of the labour market: (*Bevan* v. *Nixon's Navigation*, 139 L. T. Rep. 647; (1929) A. C. 44; *Lyon* v. *Taylor Brothers* (1929, 21 W. C. C., 416).

I have come to the conclusion that these decisions turn on the special language of the Acts applicable, and that no principle involved in those decisions enables the employer under the Act now under consideration to prove that the unemployment is not "due to the wreck" by proving the state of the labour market, and so to defeat the claim. In other words, where, either by express agreement, or on reasonable probability from past history, the seaman would but for the wreck have continued to be employed in the wrecked vessel, his loss of employment is due to the wreck, even though in the state of the labour market he finds difficulty in getting employment. Apart from evidence of refusal to serve on any particular day, the cause, or the effective cause, of his unemployment is the wreck.

The second part of sub-sect. (2) enables the employer to defeat the *primâ facie* claim under sub-sect. (1) by proving in respect of any day that the seaman was able to obtain suitable employment that day. This is a different and independent provision. The employer may not be able to prove it, and yet may succeed under the first part of sub-sect. (2) as if the employer proves that the day after the seaman was safely back in England he broke his leg and was laid up for two months, or, to take an extreme case, if the employer proves that on the same day the seaman was sent to prison for two months. But I do not think the employer satisfies the second condition in sub-sect. (2) by proving vacant places for which any seaman might apply and no attempt to obtain them. That, in my opinion, will be relevant under the first condition. To satisfy the second condition the employer must prove an offer to the seaman of suitable employment, and refusal by the seaman. I can see that difficult questions may arise when the wages offered are less than the wages earned before the wreck, and it is questionable whether the difference is due to changed conditions of the labour market or to different value between the labour originally done and the labour offered. It will be seen that, in my view, each case must depend on its own facts, but I have endeavoured to lay down certain principles for the construction of the statute, by which the particular facts in each case may be tested. I now turn to the two cases in question, with the warning that the decision in each case does not necessarily apply to each man involved in the wreck in question.

THE CROXTETH HALL.

The *Croxteth Hall* was wrecked off Flushing on the 27th Feb. 1929. John Murray was then engaged in her on an agreement dated the 29th Oct. 1928 for a voyage not exceeding two years from Manchester to the Persian Gulf, trading within certain limits, and to end at such port in the United Kingdom or Continent as may be required by the master. After reaching Antwerp with a homeward cargo the ship was proceeding to the United Kingdom and was advertised to load cargo for a new outward voyage—at Hull, the 21st March; Middlesbrough, the 11th March; London, the 15th March; South Wales, the 22nd March; and Glasgow, the 27th March. Murray had been previously engaged in the *Croxteth Hall* on four voyages, with one break, and usually stood by on pay while the ship was in port after he was paid off till he signed on again. Before the wreck he had been asked by the chief officer to stand by the ship when she got to Middlesbrough, which was apparently then treated as the end of the voyage, and was expected to be reached on the 10th or 11th March. After the wreck Murray was taken to Liverpool and there paid off on the 4th March. He claimed two months' wages from the 4th March. This was clearly wrong, as the two months began on the 27th Feb., and he had been paid up to the 4th March. It is further clear that but for the wreck he would have been paid up to the 10th or 11th March on arrival at Middlesbrough. In my opinion also the evidence shows that but for the wreck he would have been employed on the Croxteth Hall, standing by at Middlesbrough, coasting, and on the next voyage. So that the shipowner to displace his liability must show that on some named day Murray could have obtained suitable employment. I am not very satisfied with Murray's behaviour. He did not apply to the owners of the *Croxteth Hall* for employment; he energetically repudiated the suggestion that he should apply to their shipping clerk. "It was as much for the firm to give an offer to me as for me to give an offer to the firm." He did apply to one of the Hall boats for a job, the *City of Athens*, and another man got the job. He attended the signing on of a number of other ships, but being an elderly man and a stranger to the chief officer of the particular ship, he did not get a job. I am satisfied that unless the shipowner orders the chief officer of a particular ship to take on a particular man, or men, from the wrecked ship, that man—particularly if he is elderly—is not very likely to get a job. A ship's officer, unless ordered by his employers, naturally prefers men he knows, and men of as much youth as is consistent with experience. The evidence in my opinion does not show that Murray on any particular day was able to get employment on any particular ship, or that he made no attempt to obtain employment, or that his unemployment was not the result of the wreck. Under these circumstances he is entitled to receive from the shipowner two

months' wages from the 27th Feb., less any amount the shipowner has already paid him as wages. But he is not entitled to receive both the " dole " and wages, and his counsel admitted this, and that the court should make some provision to prevent it. I think the proper way to deal with the point is to order that the shipowner may satisfy the judgment against him by paying to the Ministry of Labour the amount which Murray has received in respect of the " dole " from the labour exchange, in respect of the two months in question, and by paying the balance of the judgment, if any, to Murray. It will be seen that this judgment does not apply to any other seaman of the *Croxteth Hall* except in so far as the facts of his particular case come within the principle of this judgment. While the judgment is varied to the extent I have indicated, and I do not agree with some part of the reasoning of the President, the appeal must be dismissed with costs.

The Celtic.

The *Celtic*, a White Star boat trading to and from Liverpool, was wrecked off Queenstown on the 10th Dec. 1928. Comerford, a refrigerating greaser, was brought back to Liverpool, and there paid off on, and up to, the 11th Dec. 1928. Comerford, with the exception of twelve months, had been employed in the *Celtic* for nine years, and the White Star officials say they could not have a better man. I am satisfied that it was a result of the wreck that he was not employed on the *Celtic* during the two months in question. Comerford tried to get on a number of ships, including some of the White Star boats, but did not get a job. He did not apply to the White Star office, or its shipping master, for a job ; I suspect this was the result of the instructions of the union officials. But whether this is so, the White Star officials did not offer him an engagement on any particular boat, and in the result are, in my opinion, unable to prove that he was able to obtain suitable employment on any particular day. I think in the case of engineers, the second engineer who takes on men, in the absence of definite instructions from his employers—which were not proved—is not likely to give any special preference to men from other wrecked ships of the line. Comerford is, therefore, entitled to receive two months' wages from the date of the wreck, less any wages he has received, and the appeal must be dismissed with costs.

There is no information about the " dole " in this case, but I trust the local labour exchange will look into the matter, both in this case and any future case.

I appreciate the difficulties of the shipowners in these cases. Perhaps they will consider whether by registered letter they should make an offer of employment in a named ship to each man they wish to employ, and instruct their chief officer or engineer to make that offer effective. I am also not satisfied with a system under which the seaman, whether under instructions of union officials or not, intentionally makes no application to his previous employers for employment, and then claims on them for unemployment. If such an intentional course of conduct is proved, it may have a serious bearing on the question whether the shipowners have not proved that the seaman's unemployment is not the result of the wreck.

Greer, L.J.—John Murray, the plaintiff in the first-named case, signed articles in Oct. 1928 by which he undertook to serve on board the steamship *Croxteth Hall* for a voyage to the Persian Gulf, and thence to other ports between 75° north and 60° south latitude, and to end at such port in the United Kingdom or Continent of Europe within home trade limits as might be required by the master. He was selected by the master to act as quartermaster during the voyage at 9*l.* 10*s.* per month. The vessel was wrecked off Flushing on the 28th Feb. 1929. The President of the Probate, Divorce, and Admiralty Division, who heard the action, found that if there had been no wreck the voyage would have ended at Middlesbrough on the 11th March 1929. The plaintiff claimed under the Merchant Shipping (International Labour Conventions) Act 1925 (15 & 16 Geo. 5, c. 42) two months' wages from the 4th March 1929, when he was paid off. He was clearly not entitled to wages for more than two months from the 28th Feb., the date of the wreck, and it is not disputed that the judgment will have to be varied so far as the amount is concerned. It was contended for the appellant shipowners that he was only entitled to wages down to the date when his service under the articles would have terminated at the end of the voyage, *i.e.*, the 11th March 1929. The learned President decided against this contention. In my judgment he was right in so deciding. I can state my reasons quite shortly. The evidence established a probability almost amounting to a certainty, that if the voyage had ended normally on the 11th March, the plaintiff would have been forthwith employed by the shipowners in the same capacity on the same ship. The material parts of sect. 1 read as follows : [the learned Lord Justice read sect. 1.] The plaintiff was in fact unemployed for two months from the date of the wreck, though he was paid his wages to the 4th March. Sub-sect. (1) entitled him to wages up to the 28th April unless the defendants proved facts which would disentitle him to receive his wages or some part thereof under sub-sect. (2). In my judgment the defendants did not show that the unemployment from which he in fact suffered was not due to the wreck. If they had proved that in the event of the vessel completing her voyage there was no reasonable probability that he would have been employed on the *Croxteth Hall*, it might have been contended that his unemployment in fact was not, after the 11th March, due to the wreck, as it would have happened if there had been

no wreck. It seems to me clear that the section is not dealing with unemployment under any existing contract, but with unemployment in fact, that is to say actual unemployment. In my judgment the words of sub-sects. (1) and (2) are plain and unambiguous, and we are therefore not entitled to look at the preamble or the draft convention contained in the schedule to the Act for the purpose of giving a special meaning to words which are in themselves plain and unambiguous. It is conceivable that it might have been the intention of the Legislature to provide the seaman with an indemnity against the loss of wages which he would otherwise have earned under the contract of service which was in operation at the date of the wreck, but it is impossible, in my judgment, to interpret the words of the two sub-sections as having a meaning which would confine the seaman's rights to wages to a right which would not exceed wages for the period during which his existing contract would have continued. I think the words plainly mean that if his services end before the date contemplated in the agreement, and he is in fact unemployed for the period of two months from the date of the wreck, he is entitled to receive wages for every day during those two months during which he is unemployed, unless his employer proves that he would have been unemployed if there had been no wreck. The question whether his actual unemployment was caused by the wreck is a question of fact to be determined on the evidence. The evidence in the present case makes it reasonably certain that if the *Croxteth Hall* had not been wrecked the plaintiff would not have been unemployed. The fact that he might have got employment if the state of the labour market had been better than, in fact, it was, has, in my judgment, no bearing on the question whether the unemployment from which he in fact suffered, under the circumstances of the case, was due to the wreck. Even if the court were entitled to look at the schedule, I doubt whether it would make any difference in the result. Art. 2 of the convention is not necessarily concerned with an indemnity against unemployment under the contract in operation at the date of the wreck, it is concerned with indemnity against unemployment resulting from the loss of the ship. It may well be that those responsible for the convention intended to indemnify the seaman against actual unemployment whenever it was established that the unemployment was, in fact, due to the wreck. I see no reason to conclude from the words of the convention that the parties to it intended to confine the indemnity to an indemnity against a loss of wages under the contract in operation at the date of the wreck ; but be this as it may, I think the words of the statute are plain and ought to be interpreted in the manner above stated.

In the present case I am satisfied that if the vessel had not been wrecked, the plaintiff would not have been unemployed from and after the 11th March and, therefore, that the shipowners failed to show that his unemployment was not due to the wreck. Nor am I able to say that the learned president's finding that the defendants had failed to prove that the seaman was able to obtain suitable employment on any day during the two months is not justified by the evidence. I agree with the view expressed in my Lord's judgment as to both points, and find it unnecessary to refer to the evidence in detail.

A reference was made in the course of the argument to cases under the Workmen's Compensation Act, such as *Cardiff Corporation* v. *Hall* (104 L. T. Rep. 467 ; (1911) 1 K. B. 1009), and *Bevan* v. *Nixon's Navigation Company* (139 L. T. Rep. 647 ; (1929) A. C. 44). I do not think that these cases afford any help in the interpretation of the statute we have to apply in the present case. They turn on the meaning of the words " able to earn " in the Workmen's Compensation Act. It was decided that, looking at the general purpose and scope of the Workmen's Compensation Act, " able to earn " means physically able to earn. The decisions in those cases seem to me to have no bearing on the interpretation of sect. 1 of the Merchant Shipping (International Labour Convention) Act of 1925.

In the second case the facts raise the same question as to the effect of sect. 1 on the claim made by the plaintiff Comerford, and the defence raised by the owners of the *Celtic*, and in this case I do not find it necessary to say anything except that for the reasons stated in dealing with the first case, I am of opinion that the plaintiff is entitled to retain the judgment he obtained in the court below, and the appeal should be dismissed with costs.

The order of the court in *Murray's* case will, by consent of the plaintiff by his counsel, take the form mentioned in the judgment of Scrutton, L.J.

Slesser, L.J.—In these cases I regret that I have come to a conclusion different from that of the majority of the court.

These appeals raise important questions under the Merchant Shipping (International Labour Conventions) Act 1925, which purports to give effect to certain draft conventions adopted by the International Labour Conference relating (among other things) to an unemployment indemnity for seamen in the case of loss or foundering of their ship. In my opinion this is a case where, owing to the ambiguity of the language used in the Act, and its intention as expressed in the preamble and schedules, a reference to the preamble and title is justified as a means of ascertaining the general object and intention of the Legislature for the purpose of solving the ambiguity. This is in accordance with the well-known passage of Tindall, C.J. in the *Sussex Peerage* case (11 Cl. & F. 85), where he says, at p. 143 : " 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 law-giver. But if any doubt arises from the terms employed by the Legislature, it has always been held a safe means of collecting the intention to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Dyer, C.J., is ' A key to open the minds of the makers of the Act, and the mischiefs which they intend to redress ' " : (see Lord Macnaghten in *Fenton* v. *Thorley*, 89 L. T. Rep. 314 ; (1903) A. C. 443, at p. 447).

In this case the Legislature has thought fit in the peculiar circumstances of the case, the statute being the ratification of an International Convention, to annex the convention to the preamble by a schedule to the Act itself. This preamble, which is very exclusive, is as follows : " Whereas at Genoa the General Conference of the International Labour Organisation of the League of Nations on the ninth day of July, nineteen hundred and twenty, adopted a draft Convention concerning unemployment indemnity for seamen in case of loss or foundering of their ship, and had at Geneva on the eleventh day of November, nineteen hundred and twenty-one, adopted two other draft conventions, namely, a draft Convention fixing the minimum age for the admission of young persons to employment as trimmers and stokers, and a draft Convention concerning the compulsory medical examination of children and young persons employed at sea :

" And whereas the said draft Conventions contain (together with other provisions) the provisions set out in Parts I., II., and III. respectively of the First Schedule to this Act :

" And whereas it is expedient that for the purpose of giving effect to the said draft Conventions, such provision should be made as is contained in this Act :

" Be it therefore enacted . . ."

The First Schedule, Part I., of the Act to which I have referred contains the draft Convention concerning unemployment indemnity in case of loss or foundering of the ship which is mentioned in par. 2 of the preamble.

The assistance which the preamble provides in interpreting sect. 1 of the Act, the meaning of which is here in dispute, is to be found in art. 2 of the First Schedule, which is in the following terms : " In every case of loss or foundering of any vessel the owner or person with whom the seamen has contracted for service on board the vessel shall pay to each seaman employed thereon an indemnity against unemployment resulting from such loss or foundering. This indemnity shall be paid for the days during which the seaman in fact remains unemployed at the same rate as the wages payable under the contract, but the total indemnity payable under this Convention to any one seaman may be limited to two months' wages."

The word " indemnity " which is used in this article, does not appear in sect. 1, but in so far as the appellant is here contending that sect. 1 is limited to an indemnity, and as the section is ambiguous and is capable of such a construction, the preamble and the schedule do indicate that an indemnity, and no more than an indemnity for unemployment in the case of loss or foundering of the ship is what the section intends to confer upon the seaman.

An indemnity is an undertaking express or implied to indemnify against the liability. And it is material to consider what is the matter against which the statute calls upon the shipowner to indemnify. By sect. 158 of the Merchant Shipping Act 1894, where the service of a seaman terminates before the date contemplated in the agreement by reason of the wreck or the loss of the ship, he shall be entitled to wages up to the time of such termination, but not for any longer period. This is the provision which is amended by sect. 1 of the Act now under consideration, and, were it not for that Act, as the Merchant Shipping Act provides, the right to wages would cease when the services of the seaman terminated before the date contemplated in the agreement in case of wreck or loss.

In the case of the *Croxteth Hall* the plaintiff had signed articles to serve for a voyage of not more than two years' duration commencing at Manchester and to end at such port in the United Kingdom or Continent of Europe (within home trade limits) as may be required by the master. The ship was wrecked on the 28th Feb. 1929, and the learned President has found that had there been no wreck the voyage would have terminated on the 11th March 1929. In any event, under sect. 1, the plaintiff would not be entitled to wages for more than two months from the 28th Feb., but it is argued for the appellants that, having regard to the fact that his services under the articles would have terminated on the 11th March 1929, and having regard to the fact that he was actually paid until the 4th March, he is only entitled to wages from the 4th March until the 11th March. On the evidence it appears very probable that if the voyage had ended on the 11th March, the plaintiff would have been further employed by the defendants, but, in the view which I have taken, such a consideration is not open under the statute.

It is true that sect. 1, sub-sect. (1), speaks of the seaman being " in fact unemployed during a period of two months from the date of the termination of the services where his service terminates by reason of the wreck or loss of the ship before the date contemplated in the agreement." But sub-sect. (2) of the same section is in the following terms :

" A seaman shall not be entitled to receive wages under this section if the owner shows that the unemployment was not due to the wreck or loss of the ship and shall not be entitled to receive wages under this section in respect of any day if the owner shows that the seaman was

able to obtain suitable employment on that day." This provision enables the owner to prove—the onus being upon him—that the unemployment was not due to the wreck or loss of the ship. Having regard to the fact that sect. 158 of the Merchant Shipping Act, which this Act in terms seeks to amend, provides that where the service of a seaman terminates before the date contemplated in the agreement by reason of the wreck he shall be entitled to wages up to the time of such termination and having regard to the view which I have formed that the present section operates by way of indemnity, I think that once the employer has shown as a fact that the agreement of service would have terminated in any event on a particular date, that he has discharged the onus upon him of showing that unemployment beyond that date was not due to the wreck or loss of the ship. If, on the facts of this case, it had not been found that the agreement would have ended at Middlesbrough on the 11th March 1929, it might have been otherwise. But I find it impossible to think that the mischief to which the Act was addressed and the benefits which the Legislature intended to confer upon the seaman, by the language used, were more than this; that where the shipowner failed to prove that the unemployment was not due to the wreck or loss of the ship, the seaman might recover wages for two months. In my judgment it does no more than to put the seaman in the like position as to wages, subject to a two months' limitation, *qua* his employer as he would have been if the wreck or loss of the ship had not occurred.

I am fortified in the view which I have formed by a consideration of the decisions under the Workmen's Compensation Act which seem to me to be *in pari materia*. Par. 3 of the First Schedule to the Workmen's Compensation Act 1906 (now repealed) provided that in fixing the amount of weekly compensation, the weekly payment should in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is able to earn in some suitable employment.

In *Ball* v. *Hunt and Sons Limited* (106 L. T. Rep. 911; (1912) A. C. 496, at p. 508), Lord Shaw, commenting on the words "able to earn" in Sched. I. (3) of the 1906 Act, said: "It does not appear to me to be any part of the scheme of the statute to make the employer responsible for a non-employment which is owing to general economic causes. The non-employment must be connected with the injury which has been received and with the incapacity for work which has been thereby produced. Even treating that incapacity as inclusive of the case of the impossibility or improbability of obtaining work, as well as of doing it, that impossibility or improbability must be traceable to the thing which has differentiated this workman from his other able-bodied comrades, namely, the injury received: (see also *Bevan* v. *Nixon Navigation Company Limited*, 139 L. T. Rep. 647; (1929) A. C. 44; *Cardiff Corporation* v. *Hall*, 104 L. T. Rep. 467; (1911) 1 K. B. 1009, to the same effect).

In my view, the employer has here imposed upon him no more than an indemnity for loss of employment under the agreement which the seaman has sustained by reason of the wreck or loss of the ship. When the obligation of the employer would have come to an end in any event if the ship had not been wrecked—which termination is for the employer to prove—any further unemployment due to the labour market or other causes cannot be said to be an unemployment due to the wreck, any more than inability to earn under sect. 9 of the Workmen's Compensation Act, which is the result of the labour market, can be said to be due to the accident. In construing this section as no more than an indemnity, I apply the maxim *causa proxima non remota spectatur*.

The second case, the *Celtic*, falls to be decided upon the same principle. In that case the wreck was on the 10th Dec. 1928. The learned president has found that, but for the wreck, the plaintiffs' services under the articles would be terminated on the 11th Dec., and he would have been paid off with wages up to and including that date; that the vessel was homeward bound at the time of being lost, making for Liverpool, which would have been, as is found, the port of discharge under the articles. In this case, therefore, the employers, by showing that the agreement would have ended in any event on the 11th Dec., have discharged the burden of showing that any subsequent unemployment was not due to the wreck, and, therefore, have discharged themselves from the liability imposed by sect. 1 of the 1925 Act.

For these reasons I think that these appeals should be allowed.

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

Solicitors for the respondent Murray, *Pattinson*, and *Brewer*, for *G. J. Lynskey, and Son*, Liverpool.

Solicitor for the respondent Comerford, *D. H. Mace*, Liverpool.

Oct. 29, 30, 31; *Nov.* 1, 4, 5, 6, 16, *and* 27, 1929.

(Before Scrutton, Greer, and Slesser, L.JJ.

Cosmopolitan Shipping Company (Inc.) *v.* Hatton and Cookson Limited (Liverpool). (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Carriage of Goods—Bill of lading—Freight payable—Ship or goods lost or not lost—Loss of ship and goods at sea—Goods never

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

delivered—Claim for balance of freight—Warranty of seaworthiness—Exceptions clause in bill of lading—Shipowners not liable.

The respondent-defendants, in Oct. 1919, *shipped* 412 *tons of West African produce on the appellant-plaintiffs' schooner, the* Rostellan, *for carriage from Cabinda on the west coast of Africa to Liverpool. A clause in the bill of lading provided that freight was due on shipment and should be payable on demand, ship or goods lost or not lost. The defendants paid half the freight on shipment. The vessel and cargo were lost during the voyage, and as the goods never reached Liverpool, the defendants refused to pay the plaintiffs the balance of freight, and the plaintiffs now claimed the balance of freight. The defendants pleaded that the vessel was in fact unseaworthy, and that therefore the bill of lading contract could not be enforced against them.*

By clause 2 *of the bill of lading :* " *The company shall not be liable for, or for any loss or damage arising from or due to, collision, . . . or any other peril of the sea . . . of whatsoever nature or kind, whether any perils, causes, or things in this clause mentioned are due to or arise . . . from the wrongful act, omission, or error in judgment or negligence of . . . any person whomsoever in the service of the company . . . and whether due to or arising . . . from unseaworthiness of the ship . . . provided in case of any loss, injury or damage arising from or due to unseaworthiness of the ship at the beginning of the voyage all reasonable means shall have been taken to provide against such unseaworthiness. The company may entrust to experienced or qualified officers, servants, or agents the duty of providing against unseaworthiness, and shall then be deemed to have fulfilled its obligations hereunder. . . .*"

Held, that the defendants had failed to discharge the onus which lay on them of proving that the vessel was unseaworthy at the beginning of the voyage. Moreover, even if the vessel had in fact been unseaworthy the plaintiffs were protected by clause 2 *of the bill of lading, as* (1) *they had taken all reasonable means to provide against unseaworthiness, and* (2) *they had entrusted to experienced and qualified officers, servants, or agents, the duty of providing against unseaworthiness, and must therefore be deemed to have fulfilled their obligations under the bill of lading.*

Appeal by the plaintiffs, the shipowners, from a judgment of Finlay, J.

The plaintiffs' schooner, the *Rostellan*, was abandoned in a sinking condition about 400 miles off the coast of Bermuda in Feb. 1920, while on a voyage from Cabinda to Liverpool with a cargo of West African produce. The plaintiffs claimed to recover from the defendants, Messrs. Hatton and Cookson, Liverpool, the cargo-owners, for balance of freight due under contracts of affreightment in respect of a cargo of palm oil and palm kernels shipped by the defendants from the Belgian Congo in Oct. 1919.

One of the clauses in the bill of lading provided that freight was due on shipment and should be paid on demand, ship or goods lost or not lost. By arrangement with the plaintiffs' local agents the defendants paid half the amount of freight on shipment ; but the vessel being lost on the voyage to Liverpool the cargo-owners refused to pay the balance of the freight. The shipowners now claimed to recover the balance. The defendants, the cargo-owners, counterclaimed for 19,660*l.* damages for loss of cargo, on the ground that the vessel was unseaworthy at the beginning of the voyage.

Finlay, J. gave judgment for the cargo-owners for 18,219*l.*, the amount claimed but reduced by 1442*l.*, the balance of freight which would have had to be paid had the goods been delivered.

By clause 2 of the bill of lading, the company shall not be liable for, or for any loss or damage arising from or due to, collision, stranding, straining, jettison, or any other peril of the sea, rivers, navigation, or land transit, of whatsoever nature or kind, whether any perils, causes or things in this clause mentioned are due to or arise directly or indirectly from the wrongful act, omission, or error in judgment or negligence of . . . any person whomsoever in the service of the company, or any person or persons or company for whose acts the company would otherwise be liable, or not, and whether on the ship carrying these goods or not ; and whether due to or arising directly or indirectly from unseaworthiness of the ship, vessel, craft, or lighter at the commencement of the carriage or during the carriage or any part thereof ; provided in case of any loss, injury, or damage arising from or due to unseaworthiness of the ship at the beginning of the voyage all reasonable means shall have been taken to provide against such unseaworthiness. The company may entrust to experienced or qualified officers, servants, or agents the duty of providing against unseaworthiness, and shall then be deemed to have fulfilled the obligations hereunder. This clause shall be construed as in addition to and not in derogation of or in substitution for any statutory exemption or provision in favour of the company."

The plaintiffs, the shipowners, appealed.

Cyril Atkinson, K.C. and *Justin Lynskey* for the appellants.

J. E. Singleton, K.C. and *R. K. Chappell*, K.C. for the respondents.

Cur. adv. vult.

Nov. 27, 1929.—The following judgments were read :

Scrutton, L.J.—This appeal by shipowners against a judgment of Finlay, J., which finds that their ship was unseaworthy and that they themselves are liable for nearly 20,000*l.* for cargo which was not delivered owing to the unseaworthiness of their ship as found by the

learned judge, raises difficult questions of fact and some, but not so difficult, questions of law.

I propose to deal first with the legal relations between the parties, for the reason especially that I think that the contest in the court below with regard to the facts has led to insufficient consideration being given to what are the relevant questions of law.

The voyage in question was from ports on the West Coast of Africa to Liverpool with a cargo of palm oil in casks and palm kernels. The ship was put on the berth to receive shipments from individual shippers. No bills of lading were signed, but it has now been decided that the terms of carriage were contained in an indorsement on the back of mates' receipts, and were to be found in clauses 1 to 22 of a form of bill of lading indentified and produced to us.

The most important clause is clause 2, which reads as follows : " The Company shall not be liable for, or for any loss or damage arising from or due to, collision, stranding, straining, jettison, or any other peril of the sea, rivers, navigation, or land transit, of whatsoever nature or kind, whether any perils, causes or things in this clause mentioned are due to or arise directly or indirectly from the wrongful act, omission or error in judgment or negligence of . . . any person whomsoever in the service of the company . . . ; and whether due to or arising directly or indirectly from unseaworthiness of the ship . . . at the commencement of the carriage or during the carriage or any part thereof ; provided in case of any loss, injury or damage arising from or due to unseaworthiness of the ship at the beginning of the voyage all reasonable means shall have been taken to provide against such unseaworthiness. The company may entrust to experienced or qualified officers, servants, or agents the duty of providing against unseaworthiness, and shall then be deemed to have fulfilled its obligations hereunder. . . ."

In my view this has in most respects the same effect as the Harter Act, which does not itself apply to this case as the voyage was not to or from a port of the United States. That effect is that (1) there is an implied warranty of seaworthiness when the ship sails on her voyage ; (2) the burden of proving a breach of this warranty is on the cargo owner ; (3) if the cargo owner proves unseaworthiness at the beginning of the voyage, the shipowner can limit his obligation by proving that he took all reasonable means to provide against unseaworthiness, the burden of proof being on him.

That this is the effect of the Harter Act appears from the American decision of the *Carib Prince* (1898) 170 U. S. Rep. 655), and Channell, J. has taken the same view in *McFadden* v. *Blue Star Line* (10 Asp. Mar. Law Cas. 55 ; 93 L. T. Rep. 52 ; (1905) 1 K. B. 697).

The bill of lading added a further protection to the shipowner in a clause that if the shipowner proves that he has entrusted the duty of providing against unseaworthiness to " experienced or qualified officers, servants or agents," he shall " be deemed to have fulfilled his obligations hereunder," that is, his obligations to use all reasonable means to provide against unseaworthiness at the beginning of the voyage. A vital question in the present case is, therefore, whether, assuming that there was initial unseaworthiness, the shipowner proved that he had entrusted to experienced or qualified officers or servants the duty of providing against it. If he did, he is protected ; or he is deemed to have used all reasonable means, which protects him against liability for damage caused by the initial unseaworthiness.

It is important to make this clear, for owing to the course which the case took at the trial, the learned judge did not expressly deal with this point at all in his judgment. He took the view that if the ship was initially unseaworthy all the exceptions went, including that with regard to unseaworthiness.

It is difficult to understand this, for the only point of the exception with regard to unseaworthiness is that it should apply to a case of initial unseaworthiness and provide in what circumstances the shipowner shall be liable. If the exception is excluded by initial unseaworthiness there is nothing to which the exception can apply.

That the learned judge took this view is, I think, clear from his judgment. He relies on the judgment of Bankes, L.J. in *Paterson Zochonis and Co. Limited* v. *Elder Dempster and Co. Limited* (16 Asp. Mar. Law Cas. 68, 351 ; 128 L. T. Rep. 577 ; (1923) 1 K. B. 420 ; 131 L. T. Rep. 449 ; (1924) A. C. 522), and after finding that the shipowner did not take all reasonable means to guard against unseaworthiness, he says : " I do not, if I have correctly apprehended the case, think that that finding is of importance "—that is because the exception involving it is rendered ineffective by the breach of the initial warranty of seaworthiness. Taking this view, at the end of his judgment he had not expressly found anything about " entrusting to experienced or qualified officers," for he regarded the finding as of no importance.

Counsel then asked him for a finding : " May I mention one other matter on the questions which arise on the bill of lading in case the matter has to be discussed elsewhere. In clause 2, your Lordship dealt with the question by saying that your Lordship found that it was not made out that all reasonable means had been taken to provide against such unseaworthiness. Your Lordship remembers that there are further words in that clause." Finlay, J. — " Yes, I remember. When I found that, I intended to find it generally, including the particular thing as to leaving it to a qualified person." Mr. Singleton : " That it was not left to a qualified person ? " Finlay, J. : " Yes."

This, as will be seen, does not find whether Miller or Bishop, the two ship's officers mentioned in the evidence, were or were not experienced or qualified persons, or whether the duty of providing against unseaworthiness was or was not entrusted to them, and we have not, therefore, the benefit of the judge's detailed views on the question. I am of opinion that the exception with regard to unseaworthiness did "limit or oust," to use Lord Sumner's words, the initial warranty of seaworthiness, if the shipowner proved that he had entrusted the question of initial seaworthiness to experienced or qualified persons. In that event, to use the language of Cozens-Hardy, L.J. and Fletcher Moulton, L.J. in *James Nelson and Sons Limited* v. *Nelson Line (Liverpool) Limited (No.* 2) (10 Asp. Mar. Law Cas. 390; 96 L. T. Rep. 402; (1907) 1 K. B. 769) affirmed in the House of Lords, 97 L. T. Rep. 812; (1908) A. C. 16): "The initial warranty is in force except in one event," *i.e.*, in this case, the shipowners proving an entrusting within the clause, in which case the initial warranty is "limited."

The shipowner sought to use the fact that the exceptions applied to bring in three clauses: (1) The part of clause 2 which enabled him to prove "entrusting," and so to satisfy his liability; (2) clause 1, to require production of invoices and declarations of value; and (3) clause 10, with regard to time of claim.

In my view the shipowner is not entitled to rely on clauses 1 and 10 because they do not apply to the present case. Clause 1 I will take as read. In the present case there were in the ordinary course of business no declarations of value or invoices. The freight was per ton, and did not depend on the value of goods, which there was no need to declare. Apparently, the goods were shipped by owner's agent to owner, in which case there would be no invoices of value. The clause cannot impose an obligation to produce documents which in the ordinary course of business do not exist. Clause 10 requires that a claim for loss shall be made within two days after the delivery or failure to deliver the goods. In the case of loss of ship at sea it is difficult to say what is the date of failure to deliver. I think that the clause is probably applicable to short delivery of part of a parcel. Exceptions should be construed against the shipowner framing them, and if the shipowner wants his clause to apply to total loss of ship and goods he must say so in clear terms. In my view the provisions of clauses 1 and 10 do not in any event avail the shipowner.

The question with regard to the applicability of the exception of seaworthiness in clause 2 is more complicated. In *The Europa* (11 Asp. Mar. Law Cas. 19; 98 L.T. Rep. 246; (1908) P. 84) it was decided, and the decision was approved in *Kish* v. *Taylor* (12 Asp. Mar. Law Cas. 217; 106 L. T. Rep. 900; (1912) A. C. 604) that a breach of the initial warranty of seaworthiness did not give rise to a claim against the shipowner unless it caused the loss. Subsequent authorities have said that this is not logical, but it is common sense. I prefer to say that it is determined by authorities which bind me.

In *Bank of Australasia* v. *Clan Line Steamers Limited* (13 Asp. Mar. Law Cas. 99; 113 L. T. Rep. 261; (1916) 1 K. B. 39) there was a clause in the bill of lading which provided that "the shipowners shall be responsible for loss or damage arising from any unfit state of the vessel to receive the goods, or any unseaworthiness of the vessel when she sails on the voyage. But any latent defect in the hull, machinery, equipment or fittings shall not be considered unfitness or unseaworthiness; provided that the same do not result from want of due diligence of the shipowner or of the ship's husband or manager." There was also another—clause 12—to the effect that "no claim that may arise in respect of goods shipped by this steamer will be recoverable unless made at the port of delivery within seven days from the date of steamer's arrival there."

Some of the goods were transhipped, and the question was which steamer's arrival the seven days were to date from. Bailhache, J. held that as the steamer was unseaworthy at starting, the defect not being latent, clause 12 did not apply. The Court of Appeal held that, as there was an express provision in the bill of lading about unseaworthiness, clause 12 did apply; but, as it was ambiguous in the case of transhipment, it did not apply to the particular case. The express provision was, it will be seen, a statement of responsibility with a limitation in the case of proof of certain facts which did not exist.

In the *Atlantic Shipping and Trading Company Limited* v. *Louis Dreyfus and Co.* (127 L. T. Rep. 411; (1922) 2 A. C. 250), there was nothing about unseaworthiness in the bill of lading. The ship was unseaworthy at starting, and the House of Lords held that a clause requiring arbitration within a certain time was excluded by breach of the warranty. Lord Sumner said that it would be different if there was "an express exception of unseaworthiness," meaning, as I understand, an express provision with regard to unseaworthiness which ousted or limited the initial implied warranty.

In *Paterson, Zochonis and Co.* v. *Elder Dempster and Company Limited* (*sup.*) the clause was the same as in the present case, but the exception originally relied on by the shipowner was bad stowage, which was in a different sentence in the bill of lading from the clause about perils of the sea, whether due to unseaworthiness or not. The majority of the Court of Appeal held that the ship was unseaworthy at starting by reason of bad stowage, and escaped from the seaworthiness exception by saying that the ship was unseaworthy at starting, and therefore the exception of unseaworthiness did not apply. They also held that the clause was so ambiguous as to be no protection, with regard to which it seems to me that the

clause, which gives the same protection as the Harter Act, is clear in giving the shipowner protection if he proves—and the burden is on him—that he used reasonable means to provide against unseaworthiness, which he may prove by proving that he entrusted the matter to experienced and qualified officers. On this matter, Bankes, L.J. says that no evidence was given in the court below.

The House of Lords held that bad stowage, not affecting the safety of the ship, was not unseaworthiness, so that the whole foundation of the judgment of the majority of the Court of Appeal went. But Lord Cave said that the shipowners had not proved the existence of the conditions referred to in the proviso, which, as the point had not been raised before Rowlatt, J., appears accurate.

Lord Sumner says (16 Asp. Mar. Law Cas. at p. 360; 131 L. T. Rep. 449 (1924) A. C. at p. 548): "The contract of carriage excepts liability for damage by improper stowage, but, if there was a breach of the implied warranty of seaworthiness, which there is nothing in the contract to limit or to oust, none of the exceptions or limitations contained in the bill of lading avail to prevent the cargo-owner from recovering."

But if the contract does limit the implied warranty of seaworthiness that limitation must be given effect to; and if the shipowner proves himself within the limited warranty, the fact that he has not proved compliance with the unlimited warranty does not, in my opinion, destroy the limited warranty. If the implied warranty would be of A. and B., and there is an express clause in the contract that the shipowner shall not be liable if B. does not exist provided he complies with A. I cannot see how he can be liable for B. This is my view, which is, I think, consistent with the judgments already referred to in *Nelson's* case (*sup.*); and if the judgments of the majority of the Court of Appeal in *Paterson's* case (*sup.*) are inconsistent with it I prefer those in the earlier case.

I therefore approach the facts of this case on the footing that in law the shipowner will succeed if he proves that he has entrusted the duty of providing against unseaworthiness to experienced and qualified persons, even though the ship was unseaworthy at starting. On the facts we have to consider whether the ship was unseaworthy on starting, the cargo owners' allegation being (i) that she was so wormeaten in her rudder that it was unable to withstand the ordinary perils of the sea and broke adrift; and (ii) that her sails were defective and insufficient.

It was also argued, though not with much vigour, (iii) that her cargo was so stowed as to be a danger to the ship in that the palm kernels were stowed among the casks and that heat melted the palm oil, which choked the bilges, while the kernels gave off an offensive gas; and (iv) that the captain and crew were incompetent. The learned judge found the first two allegations proved, but did not, as I understand him, make any findings on the last two, and he found that such unseaworthiness caused the loss.

The Rostellan was a four-masted schooner of a common American type. She was built in the State of Maine in 1906, and was at the time of her starting on the voyage in question, in October, 1919, just over thirteen years old. There was nothing in her age to prejudice a wooden vessel. She had the highest class in the American Register of shipping, and in 1916 had passed the survey to maintain her class. Her next survey was not due till 1920. The present plaintiffs had bought her soon after her survey in 1916, and spent some 650*l.* on her at the end of 1917, when she was dry-docked. Miller had joined her as captain in July 1917, and was her captain till 1st June 1919. He had been over twenty years a master, was obviously a very experienced and competent man, and had the full confidence of his owners. Bishop had joined her as mate in Oct. 1917, became her captain on 1st June 1919, and was in command when she started on the voyage in question, and when she was abandoned in Feb. 1920. He had then been at sea some fifteen years, four or five years before the mast, sometimes as sailmaker, then second mate for three years, then chief mate for seven years in American schooners trading to South America, the West Indies and coastwise. On vessels of the *Rostellan's* size no licence is needed for mates by the United States regulations. Before the voyage in question he had obtained, apparently under American regulations, a provisional licence as master; and after the voyage in question he obtained after examination in the United States, a regular licence as master for sailing ships and chief mate for steamships. He had sailed for two years with Miller, who spoke highly of his competence, and was obviously, from what had happened on the voyage, a man of courage and resource who had the confidence of his crew. At the end of 1917 the *Rostellan* went on a voyage from the States to Port Elizabeth, South Africa, and back. She made the voyage successfully, and delivered her cargoes safely; there was no appreciable leakage. She was again dry-docked and her bottom put in good condition, two coats of copper paint being applied to her waterline as a protection against worms, and on 31st Aug. 1918, she left for New York for a voyage to Boma, a town a little way up the Congo, in Belgian territory. On this voyage near Bermuda she met with a severe hurricane, she sprang a leak, and suffered considerable damage to hull, masts, and sails. With other ships injured in the same storm she put into Bermuda. There she was three times surveyed by independent surveyors; part of her cargo was discharged and the specific leak was located.

On 14th Oct. 1918 a third survey report was given, stating that the vessel had stopped

leaking, but that a diver should be employed to examine the bottom, and recommending certain work to be done on her. Some 1350*l.* was spent on her repairs; the diver located the leak and considerable caulking was done, a good coat of copper paint was put over the lower section of the hull, the cargo was reloaded, and on 6th Nov. 1918, a final certificate was given:

"And after a careful and minute examination found that the cargo recommended to be landed in former survey had been put back in the ship, repairs as recommended carried out to the master's satisfaction, two new gasoline pumps installed, vessel now making only a small amount of water; and we consider the said schooner, *Rostellan*, to be in fit condition and sufficiently seaworthy to proceed to her port of destination, the Belgian Congo, West Africa."

She did proceed on the 17th Nov. 1918, had an uneventful voyage, with no appreciable leakage, and arrived in safety with her cargo on the African coast, arriving at Banana, at the mouth of the Congo, at the end of March. In entering the port the wind dropped and the vessel was carried by the current on to the Stella Bank, variously described as of mud or sand. A tug towed her off next day; there is no evidence of her leaking in consequence of this Stella Bank grounding.

A difficult commercial situation then arose not directly connected with the seaworthiness of the ship. By her contract of affreightment she was to deliver her outward cargo at Boma, a short distance up the Congo. But the river current was so strong that a sailing ship could not get to Boma under her own sail, and the tug and lighter company wanted 1650*l.* to take ship or cargo to Boma. Prolonged discussion with the consignees occurred, the vessel meanwhile lying at Banana with her cargo on board. Also the tug started a claim for salvage. There was a general average contribution to be obtained from the consignees of the outward cargo, for the port of refuge expenses. The result was that Miller, with the approval of the owners, put Bishop in command of the vessel and devoted himself mainly to these difficulties, which culminated in litigation in the local Courts. The vessel lay at Banana sixty-seven days; her discharge at Banana beginning on 21st June 1919 and finishing on 7th July. It was intended to charter her, but she was ultimately put on the berth to load palm oil and palm kernels at Cabinda and Landana, two places on the coast to the north of the Congo. She started for Cabinda on the 4th Aug., but again, owing to the wind dropping, got on to the Stella Bank. There she remained until the 7th Aug., when she was got off the Bank, by her own gear, sailed for and arrived at Cabinda on the 8th Aug. She is not recorded as making any water, other than the slight "seepage" which every wooden ship makes. After discharge she had the usual overhaul. A certificate of fitness to load cargo was given her by the chief pilot and his assistant on 20th July. There was a similar certificate before she loaded cargo at Cabinda. She loaded cargo at Cabinda in the open sea, the shipper and Featherstone, the shipper and ship's agent, being constantly on board, and the latter acting as interpreter between Bishop and the workmen loading. She then proceeded to Landana and again loaded in the open sea, returned to Cabinda on the 23rd Oct. and left on her voyage on the 30th Oct. 1919. There is no evidence that she was leaking at all during the whole of her stay on the coast. There is evidence that, to an extent which it appears to me impossible to determine, worms had bored into her planking.

The Teredo worm, very prevalent in tropical waters, at a certain stage of its life floats on the surface and if it floats against a ship may bore a very small hole into the side. Once in, it bores and grows and ultimately has made a very considerable tunnel and attained to a very considerable size. If many get in, the wood may become so fragile and honeycombed as to give way. The progress of deterioration sometimes is rapid, and three months may destroy the wood. The shipowners called as a witness the London surveyor to the Norwegian Veritas for wooden vessels for twenty-five years, after being eighteen years master of sailing vessels. He said that you generally found signs of worms in any wooden ship that had been in tropical waters, and unless the signs were very considerable he would not regard them as serious in his survey. Many wooden ships were copper bottomed to protect them against tropical worms, many were not. Copper paint was also used along the waterline, which protected the timber for a short time. In his view six months would not be enough for serious damage to develop.

The *Rostellan* started homeward on the 30th Oct. We have the advantage of a log carefully kept by Peters, the chief mate, in an educated handwriting, and apparently recording every event of importance. From the 30th Oct. to the 24th Dec., nearly fifty-five days, the vessel is not recorded as making any water worth mentioning. In fact there is only one entry on the subject on the 14th Nov., when the ship is recorded as making 3 inches a day, nothing under 2 inches an hour being of any importance.

The only weather to be noticed is the heavy swell, with ship rolling badly occasionally mentioned. The ship caught the southeast trades on the 1st Dec., and they lasted till about the 16th Dec., when she crossed the line, and appears to have entered the Doldrums, a stretch of sea of varying size, between the south-east and north-east trade winds. This region, the terror of the old sailing ship days, is characterised by calms and very slight baffling winds from every direction, coupled with heavy swells caused by the adjoining trade winds.

In this voyage, on the first fifty-five days damage is recorded on several occasions to the sails, particularly to the spanker, but always in heavy swell. Otherwise there is nothing of importance in the fifty-five days' voyage till the incident of the 24th Dec., which is of cardinal importance in the case. There appears to me nothing to suggest unseaworthiness on the first fifty-five days of the voyage, and I now come to the breaking of the rudder on the 24th Dec., the cause of which in my view is the vital point in the case. Looking at the log, on the afternoon of the 23rd Dec., there was no wind, but a heavy swell, and the sails were eased. This continued on the morning of the 24th, and the jibs were taken down to ease them. The sea increased from the north-east ; still no wind, and all ordinary sails were taken down, and only two storm trysails set on the two aft masts. " Noon—heavy sea struck vessel on starboard quarter and carried away rudder. Vessel rolling heavily and starting to leak."

Next morning she was leaking 6 inches an hour, which is serious. She had strong winds and heavy seas for some days while they were making and rigging the jury rudder and rolling in the trough of the sea, but by the 2nd Jan. the leakage had dropped to 3 inches an hour, which the pumps had no difficulty in dealing with. It is difficult to make out exactly what happened, whether the rudder broke away from the rudder post, in which case the gudgeons must have pulled out of the wood, or the rudder post broke away from the sternpost, in which case the fastening of the pintles must have gone. The ship was not fully laden in weight, 1,100 tons of cargo, against 1,500 tons which could be carried, so that more of the rudder than usual would be out of water, in which case, according to the evidence, a heavy swell could smack against it. That a rudder should break in these circumstances is unusual, but the plaintiffs' seafaring witnesses give evidence of their own experience of serious damage done in calm weather by a heavy swell which does not break as a wave. Evidence was given a long while after the event of examination of the rudder and no sign of worm found, though worm holes are found in the hull.

I have carefully considered the evidence and documents and have come to the conclusion that the burden being on the cargo owners to prove the ship unseaworthy because of the worm-eaten rudder, they have not supported it. If the evidence is equally consistent with either view, those on whom the burden is of proving the allegation fail : (*Wakelin* v. *London and South-Western Railway Company*, 1886 ; 55 L. T. Rep. 709 ; 12 App. Cas. 41).

It was argued that a heavy blow on a sound rudder must have acted violently on the man at the wheel, and he was not called. On the other hand, the swell was sufficiently heavy to require all the ordinary sails to be lowered, and only two stormsails hoisted ; and the sudden leaking of the ship suggests a heavy blow. In the result I am not satisfied that the rudder on sailing was unseaworthy through worm, or that it was unseaworthy through worm at the time of the accident. Whatever be the cause there is no doubt of the result of the breaking of the rudder. For twenty days the ship was rudderless, lying in the trough of the sea, and rolling heavily. On the 18th Feb. the ship being then 111 days out, the captain and crew determined to abandon the ship, leaking badly, food and water nearly finished, all hands about played out.

The learned judge below has found her unseaworthy at starting in two respects ; worm-eaten rudder, and sails. With regard to the rudder, I have said that the cargo owner has not satisfied me that the ship was unseaworthy. The question of the sails stands in this position. The fact that a sail or several sails are blown away on a sailing ship voyage is in itself no evidence that they are unfit for the voyage, no sails can stand some gales or " savage squalls " or continuous heavy rolling in a calm when the sails flap and are torn. For these accidents spare sails are carried. No evidence was called from Lloyds' Register about the extent of spare sails fore and aft sailing ships should carry, but the London surveyor for the Norwegian Veritas, which surveys many wooden ships, said that his society said ships " should have generally about a suit and a half." A full suit for this schooner was twelve sails, and she started with either twenty-one or twenty-two sails, which had given no trouble on the voyage out, and some spare canvas for repairs. It was not till the 1st Feb. that her materials for repairs gave out. I am quite unable to find that she was unseaworthy at starting in respect of her sails, and I say this having carefully considered the records of sail damage and the weather when they were damaged.

The two other allegations of unseaworthiness —bad stowage of dangerous cargo and inefficiency of master and crew—the judge did not base his judgment on ; and counsel for the plaintiffs, while reserving his rights, did not seriously argue them. With regard to the cargo, palm oil in casks and palm kernels are staple cargo from the African coast. Sometimes the casks leak, as they did in *Paterson, Zochonis and Co.* v. *Elder Dempster and Co.* (16 Asp. Mar. Law Cas. 68, 351 ; 131 L. T. Rep. 449 ; (1924) A. C. 522), and the kernels may give off gas. But I see no evidence that the leakage or unpleasant smell caused the loss, and Featherstone, though shipper's agent, saw the stowage at Cabinda and made no objection. I think that the cargo owners can make nothing of this point. Again, with regard to the efficiency of master and crew, I see no reason to think that this inefficiency existed, or that if it existed it caused the loss. There are fewer Europeans in the crew than on the voyage out, but an extra number of natives accustomed to work in schooners on the coast were taken, and Bishop speaks well of them.

I am unable therefore, to agree with the findings of the learned judge below, that the

Rostellan was unseaworthy by reason of (1) her worm-eaten condition, and (2) the condition of the sails. I am not satisfied on the first point; on the second point I find that she was seaworthy in respect of sails. But if I am wrong on these two points there remains the question whether the shipowner has not protected himself under the exception by proving that he has "entrusted to experienced and qualified officers the duty of providing against unseaworthiness."

This point the judge below, owing to his view, with which I cannot agree, that the benefit of the exception had gone if the ship was found unseaworthy, did not deal with in detail. There are obviously cases where it is the duty of the owner to give his master specific instructions about some technical information the owner has upon some special point about the ship which a master could not be expected to know. An example of this is special information about the stability of the ship, the failure to communicate which was held to be negligence of the owners in *Standard Oil Company* v. *Clan Line Steamers Limited* (130 L. T. Rep. 481; (1924) A. C. 100). But I cannot think it is necessary for an owner who is sending a certificated master of experience out on a voyage to give him detailed instructions in all the ordinary points of a master's duty, such as the condition of sails and the "tightness and staunchness of the hull." I have no doubt that Miller was an experienced and qualified officer of great efficiency and while he was engaged on the disputes with the cargo owners after the 11th June, he was also in close touch with the ship and looking after it up to about the 12th Aug., and in consultation with Bishop after that date. Miller had experience with worms and looked into the matter of danger from them. With regard to Bishop, in the year he abandoned the ship, the United States authorities, after examination, gave him a certificate as master of sailing ships, with full knowledge of his records, and he had a temporary certificate for the voyage under American regulations. I am satisfied that he was fully competent to deal with the sail question; and with regard to worms, he had the active assistance of Miller and the surveyors on the coast.

This exception is meant to protect the owner against mistakes of his officers, if he has appointed experienced and efficient men, and I should find that the owners in this case had done so. This finding renders it unnecessary to deal with the defence to the plaintiffs' claim for freight based on the unseaworthiness of the ship. I think the point was academic, as if the goods arrived the goods owner agreed that he would have to pay the freight to get the goods, and that if they did not arrive he should deduct from the hypothetical arrival value the amount that he must pay to get them. I doubt, however, if a plea of circuity of action would have been useful, as the amount of advance freight paid does not necessarily increase the value of the goods by the exact amount paid, and the plea of circuity of action only avails when the two claims are between the same parties and of the same amount.

Having given the best consideration I can to this not very easy case, I think that the judgment appealed from should be set aside and judgment entered for the plaintiffs on the claims for the amount claimed, and on the counterclaim with costs here and below.

Greer, L.J. [stated the facts and issues, referred to clause 2 of the bill of lading, and continued:] I do not regard this clause in the bill of lading as a clause which expressly provides that the shipowner shall be liable for damage occasioned by the provision of an unseaworthy vessel if he has failed to take reasonable means to provide against unseaworthiness. I think it is a clause which recognises the obligation to provide a seaworthy vessel which is implied by law, and seeks to limit that obligation by a proviso that the company shall not be liable for the results of unseaworthiness if they have taken all reasonable means to provide against it; and it further provides that they shall be deemed to have brought themselves within the proviso if they have entrusted to experienced or qualified officers or agents the duty of providing against unseaworthiness—that is to say, it does not create the obligation, but only puts limits on the obligation implied by law.

I have come to the following conclusions on the evidence in this case: (1) That the vessel was not proved to be unseaworthy at the material times; (2) that in any event the plaintiffs by their servants or agents did in fact take all reasonable means to provide against the alleged unseaworthiness; and (3) that they did in fact entrust to experienced or qualified officers, servants, or agents the duty of providing against the alleged unseaworthiness. The learned judge found that the vessel was unseaworthy in two respects; (*a*) that she sailed with an inadequate supply of proper sails, and (*b*) that when she sailed her rudder had become weakened by worm damage, and that she was, therefore, in these respects in an unfit condition to withstand the ordinary risks that she would be expected to meet on a voyage from the West Coast of Africa to Liverpool. The defendants' counsel also contended before us that the vessel was unseaworthy in that she had been badly strained by events which happened on the other side of the Atlantic, that the effects of the straining could not then be sufficiently corrected, that she ought to have been dry docked when she got to Africa, and that by reason of the straining and her consequent liability to leak she was unseaworthy when she started from the West Coast. He also relied on the method of stowage adopted, and alleged that this also rendered her unseaworthy.

The learned judge did not find either of the two contentions proved, and I can deal with them quite shortly by saying that there is

nothing in the evidence to show that when the vessel started from the West Coast she had been so strained as to make her unseaworthy. After the damage she met with in very bad weather when she left New York she was surveyed at the Bahamas after her cargo was partly discharged. All the requirements of the surveyors were complied with and a certificate of seaworthiness was granted to her. Nothing happened on the voyage to the West Coast of Africa to indicate that there was anything in the condition of the vessel that ought to cause anxiety. She was a very considerable time on the coast, and after she sailed she was subjected to considerable strains, and no leakage of any consequence took place until after the loss of her rudder. As regards the alleged bad stowage, in my judgment, there was no evidence of any sort of bad stowage which rendered the vessel unseaworthy. The stowage was only of the kind which was held in the case of *Elder Dempster and Co. Limited* v. *Paterson, Zochonis, and Co. Limited* (16 Asp. Mar. Law Cas. 68, 351; 131 L. T. Rep. 449; (1923) 1 K. B. 420; (1924) A. C. 522), not to amount to unseaworthiness. It was also faintly contended that she was unseaworthy in that she had an unqualified and incompetent master and was undermanned. I think it is unnecessary to deal with that part of the case, except to say that the learned judge did not find unseaworthiness in that respect, and I think there was no evidence which would have justified such a finding.

It remains to consider (1) the alleged inadequacy of the sails, and (2) the alleged weakness of the rudder. If a cargo owner relies either by way of defence or by way of claim on an allegation of unseaworthiness, the onus is clearly on him to prove the allegation. I do not think that this means, as counsel for the shipowners contended, that he must give evidence which makes it quite certain that the vessel was unseaworthy. All he need do is to give evidence which establishes unseaworthiness beyond the reach of reasonable doubt. If the evidence merely raises a suspicion, or if it goes beyond suspicion but leaves in the mind of the tribunal a reasonable doubt whether unseaworthiness is established, the cargo owner alleging unseaworthiness fails. Some repairs were required to the sails when the vessel was in the Bahamas. Those repairs were done to the satisfaction of the surveyors, and it does not seem to have occurred to anyone, either to the owner or to Captain Miller, the experienced captain, then in charge of the vessel, or to any of the marine surveyors, that she had an inadequate supply of sails. There was evidence from expert witnesses that the quantity she had, which is described as one suit and a half, was sufficient according to the accepted standard. She had a supply which is regarded as rather more than one suit and a half. Capt. Kverndal, surveyor in London for the Bureau Veritas, said that one suit and a half would have been passed by Bureau Veritas as an adequate supply. After this the fact that some marine surveyors say she ought to have had two suits does not seem to me to be sufficient to enable the court to find that unless she had more sails than she in fact had, the vessel was unseaworthy.

While she was on the West Coast the sails were overhauled under the supervision of Captain Bishop. I am inclined to think that the spanker was not in very good condition, but that in all other respects the sails were reasonably fit for the voyage on which the vessel started. I think the vessel would have been lost anyway, even if the spanker had been in better condition than it was, and the fact that it does not appear to have been in very good condition may be disregarded as unimportant. The question of the rudder is more difficult.

The defendants put their case with regard to the rudder in two ways. They say that the rudder broke in such circumstances that the court is entitled to infer that it must have been weakened in some way or other before the vessel started on her voyage, because nothing had happened after the vessel put to sea which would be sufficient to account for the breaking of the rudder if it had been in a reasonably fit condition when the voyage started. The defendants also say that the evidence provides them with a sufficient explanation of how the rudder became so weak as to be unable to withstand the ordinary incidents of the voyage. They say that it had been badly wormed some time when it was on the West Coast before it started for Liverpool. The ship started from Cabinda on the 30th Oct.; she lost her rudder on the 24th Dec. After the loss of the rudder there were twenty days on which she remained at the mercy of heavy swells when there was no rudder to control her. I have no doubt whatever that it is right to attribute the subsequent damage to the vessel, and her ultimate abandonment and loss, to the loss of her rudder on the 24th Dec.; and the question that arises for decision is whether it is right to infer from the evidence that the defendants have discharged the onus which lies upon them of establishing that the ship lost her rudder on the 24th Dec. because it was in an unseaworthy state when she started her voyage on the 30th Oct. [His Lordship then discussed the evidence on that point and continued:] I do not think this is a case in which the court can infer that the loss of the rudder is difficult to account for on any theory other than that it was unfit for its work when the ship started.

The considerations appropriate to the solution of the questions involved in this part of the case are clearly and authoritatively stated by Lord Lindley in *Ajum Goolam Hossen and Co.* v. *Union Marine Insurance Company* (9 Asp. Mar. Law Cas. 167; 84 L. T. Rep. 366; (1901) A. C. 362, at p. 366). That was a case in which it was alleged that the fact that a vessel foundered in calm water

within twenty-four hours after she started was sufficient evidence that she was unseaworthy when she started. Lord Lindley says this, dealing with that situation: "The underwriters have the great advantage of the undoubted fact that the vessel capsized and sank in less than twenty-four hours after leaving port without having encountered any storm or other known cause sufficient to account for the catastrophe; and there is no doubt that if nothing more were known they would be entitled to succeed in the action. If nothing more were known, unseaworthiness at the time of sailing would be the natural inference to draw; there would be a presumption of unseaworthiness which a jury ought to be directed to act upon, and which a court ought to act upon if unassisted by a jury. But if, as in this case, other facts material to the inquiry with regard to the unseaworthiness of the ship are proved, those facts must also be considered; and they must be weighed against the unaccountable loss of the ship so soon after sailing, and unless the balance of the evidence warrants the conclusion that the ship was unseaworthy when she sailed, such unseaworthiness cannot be properly treated as established, and the defence founded on it must fail. The law on the point was finally settled in *Pickup* v. *Thames and Mersey Marine Insurance Company* (4 Asp. Mar. Law Cas. 43; 39 L. T. Rep. 341; 3 Q. B. Div. 594), which followed *Anderson* v. *Morice* (3 Asp. Mar. Law Cas. 31; 31 L. T. Rep. 605; L. Rep. 10 C. P. 58). In these cases the court pointed out the danger and error of acting on the presumption in favour of unseaworthiness in case of an early loss of which the assured cannot prove the cause; and the court pointed out the necessity of bearing in mind that the defence of unseaworthiness must be overruled unless supported by a sufficient weight of evidence in its favour, after duly considering all the evidence bearing on the subject, including, of course, the very weighty evidence with which the underwriters start their case.

In my judgment the weather from the 17th to the 24th Sept. is sufficient to account for the loss of the rudder, and the facts do not require for their explanation that the court should find, contrary to the evidence of the ship's officers supported by the certificates obtained on the West Coast of Africa, that some part of the rudder had been so badly wormed as to render the ship unseaworthy.

I have come to the conclusion that the defendants have not discharged the onus which rests on them to prove that the ship was lost because she was unseaworthy when she loaded her cargo, or when she sailed with it from Cabinda.

If I should be wrong about this, I would still think that the plaintiffs ought to succeed, as I am satisfied that they took reasonable means to provide against unseaworthiness, and in any case that they entrusted to experienced officers, servants, or agents the duty of providing against unseaworthiness, and, therefore, they committed no breach of the implied warranty of seaworthiness as limited by the express words of the bill of lading.

I fail to see what course other than that which they took of examining the hull, and obtaining the best experts they could on the spot to examine and survey the condition of the vessel, they could have taken, or what other reasonable means were open to them to provide against unseaworthiness. In voyages of sailing vessels and tramp steamers which are of long duration, and which leave the vessel in small ports a long way from the owners' headquarters, business would be impossible if it was not considered reasonable to trust the agent and captain on the spot to use their best judgment with regard to whether the ship is, or is not, reasonably fit to encounter the perils of the voyage.

In my judgment the appeal should be allowed with costs and judgment should be entered for the plaintiffs for the amount claimed by them, with costs, and on the counterclaim with costs.

Slesser, L.J.—I agree that this appeal should be allowed. The learned judge has found that the vessel was unseaworthy at the time of sailing, but, as in my view, the finding cannot be supported, any question which would arise on an assumption of unseaworthiness need not be considered. The implied liability of the company for unseaworthiness in the absence of any express undertaking of seaworthiness, which express undertaking is absent from the contract of carriage in this case, is limited by clause 2 of the contract of carriage. Clause 2 operates to limit the liability of the company and limits the liability for perils of the sea arising from unseaworthiness if all reasonable means have been taken to provide against such unseaworthiness at the beginning of the voyage. The clause continues "The company may entrust to experienced or qualified officers, servants, or agents the duty of providing against unseaworthiness, and shall then be deemed to have fulfilled its obligation hereunder." That is to say, that if the company do entrust such duty to experienced or qualified officers they must be taken to have used reasonable means to provide against loss, injury, or damage.

Lord Cave, L.C. in *Elder Dempster and Company Limited* v. *Paterson, Zochonis and Company Limited* (16 Asp. Mar. Law Cas. at p. 355; 131 L. T. Rep. 449; (1924) A. C. 522, at p. 533) said: "It becomes unnecessary to consider whether, in the event of unseaworthiness being found, the conditions of the bills of lading would have been sufficient to protect the charterers from liability. It is enough to say that, in my opinion, they are not sufficient for that purpose, the requirements of the proviso to condition No. 2 not having been satisfied."

This, though *obiter*, is an authority for the proposition that where the requirements of the proviso are satisfied the conditions may protect the charterers from liability. Viscount Finlay says (16 Asp. Mar. Law Cas. at p. 359; 131 L. T. Rep. 449; (1924) A. C. at p. 547): "The appellants have entirely failed to show that this condition was fulfilled." The company never entrusted to anyone the duties there material.

In my opinion the company in this case have discharged the onus of showing that both their officers were experienced and qualified and were acting within the scope of the matter with which they were properly entrusted. If, then, the company have entrusted to experienced or qualified officers the duty of providing against unseaworthiness, they are to be deemed under the second condition to have fulfilled their obligations, and, once this is established, the history of the voyage becomes of secondary importance. If, however, it were the case that the company did not so entrust to experienced and qualified officers the obligation of providing against unseaworthiness, then I am of opinion that in any event the evidence shows that all reasonable means have been taken to provide against unseaworthiness.

Having regard to the limitations of the warranty contained in the contract—limitations resembling those imposed by the Harter Act—I think that the defendants, apart from all question of reasonable means taken by the plaintiff company and its officers, have failed to discharge the onus which lies on them to show that the ship was unseaworthy: (*Steel* v. *State Line Steamship Company*, 3 Asp. Mar. Law Cas. 516; 37 L. T. Rep. 333; 3 App. Cas. 72; *The Glenfruin*, 5 Asp. Mar. Law Cas. 513; 52 L. T. Rep. 769; 10 Prob. Div. 103).

I have come to the conclusion (1) that the company did entrust to experienced or qualified officers the duty of providing against the unseaworthiness of the ship; (2) that the company have taken all reasonable means to provide against unseaworthiness; and (3) that the defendants have failed to prove that the ship was unseaworthy.

In the result the plaintiffs are free from all liability to the defendants due to the loss of the ship, and should succeed on the claim and counterclaim.

Appeal allowed.

Solicitors for the appellants, *Batesons* and *Co.*, Liverpool.

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

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Tuesday, Dec. 17, 1929.

(Beford Lord HEWART, C.J., AVORY and TALBOT, JJ.)

MANCHESTER SHIP CANAL COMPANY *v.* DIRECTOR OF PUBLIC PROSECUTIONS. (*a*)

Factory—Docks—Process of unloading a ship—Fencing or covering of hatches that are not in use—Hatches that have been used—On whom duty lies—Stevedore or ship—Whether process of unloading includes fencing or covering of such hatches—Factory and Workshop Act 1901 (1 *Edw.* 7, *c.* 22), *ss.* 79, 85—*Docks Regulations* 1925 (*S.R. & O.* 1925, *No.* 231), *reg.* 34.

By reg. 34 *of the Docks Regulations* 1925: "*Where there is more than one hatchway, if any hatch of a hold exceeding 5ft. in depth, measured from the level of the deck in which the hatch is situated to the bottom of the hold, is not in use for the passage of goods, coal, or other material or for trimming, and the coamings are less than 2ft. 6in. in height, such hatch shall either be fenced to a height of 3ft. or be securely covered.*"

Under the head of "*Duties*" *in these regulations it is provided:* "*It shall be the duty of every person who by himself, his agents or workmen carries on the processes, and of all agents, workmen and persons employed by him in the processes, to comply with Part IV. of these regulations (which includes reg.* 34). "*Provided that while the processes are being carried on it shall be the duty of the owner, master or officer in charge of a ship to comply with reg.* 34, *so far as it concerns those hatches which are not in use and which, during the processes, have not been used, and are not about to be used for the purpose of the processes.*"

Held, that on the proper construction of these regulations the duty, under reg. 34, *to fence or cover the hatches that have been used when unloading is upon those who carry out the process of unloading: the duty (whilst the process of unloading is being carried on) of the owner, master, or officer in charge of the ship in the case of a hatch not in use is to comply with reg.* 34 *so far as it concerns hatches which during the processes have not been used and are not about to be used for the purpose of the processes.*

Held, further, that the process of unloading such a hold includes the fencing or covering the hatches that have been used and is not complete until such hatches have been fenced or covered.

Whatever obscurity there may be in the text of the Docks Regulations 1925, *that this construction is correct appears from the consideration of the earlier regulations* (*S.R. & O.* 1904, *No.* 1617),

(*a*) Reported by C. G. MORAN, Esq., Barrister-at-Law.

and the subsequent decisions thereon of Owner v. C. J. King and Sons Ltd. (1922, 128 *L. T. Rep.* 307) *and* Howlett v. Shaw-Savill and Albion Company Limited (1924, 40 *Times L. Rep.* 778 ; 19 *Lloyd's List Rep.* 176).

CASE stated by the chairman of Quarter Sessions for the County Palatine of Lancaster. An information was preferred by the Director of Public Prosecutions at the County Police Court, Strangeways, Manchester, against the Manchester Ship Canal Company, the appellants, for that they being persons who by themselves or by their agents or workmen were carrying on processes within the meaning of the Docks Regulations 1925, made in pursuance of the Factory and Workshop Act 1901 on the steamship *Manchester Citizen*, then lying at the Sun Mills Berth, Trafford Wharf, Stretford, did unlawfully neglect to comply with No. 34 of the regulations, in that the shelter deck hatch of hatchway No. 6 of the said steamship, being the hatch of a hold exceeding 5ft. in depth measured from the level of the deck in which the said hatch is situated to the bottom of the hold and being a hatch of which the coamings were less than 2ft. 6in. in height, having been used for the said processes, but having ceased to be in use for the passage of goods, coal, or other material, was neither fenced to a height of 3ft. nor securely covered contrary to sect. 85 of the Factory and Workshop Act 1901. The appellants were convicted and fined 5*l.*, but appealed to Quarter Sessions, who confirmed the conviction but consented to state and sign the following case.

Upon the hearing of the appeal, the following facts were admitted.

On the 30th Oct. 1928 the steamship *Manchester Citizen* was laying at the Sun Mills Berth, Trafford Wharf, Stretford, loaded with grain. She had six cargo holds and six hatchways, No. 1 hold being at the bow and No. 6 at the stern. She had three decks. There were three decks above holds numbered 1 to 5, and two decks above hold numbered 6. These two decks were known as the top deck and the shelter deck respectively. There was a hatch on the top deck to hold No. 6, and a considerable distance below that was the shelter deck in which there was another hatch to hold No. 6. The bottom of hold No. 6 was some 28ft. below this hatch in the shelter deck, and the coamings round this hatch on the shelter deck were only 6in. in height.

Holds Nos. 1 to 5 were being unloaded by the Co-operative Wholesale Society, who had commenced unloading on the 29th Oct. 1928, and had continued the unloading from about eight a.m. on the 30th Oct. 1928. On that date they were unloading hold No. 4 until about three p.m., then hold No. 2 until about 3.30 p.m., and then hold No. 5 until five p.m., at which time there was a break for tea. From about 5.30 p.m. they continued to unload hold N. 1 until ten p.m.

Hold No. 6 was being unloaded by the appellants. They commenced to unload it at about eight a.m. on the 30th Oct. 1928. When the appellants first went on the steamship on that date the hatch of hold No. 6 on the top deck was covered, but the hatch of the hold on the shelter deck was not covered but was open. The appellants removed the hatch cover of hold No. 6 on the top deck and put an elevator in hold No. 6 for the purpose of unloading. They unloaded the grain out of hold No. 6 until about 2.30 p.m. on the 30th Oct. 1928, by which time all the grain in the hold had been unloaded. The appellants were then engaged until about 3.45 p.m. in removing the elevator. The appellants then replaced the cover of the hatch of hold No. 6 on the top deck, and left the ship. The appellants did not cover the hatch on the shelter deck of hold No. 6 or in any way fence this hatch. The shelter deck in the vicinity of the hatch to hold No. 6 was made completely dark by the replacement of the cover of this hatch on the top deck.

Between 4.30 p.m. and 5 p.m. on the 30th Oct. 1928 a man fell into hold No. 6 and was killed.

For the appellants it was contended :

(*a*) That the facts did not disclose the offence of which the appellants were convicted ; (*b*) That the conviction was erroneous and unjust ; (*c*) That the said Docks Regulations only applied to a person carrying on a process during the time that a process was being carried on by him ; (*d*) That the appellants had ceased to carry on on the said ship any process when they removed their tackle and left the ship ; (*e*) That it was not in the circumstances obligatory upon the appellants to fence or cover the said hatchway ; (*f*) That the covering or fencing of the hatches is not a part of the process of unloading as defined by the said regulations.

For the respondent it was contended :

(*a*) That the conviction of the appellants was right ; (*b*) that the hatch of hold No. 6 on the shelter deck of the said steamship having been used by the appellants during the unloading of hold No. 6, but having ceased to be in use for the passage of goods, coal or other material ought to have been fenced to a height of 3ft. or securely covered by the appellants upon such cessation and before leaving the steamship ; (*c*) that the process of unloading hold No. 6 included the fencing of the hatch of hold No. 6 on the shelter deck of the said steamship to a height of 3ft. or the covering of the said hatch securely upon its ceasing to be in use for the passage of goods, coal or other material, and (*d*) that the process of unloading hold No. 6 was not complete until the hatch of hold No. 6 on the shelter deck of the said steamship was fenced to a height of 3ft. or securely covered. On the part of the respondent the attention of the court was directed to the decision in *Stuart* v. *Nixon and Bruce* (1901, 84 L. T. Rep. 65 ; (1901) A. C. 79. The question for the High Court was whether upon the above statement

of facts the Court of Quarter Sessions came to a correct determination in point of law.

The Factory and Workshop Act 1901 (1 Edw. 7, c. 22) provides:

Sect. 79: Where the Secretary of State is satisfied that any manufacture, machinery, plant, process or description of manual labour, used in factories or workshops, is dangerous or injurious to health or dangerous to life or limb, either generally, or in the case of women, children or any other class of persons, he may certify that manufacture, machinery, plant, process or description of manual labour to be dangerous; and thereupon the Secretary of State may, subject to the provisions of this Act, make such regulations as appear to him to be reasonably practicable and to meet the necessity of the case.

Sect. 85 prescribes fines for failure to comply with regulations made under the Act.

The Docks Regulations 1925 (S.R. & O. 1925, No. 231) were made by the Secretary of State under sect. 79 (*sup.*) in respect of "the processes of loading, unloading, moving and handling goods in, on, or at any dock, wharf or quay, and the processes of loading, unloading and coaling any ship in any dock, harbour, or canal." These regulations revoked the earlier regulations made by the Secretary of State in respect of the same processes (S.R. & O. 1904, No. 1617).

In the regulations of 1925 there were the following definitions:

"'Processes' means the processes above mentioned or any of them."

"'Person Employed' means a person employed in the processes."

"'Hatch' means an opening in a deck used for the purpose of the processes or for trimming or for ventilation."

"'Hatchway' means the whole space within the square of the hatches, from the top deck to the bottom of the hold."

Par. (*d*) under the head of "Duties" in these regulations is as follows:

(*d*) It shall be the duty of every person who by himself, his agents or workmen carries on the processes, and of all agents, workmen and persons employed by him in the processes, to comply with Part IV. of these Regulations. Provided that while the processes are being carried on, it shall be the duty of the owner, master or officer in charge of a ship to comply with Regulation 34 so far as it concerns those hatches which are not in use and which during the processes have not been used and are not about to be used for the purpose of the processes.

Reg. 34 is in Part IV. of the regulations, and is in these terms:

(*a*) Where there is more than one hatchway, if any hatch of a hold exceeding 5ft. in depth measured from the level of the deck in which the hatch is situated to the bottom of the hold, is not in use for the passage of goods, coal or other material or for trimming, and the coamings are less than 2ft. 6in. in height, such hatch shall either be fenced to a height of 3ft. or be securely covered. Provided that the regulation shall not apply (1) during meal times or other short interruptions of work during the period of employment; (2) to trimming hatches which are not accessible to persons employed. (*b*) Hatch coverings shall not be used in the construction of deck or cargo stages, or for any other purpose which may expose them to damage. (*c*) Hatch coverings shall be replaced on the hatches in the positions indicated by the markings made therein in pursuance of Regulation 14.

G. P. Langton, K.C. and *J. Lustgarten*, for the appellants.—The facts shown by the evidence and set out in the case stated did not disclose an offence under reg. 34. The appellants left the ship as they found it; they replaced the cover to the hatch of hold No. 6 on the top deck, but did not place the cover on the hatch of that hold on the shelter deck, but left that hatch as they found it, when they went on board. There is no provision in the Dock Regulations 1925 requiring the appellants to cover this hatch after they have finished unloading. The Docks Regulations 1925 only apply to a person carrying on a process, during the time when a process is being carried on by him. The facts show that there were two distinct processes: the process of unloading holds Nos. 1 to 5 on the *Manchester Citizen*, and the process of unloading hold No. 6. At the time when this accident happened the process of unloading hold No. 6 had been finished. The appellants ceased to carry on any process on this ship when they removed their tackle and left the ship. It is provided under the head of "Duties" in the Docks Regulations 1925 (see par. (*d*)) that it shall be the duty of every person who "carries on" the processes to comply with Part IV. of these regulations in which is contained reg. 34. The verb is in the present tense, "carries on." The appellants had ceased to carry on the process of unloading at the material time. They had fulfilled the duty laid upon them. They were not bound to fence or cover this hatchway, for the covering or fencing of the hatches was not a part of the process of unloading within the meaning of these regulations. In *Stuart* v. *Nixon and Bruce* (84 L. T. Rep. 65; (1901) A. C. 79) it was held that an injury to a workman from iron beams slung across a hatchway was in the course of the process of loading, although the cargo had at the time of the injury been put into the hold, as the process of loading was not complete till the hatchway was secured. But for that decision there is good reason, as the hatch covers must be placed on a ship before she can proceed safely on her voyage. But that case is no authority for holding that the process of unloading is not finished until the hatches are fenced or covered. Lord Davey said in *Stuart's* case (*sup.*) (see 84 L. T. Rep. 70 and (1901) A. C. at p. 98): "Notwithstanding that the actual putting of the goods into the hold has been completed, I think this was 'relating to the process'—in fact, I find an admission before the learned County Court judge that the process was incomplete, without the putting in of these beams. . . . If the two operations had been in fact severed and the one had been

done by a contractor, and the other had been done by the master of the ship, that might not have been so." As to the finding in the case that the shelter deck in the vicinity of the hatch to hold No. 6 was made completely dark by the replacement of the cover of this hatch on the top deck, by reg. 12 and par. (6) of the heading "Duties" a duty is imposed on the owner, master or officer of the ship efficiently to light the ship while the processes of loading and of unloading are being carried on.

Sir *William Jowitt*, K.C. (A.-G.), *H. M. Giveen*, and *W. Gorman* for the respondent.—It is plain that the Factory and Workshop Act 1901 was designed to protect, not only those who are employed in the factory but also anyone who is working on the premises although not so employed. (See sects. 10, 12, and 13, and especially sub-sect. (4) of sect. 12.) That purpose of the Act should be borne in mind in construing regulations made pursuant to that Act. Regulations were made under sect. 79 of the Factory and Workshop Act 1901, in 1904, the predecessors of those now under consideration (see S. & O. 1904, No. 1617). Two decisions were given under those regulations: *Owner* v. *C. J. King and Sons Limited* (16 Asp. Mar. Law Cas. 107; 1922, 128 L. T. Rep. 307) and *Howlett* v. *Shaw, Savill and Albion Company Limited* (1924, 40 Times L. Rep. 778; 19 Lloyd's List Rep. 176), which illustrate and illuminate the proviso to par. (d) under the heading of "Duties" in the regulations of 1925, namely, "Provided that while the processes are being carried on, it shall be the duty of the owner, master, or officer in charge of a ship to comply with regulation 34 so far as it concerns those hatches which are not in use and which during the processes have not been used and are not about to be used for the purpose of the processes." In *Owner's* case (*sup.*) the point for which the respondent here contends was assumed; it was taken that the stevedores working on No. 2 hold were responsible for leaving that hatchway covered; the claim was under reg. 19 of the 1904 regulations, that they were responsible for covering No. 3 hatchway where the crew and not the stevedores had been working. Lord Hewart, C.J., in giving judgment in that case, supporting the decision of the justices, said (see 16 Asp. Mar. Law Cas., at p. 109; 128 L. T. Rep., at p. 309): "They have found . . . that each employer is responsible only for the protection of those hatchways upon which he has been employed to carry out work; in other words those hatchways which have been or are being used or are to be used by the particular persons employed by him or by his agents upon the carrying out of the process." It will at once be seen that those who framed the proviso above cited defining the duties of the "ship" used the language of Lord Hewart, C.J., in defining the duties of the employer, to show the duties for which the "ship" was not responsible. *Howlett's* case (*sup.*) was an action under the Fatal Accidents Acts by the mother of a joiner's labourer who was working on a steamship in dock, when he was killed by falling down an unfenced hatchway. The Court of Appeal held that as the plaintiff's son was not employed on unloading the vessel there was no breach of duty towards him, on the part of the shipowners, since he was not employed in any of the processes mentioned in the regulations of 1904, and also as the unloading though not finished had so completely stopped, that it could not be said to be still going on within the meaning of the regulations. These two cases led to the amendment of the regulations of 1904. In the regulations of 1925 the paragraph in the regulations of 1904, setting out the persons for whose protection the regulations were made, was omitted, and this proviso to paragraph (d) under the head of "Duties" was inserted by which the "ship's" duty was to comply with regulation 34 "so far as it concerns those hatches which are not in use and which during the processes have not been used and are not about to be used for the purpose of the processes." [Lord HEWART, C.J.—Omitting "hatches that have been used."] It is plain that there was a duty on someone to cover or fence this hatchway to hold No. 6. By par. (d) it was the duty of every person who carries on the processes, one of which is "unloading," to comply with Part IV. of the regulations, which included reg. 34. Then the proviso enumerates the duties of the ship. The argument that the fencing or covering of this hatchway was not part of the process of unloading comes thirty years too late (see *Stuart* v. *Nixon and Bruce*, 1901, 84 L. T. Rep. 65; (1901) A. C. 79), where it was held that the process of loading was not complete until such a hatchway was secured. It is clear that in that case for this purpose no distinction was made between loading and unloading. See the judgment of Lord Halsbury, where he said: "The loading or unloading must be treated as a whole transaction" (see 84 L. T. Rep. at p. 68; (1901) A. C. at p. 91). And if safety be the criterion, it is safer to fall down a hatchway when the hold is full of cargo than when it is empty. The two cases I have cited, *Owner's* case (*sup.*) and *Howlett's* case (*sup.*) clearly pre-suppose the argument for the appellants as impossible. Experience has shown that of those two bodies of persons —those concerned with the loading or the unloading and the owner, master, or officer in charge of the ship—each endeavours to leave the duty of closing those hatchways to the other. The regulations of 1925 have made the duties of each body clear. The person who carries on the process and his men are liable in the case of hatches that have been used by them; the process of unloading is not complete until the lid or cover is placed upon the hatch. The ship is liable while the processes are being carried on for those hatches which are not in use and which during the processes have not been used and are not

about to be used for the purpose of the processes. [AVORY, J.—What do you say as to the use of the present tense in par. (d), "carries on the processes?" On your argument would you not expect the past to be used, "who has carried on?"] This provision is not concerned with time; it is attempting to describe a class of persons.

G. P. Langton, K.C. in reply: In *Owner's* case the crew were working on hold No. 3, down which the workman fell, and there was no reason why the stevedores should have been held responsible. And it appears from the judgments in *Howlett's* case that one must look at the time when the accident happened to see upon whom the obligation to cover or fence the hatch falls. Bankes, L.J. said (see 19, Lloyd's List Rep. at p. 178): "Yet at the time of the accident this unloading had so completely stopped—it is quite true not for all time—that it could not be said that the process of unloading was going on, even although the unloading was not complete; and I think myself that the proviso to [reg.] 19 indicates that the object of the regulation is to provide for what is to happen while the process of unloading is going on." Scrutton, L.J. said (see 19 Lloyd's List Rep. at p. 179): "I cannot see any obligation in the regulations to fence a hatch on which the hatchways have not been put after unloading has ceased. Reg. 19 in the first paragraph does seem to be absolute; but the proviso appears to show that the obligation either to fence or cover the hatch only applies during the period of employment; and in the case of a 'tween deck hatch, which it is not necessary to close for the safety of the ship or cargo I cannot see any obligation to fence it at a time when the people working on discharging are no longer working."

Lord HEWART, C.J.—This is a case stated by the justices of the Salford Sessions, and the question which is involved arises in the following way: an information was preferred by a solicitor, acting on behalf of the Director of Public Prosecutions, under the Factory and Workshop Act 1901, against the appellants "for that they being persons who, by themselves or their agents or workmen were carrying on processes within the meaning of the Docks Regulations 1925, made in pursuance of the Factory and Workshop Act 1901, on the steamship *Manchester Citizen*, then lying at Trafford Wharf, did unlawfully neglect to comply with No. 34 of those regulations, in that the shelter deck hatch of hatchway No. 6 of that steamship, being the hatch of a hold exceeding five feet in depth, measured from the level of the deck in which the hatch was situated, to the bottom of the hold, and being a hatch of which the coamings were less than 2ft. 6in. in height, having been used for the said processes, but having ceased to be in use for the passage of goods, coal or other material, was neither fenced to a height of 3ft. nor securely covered, contrary to sect. 85 of the Factory and Workshop Act 1901." The justices having heard the information, convicted the appellants and fined them £5. Thereupon the appellants appealed to the Quarter Sessions and the Court of Quarter Sessions having heard the appeal, dismissed it and confirmed the conviction. Afterwards, upon request, the Court of Quarter Sessions stated the present case for the opinion of this court.

The facts which are found may be quite briefly summarised. The ship referred to—the *Manchester Citizen*—which was loaded with grain and which had six cargo holds and six hatchways, had above the holds numbered 1 to 5 inclusive three decks. Above hold No. 6 there were two decks known as the top deck and the shelter deck respectively. There was a hatchway on the top deck to hold No. 6, and a considerable distance below that was a shelter deck, where there was another hatch to hold No. 6, and the bottom of hold No. 6 was 28 feet below the hatch in the shelter deck. More than that, the coamings round that hatch on the shelter deck were only 6 inches in height. With regard to the holds numbered 1 to 5, they were being unloaded, it is found, by the Co-operative Wholesale Society, but hold No. 6 was being unloaded by the appellants. The times at which work was commenced and finished on the several holds is set out in the case. With regard to the appellants it is found that when they first went on the ship on the 30th Oct. 1928 the hatch of hold No. 6 on the top deck was covered, but the hatch of the hold on the shelter deck was not covered, but was open. The appellants removed the hatch cover of No. 6 hold on the top deck. They then put an elevator in hold No. 6 for the purpose of unloading, and they began to unload the grain. They went on unloading until 2.30 p.m. of the 30th Oct., by which time the grain in this hold had been unloaded. The appellants were then engaged until about 3.45 p.m. in removing their elevator. They completed that task and they replaced the cover of the hatch of hold No. 6 on the top deck and left the ship, but they did not cover the hatch on the shelter deck of hold No. 6, nor did they in any way fence that hatch. The effect of the replacing of the cover on the top deck was to make the neighbourhood of the hatch on the shelter deck completely dark. Between 4.30 and 5 p.m. on the same day a man fell through this hatchway on the shelter deck into hold No. 6 and was killed.

The contentions on behalf of the respondent were that the hatch of No. 6 hold on the shelter deck, having been used by the appellants during the unloading of that hold, and having ceased to be in use for the discharge of goods, ought to have been fenced to a height of 3 feet or securely covered by the appellants upon the cessation of the work and before they left the steamship. Further that the process of unloading hold No. 6 included the fencing of the hatch of hold No. 6 on the shelter deck of the steamship to a height of 3 feet or the covering

of the said hatch securely upon its ceasing to be in use for the passage of goods, coal or other material. And finally that the process of unloading hold No. 6 was not complete until the hatch of hold No. 6 on the shelter deck of the steamship was fenced to a height of 3 feet or securely covered. The contrary contention was that the regulations only applied to a person carrying on a process during the time that the process was being carried on; that the appellants had ceased to carry on any process when they removed their tackle, and that there was no obligation upon them to fence or cover the hatchway; and finally, that the covering or fencing of hatches is not a part of the process of unloading as defined by the regulations.

Now in approaching the question whether the Court of Quarter Sessions in upholding the decision of the justices, came to a correct conclusion, it is a little important to have regard to the history of this matter. By sect. 79 of the Factory and Workshop Act 1901: "Where the Secretary of State is satisfied that any manufacture, machinery, plant, process, or description of manual labour used in factories or workshops is dangerous or injurious to health, or dangerous to life or limb"—he may certify that manufacture, machinery, plant, process, or description of manual labour to be dangerous, and he may make regulations. Regulations were, in fact, made, and in the year 1904 by Statutory Rules and Orders No. 1617, a series of regulations came into existence in respect of the processes of loading, unloading, moving and handling goods in, on, or at any dock—docks being expressly named in the Factory and Workshop Act 1901. Those regulations, as experience proved, were in some respects insufficient; for example, while, in general, it is the purpose of the Factory and Workshop Acts to protect the life and limbs, both of persons employed by the owners of the factory, and all persons working in the factory, although not so employed, these regulations were described as regulations for the protection of persons employed in the processes or any of them, and so forth. When one comes to the particular regulation, which in that series is No. 19, about hatchways, in that case also experience proved that for the purposes of the Act, the regulations were not complete. In *Owner* v. *C. J. King and Sons Limited* (16 Asp. Mar. Law Cas. 107; 1922, 128 L. T. Rep. 307), it was held that the words of reg. 19, read in connection with the other regulations had to do only with a case where there was more than one hatchway within the sphere of the activities of the person carrying out the work or of his employees. In giving judgment in that case, if I may refer to my own words, I said this (see p. 309): "The justices have found in this case the facts, which it is not necessary for me to dwell upon, and that each employer is responsible only for the protection of those hatchways upon which he has been employed to carry out work; in other words, those hatchways which have been or are being used, or are to be used by the particular persons employed by him or by his agents upon the carrying out of the process." Then came the decision in *Howlett* v. *Shaw, Savill, and Albion Company Limited* (1924, 40 Times L. Rep. 778; 19 Lloyd's List Rep. 176), to which I need not more particularly refer. But in consequence of those decisions it would appear that new regulations were made—S. R. & O. 1925. No. 231. And it was under these regulations that the prosecution now in question was launched. The words limiting the benefit of the regulations to persons employed in the processes were omitted. And the words which I have referred to in my judgment in *Owner* v. *C. J. King and Sons Limited* (*sup.*) form the basis of the proviso that has been cited. And the substantive provision of the regulation and the proviso were founded upon the assumption that no one in the case of *Owner* v. *C. J. King and Sons Limited* (*sup.*) had in any way attempted to dissent from the proposition that a person who is loading or unloading at a hatchway must look after that hatchway. Accordingly one finds on page 2 of the regulations under the head of "Duties" these words: "(*b*) It shall be the duty of the owner, master, or officer in charge of a ship to comply with Part II. of these regulations. (*c*) It shall be the duty of the owner of machinery or plant used in the processes, and in the case of machinery or plant carried on board a ship not being a ship registered in the United Kingdom, it shall also be the duty of the master of such ship, to comply with Part III. of these regulations. (*d*) It shall be the duty of every person who by himself, his agents or workmen, carries on the processes, and of all agents, workmen and persons employed by him in the processes, to comply with Part IV. of these regulations." "Processes" are defined in the regulations as the processes above mentioned, or any of them, and the processes above mentioned are "loading, unloading, moving and handling goods in, on, or at any dock, wharf or quay, &c. Now stress was laid by Mr. Langton in the course of his argument upon the use of the present tense in the words "carries on," in par. (*d*) of "Duties"; and that argument is, no doubt, the basis of the contention urged, as the case finds, by the appellants, that the regulations applied only to a person carrying on a process, during the time when the process was being carried on by him. I cannot take that view of these words. In my opinion these words in par. (*d*) "who by himself, his agents or workmen, carries on the processes" are merely descriptive, words designating the person—that is to say the person who is engaged in the occupation of loading or unloading or moving or handling the goods. Then comes the proviso: "Provided that while the processes are being carried on, it shall be the duty of the owner, master or officer in charge of a ship to comply with Regulation 34, so far as it concerns those hatches which are not in use and which during

the processes have not been used and are not about to be used for the purpose of the processes." In other words, that enumeration closely follows the enumeration observed in the judgment in the case of *Owner* v. *C. J. King and Sons Limited* (*sup.*) distinguishing three things: hatches not in use, hatches which have not been used, and hatches which are not about to be used; and in the proviso, as in that judgment, an exception is most deliberately made about hatches that have been used. And it is to be observed that these words appear in this proviso, which places certain duties upon the owner, or master or officer. The substantive part of this provision is to describe the duty of the person who carries out the processes, and I think that it is quite obvious, when one looks at these words, side by side with the cases which were decided between the time of the passing of the old regulations and the passing of the new, that it was intended that the person doing the unloading should have placed upon him the responsibility as to the hatch which he was using, and had used; that is to say that he most observe, for example reg. 34, and excepting during meal times, or other short interruptions, as the trimming of hatches not accessible to persons employed, the hatch covers must be replaced on the hatches in the position indicated by the markings. Now it is strongly urged that the replacing of such hatches, or the covering in of hatches which were in such a position, and in such a condition as to require fencing or secure covering, was no part of the work of unloading; and reference for that purpose was made to the case of *Stuart* v. *Nixon and Bruce* (1901, 84 L. T. Rep. 65; (1901) A. C. 79). It was sought with no little ingenuity and persistence, to distinguish in this respect the work of loading from the work of unloading. It is quite obvious that, in the circumstances of that case at any rate, it had been found that the task of covering in was a part of the work of loading, notwithstanding that at the time when the operation of covering in began all the cargo, as might be expected, had already been stowed in. But it seems to me that the attempt to distinguish loading and unloading for that particular purpose entirely fails, and the matter is made quite clear, as it seems to me, by what was said by Lord Halsbury at page 91 of the Law Reports, which I need not repeat. It seems to me as obviously true of the process of loading as it is of the process of unloading to say that "covering in" is ancillary to the main transaction and is a part of the work, and a part of the operations for which the Legislature contemplated that protection was desirable.

In my opinion, therefore, upon the true construction of these regulations, especially when they are regarded in the light of the two antecedent decisions to which I have referred, the Court of Quarter Sessions came to a right conclusion. The present appellants were engaged in unloading at hold No. 6, and when they had taken out all the grain it remained for them to see that that hatch covering was put in its proper place—where it ought to be; in other words, they were to leave the place safe for persons passing to and fro upon the ship. It seems to me that to attempt to distinguish between the two processes of loading and unloading so far as the ancillary or final operation of "covering in" is concerned, is quite impossible, and there is no distinction between the two. I think, therefore, that the contentions which were urged before Quarter Sessions on the part of the respondent were right, and that the justices came to a right determination in point of law in accepting them.

I abstain from criticising the phrasing of these regulations tempting as it might be to essay that task. Knowing something of the difficulties under which these regulations were brought into existence, I desire to refrain from unnecessary criticism. And so far as these particular regulations are concerned, which we have had to consider, whatever obscurity there may appear to be in construing them, when they are regarded simply within the four corners of the text, that obscurity is, I think, removed when one looks back at the history of these regulations and of the cases decided upon them to which our attention has been directed by the Attorney-General. For the reasons I have given, I think that the appeal fails and must be dismissed.

AVORY, J.—I am of the same opinion. The question raised by this information was whether it became the duty of the appellants, the Manchester Ship Canal Company, in the circumstances proved, either to fence or to secure and cover this hatch, which was situate at the 'tween decks. That depends, it seems to me, upon whether they come within the terms of No. 34 of these regulations. If they come within reg. 34 then this duty appears to me to follow from the definition of "Duties" under par. (*d*) of these regulations, by which: "It shall be the duty of every person who by himself, his agents or workmen, carries on the processes, and of all agents, workmen and persons employed by him in the processes, to comply with Part IV. of these regulations." Part IV. includes reg. No. 34. The whole question, therefore, resolves itself into this: Were the appellants carrying on the process of unloading this ship? It has been contended before us that these words should be construed as imposing a duty only upon them while they are actively engaged in the actual unloading, and that as soon as the actual unloading is concluded, they cease to be persons who are carrying on the process. In my opinion that is not the proper construction, in view of the history, and all the circumstances in which these regulations came into force. I think that the words "carries on the processes" may be properly paraphrased by saying that the person who in fact does the loading of the ship, and that the person who, in fact, does the unloading, is to be liable for the duty imposed

by reg. No. 34. There is no question that the appellants were the persons who, in fact, did the unloading. I think, therefore, that the justices were right.

TALBOT, J.—I am of the same opinion. Speaking for myself, I must say that looking at these regulations by themselves only, it is most difficult to ascertain what the true answer is to the question raised in this case. But looking at the two decisions of *Stuart* v. *Nixon and Bruce* (*sup.*) and *Owner* v. *C. J. King and Sons Limited* (*sup.*), to which we have been referred, and more particularly to the judgment of the Lord Chief Justice in the last-mentioned case, it seems to me that if we were to interfere with this decision of Quarter Sessions we should be introducing fresh and unnecessary confusion into the law on this matter.

Appeal dismissed.

Solicitors for the appellants, *Grundy, Kershaw, Samson,* and *Co.*

Solicitors for the respondent, *The Treasury Solicitor.*

March 6, 7, 10, 11 *and* 12, 1930.

(Before WRIGHT, J.)

FIUMANA SOCIETA DI NAVIGAZIONE *v.* BUNGE AND COMPANY LIMITED. (*a*)

General average—Centrocon charter-party—Fire—Spontaneous combustion in bunkers—Cargo loaded while fire in progress—Claim by shipowners for contribution—Unseaworthiness—York–Antwerp Rules 1924.

The plaintiffs were the owners of the steamship Alberto Fassini *under charter to carry coal from Cardiff to the Plate and there load a cargo of grain for Antwerp or Rotterdam. The vessel bunkered at Rotterdam with sufficient coal to take her out and back to Europe or at least to the Islands. On arrival at the Plate she was detained fourteen days at Villa Constitucion before she could get into her berth. After completing the discharge of the outward cargo she proceeded to Santa Fé her first loading port. By the time she arrived there she had been a month in the Plate and the bunker coal had been on the ship for about two and a half months and had been carried through the tropics. While loading at Santa Fé the coal was found to be on fire in the upper-bunkers on both sides. The fire was got under after some days, some* 200 *tons of coal being put on deck in the process.*

The vessel then proceeded to San Nicholas her next loading port. On the way fire again broke out in the bunkers and continued, although the loading had been completed, for several days and was only extinguished with great difficulty. The shipowners claimed a general average contribution for expenses incurred in dealing with the fires, relying on the terms of the bills of lading which embodied the York–Antwerp Rules 1924. *The defendants alleged that the ship was unseaworthy at the time of the loading of their grain and counterclaimed for the amount, if any, they might be liable for in general average.*

Held, on the evidence that there was a defect in the coal at the dates of loading which resulted in fires and that the ship was unfit to receive cargo till labour, time and money were expended to make her fit for the voyage. She was therefore unseaworthy, and the plaintiffs' claim failed.

Held, further, for reasons given in Tempus Shipping Company Limited *v.* Louis Dreyfus and Company (post, p. 152); (1930) 1 *K.B.* 699, *the exception of latent defects and Rule D. of the York–Antwerp Rules of* 1924 *which provides that a claim in general average is not to be barred because it arose by default of the carrier, could not prevail over the absolute warranty of seaworthiness.*

ACTION tried before Wright, J. in the Commercial List.

Miller, K.C. and *Harold Stranger* for the plaintiffs.

Sir *Robert Aske* and *F. Martin Vaughan* for the defendants.

The facts and arguments are fully apparent from his Lordship's considered judgment.

March 12.—WRIGHT, J. read the following judgment:

This is a claim by shipowners against cargo owners for a general average contribution. The plaintiffs are the owners of a vessel called the *Alberto Fassini*, of 4560 tons gross measurement, and the defendants are bill of lading holders, indorsees of the bill of lading from certain shippers, an allied company registered in the Argentine as Bunge and Borne Limitada. These shippers were charterers of the vessel under a charter-party dated the 11th Aug. 1927, under which the vessel then on her way from Cardiff with coals for Villa Constitucion or Rosario was to load at a port in the River Plate a cargo of grain including maize, to deliver the same at Antwerp or Rotterdam at various freights depending on the port of loading. I need only refer to two clauses in the charter-party. One is clause 31, which provides that "average, if any, is payable according to York-Antwerp rules, 1924." The other is the exception clause, clause 29: "The steamer shall not be liable for loss or damage occasioned by the act of God, by quarantine restrictions, by perils of the sea" and certain other perils or any latent defects in hull, machinery or appurtenances, by collision, stranding or other accidents arising in the navigation of the steamer, even when occasioned by the negligence, default or error of judgment of the pilot, master, mariners or other servants of the shipowners or persons for whom they may be responsible

(*a*) Reported by R. A. YULE, Esq., Barrister-at-Law.

(not resulting, however, in any case from want of due diligence by the owners of the steamer, or by the ship's husband or manager)." That charter is the well-known "Centrocon" form.

The vessel bunkered at Rotterdam, which port she left on the 30th June with 1618 tons of Westphalian coal, which was usual coal of good reputation, and which was shipped in the usual mixture of screened and unscreened. I refer to the 1440 tons loaded at Rotterdam. There had been about 117 tons only on board before the bunker coal was loaded at Rotterdam, which had been previously shipped, but of that quantity the bulk had been shipped shortly before at Hamburg, and in the events which happened I attach no importance to the small quantity which I think must have been used and disposed of before any matters material to this question arose. The cargo of coal which was shipped at Cardiff was destined to Villa Constitucion, and the bunker coal, which had been shipped in the large quantities that I have indicated, was intended to take the vessel out to the Plate and bring her back to Europe or to the Islands. Such a practice of bunkering for the round voyage or for the principal part of the round voyage is common in this trade. The vessel sailed from Cardiff early in July. She arrived in the Plate or Buenos Ayres on the 12th or 13th Aug. Her bunker coal shipped at Rotterdam had been partly put in the No. 4 hold. That hold was required for cargo on the voyage back from the Plate, and at Buenos Ayres, or shortly after leaving that port, that coal was shifted from No. 4 hold to the bunkers. The permanent bunkers, apart from the hold used as a cross bunker, were identical in arrangement on each side with an immaterial exception. The lower bunkers went up to the 'tween decks from the tank top. They continued through the engine room space and the boiler space, being recessed in the boiler space. Above them were the upper bunkers on the bridge deck. There was a coal shoot to the bridge deck with a hatch opening out on the weather deck. There were three hatches on the bridge deck to the lower bunkers on each side, and there was a shoot on each side for putting coal into the lower hold from the top deck. The hatches in the 'tween deck opening into the lower bunkers were, so far as I follow, generally left open so that there was a communication between the coal above and the coal below. The total capacity of the bunkers was 530 tons in all, about 350 in the lower bunkers and about 280 tons in the upper bunkers.

The vessel, when she was at Villa Constitucion and had discharged her cargo, had about 706 tons of coal left, some of which I suppose must have been on deck or in some place other than in the permanent bunkers. She was kept waiting in the roads at Villa Constitucion exposed to the sun for fourteen days before she could get into her berth. The discharge of the coal was finished on September 7th. She then proceeded to Santa Fé, where she arrived, as her first loading port, on the 10th Sept. and began to load. Six hundred tons of bunkers were then left on board. At that time she had been more than a month in the Plate, and the coals had been on the ship since about June 30th and had been carried through the tropics.

On the afternoon of the 14th Sept. fire was discovered in the upper bunkers on both sides. According to the log, which was put in evidence, several plates were hot, some paint was falling off on the upper portion on a line with the 'tween deck bunkers. Water was used to extinguish the fire, but without effect. Next day water was also used, and the coal was shifted from the bunker to the deck, a wood bulkhead at the after end between the bunkers and the deck having been removed. On the 16th, water was still being poured into the bunkers, and the fire was spreading forwards. On the 17th, shifting of the coal was still going on, and at 5 a.m. flames were coming out of No. 2 bunker hatch. Plenty of water, according to the log, was used, and the fire was localised. In the end the coal was all shifted from those bunkers except about 5 tons on each side. Probably about 200 tons were so shifted.

The master and the chief engineer gave evidence before the case was opened, and were allowed to go away. They had left the ship for some time and the events in question occurred two-and-a-half years or so before they gave evidence. I regret that their evidence was not more carefully tested by reference to the logs. The master says he saw fire, but he does not say at what time he saw it, nor does he explain its obstinacy or failure to yield to the application of water, which application went on for nearly three days. He speaks to two separate fires on the port side close to No. 2 hatch, that is about the middle lengthways of the bunker, one small, like a football, one rather larger near the inside wall, and he says in between he found coals which were not too hot to take into his hand. On the starboard a vein in a curved line about 1ft. thick was what he saw going forward from No. 2 hatch near the bottom of the bunker. He also says he felt the walls of the bunkers on each side, and did not find them warm. The Chief Engineer adds nothing material, except that he says he used his thermometer after the first fire in the bunkers, and found nothing wrong. I think the entries in the two logs indicate a much less localised and more extensive fire than would appear from the officers' evidence, which, however, may be quite true of what they observed at some time or times. They could not enter the bunkers until after water had been poured on the coal.

With about 200 tons of coal shovelled on deck the ship proceeded to San Nicolas to complete loading.

On the way, on the 21st Sept., smoke and a strong gas smell were observed in the engine room, indicating a fire in the bunkers, the plates being heated. On that and the following two days water was poured into the bunkers to

extinguish the fire, and on the 24th they began shifting coal on deck. Loading had then been completed and the ship shifted to the roads. Discharging of the coal was difficult and slow because of the small hatches, and it could only be done by means of small baskets, and fumes and gasses made the work difficult. By the 4th Oct. the coal was finally all discharged on deck. Water had been constantly used on the burning coal even to the 2nd Oct., and on the starboard side the fire in the coal was still burning. By the 7th Oct. the coal had been all replaced in the bunkers and the ship sailed on the 8th Oct. I think these log entries made at the time give a much truer picture of the nature and extent of the fire than the officers' evidence, and I repeat my regret that I had no chance of putting them to the officers. The master says that on the starboard side the second fire was aft near the engine room bulkhead, and the engineer says much the same, and as to the port side also puts the fire in the after corner. The master says he saw it in two or three places each side. The engineer says it was difficult to ascertain the exact seat of the fire because as the coal was being shifted it collapsed to the bottom. The engineer's log under date the 7th–8th Oct. says 533 tons of bunker coal were then on board, one-third not usable, showing heavy wastage by fire and also a heavy loss compared with the quantity of 585 tons on board before the fire. The impression made on me by the master and engineer is that while they did not seek to deceive the court, they simply did not remember. I infer and find that a large portion of the coal was on fire, probably still more was heated, and the fire was only extinguishable by the actual use of water for days and by the shifting of the coal on deck. If the fire had been merely in one, two or three isolated patches I think the water would have put it out much sooner.

Small bunker fires in the Plate are said to be not uncommon, and are dealt with by the engineers and crew, who shovel out and flood a ton or so of burning coal. In three years recently 335 larger fires were reported to the Board of Trade, a very small proportion of the cargoes or bunkers handled in the world. It seems to me that fire such as happened in this ship, requiring days to extinguish, must rank in the category of more important fires. Why they happen may not admit of precise explanation, nor may their happening in any particular case be easily foreseen, at least without very special investigation.

I have had the benefit of a distinguished expert on this subject, Dr. Lessing, who has developed in a most interesting manner the extreme difficulty in analysing in any particular case the precise concurrence of circumstances which may lead to spontaneous combustion. Coal, he says, is always in process of oxidation, which is due to the effect of oxygen on the coal, but the heating process may be almost imperceptible and will certainly be harmless so long as the process is neutralised by the proper proportion of air to coal and you carry off the heat. But actual fires are very exceptional, even in cargoes or bunkers kept in confined holds for considerable periods. The material conditions are ventilation. proportion of dust, the sizes of the pieces of coal and the relative arrangement *inter se* of the pieces of different sizes. Where all these conditions co-operate in a manner most favourable to heating, then heating may ensue ; but the arrangement of the pieces of coal may be constantly changing, for instance, while the bunkers are being worked or even by the motion of a ship pitching at sea. Whether or not a bunker fire occurs he says may be regarded as a matter of chance, namely, the due concurrence of the appropriate conditions at one moment. He seems to be of opinion that the fires in question were sudden in their origin and outbreak and did not show any prolonged previous heating. But this view seems to be based on accepting the evidence of the master that the first fires were of the size of a football and the other similar evidence I have referred to. He agrees, however, that once a fire is started there is a difficulty in finding where it started and he agrees that a diffused and not localised fire would indicate a degree of heating for some length of time. While refusing to dogmatise on the causes of fire in coal he says that the time that it has been confined in the compartment, the fact that it has come through the tropics, the fact that it has been in a compartment, one side of which is the ship's plates, which have been exposed to the sun's rays in a hot climate, are all factors relevant for consideration. These are in fact all present in the coal which fired in this case. There is no evidence of what he regards as the vital element of temperature, namely, the sun temperatures, but only of shade temperatures to some of which Dr. Lessing seemed somewhat doubtfully to attach importance, and I find it difficult to agree with him.

On the whole, having regard to what I regard as the true extent of the fires (on the whole of the evidence), I think the true inference is that these fires which occurred in four different bunker spaces almost simultaneously in each pair of instances, upper and lower bunkers, were mainly governed by the common factors, the class of coal, the long voyage, the long stay at the Plate, especially in the roads at Villa Constitucion, all of which conditions had existed before loading either at Santa Fé or San Nicolas. In my judgment there was a defect in the coal at those dates of loading which did in fact result in fires, though perhaps in other similar cases no fires have occurred. I cannot regard the concurrences as a result of mere casual and sudden and sporadic conditions in coal otherwise free from any liability to spontaneous combustion. On this finding the ship was unfit to receive the cargo and, indeed, the voyage could not be proceeded with, as the claim for general average admits, until labour, time and money were expended to

make her fit for the voyage. *Primâ facie,* therefore, she was unseaworthy.

The practice of carrying bunker coals on the voyage out and back may always, I think, involve this risk of fire. Even though in many cases fire may not ensue the ship may be unseaworthy, just as a ship is unseaworthy with a latent defect in the crankshaft, though the defect may not develop and operate until after several voyages and though the shipowner may neither know of nor be able to avert the danger. Such a case is *The Glenfruin* (5 Asp. Mar. Law Cas. 413; 1885, 52 L. T. Rep. 769; 10 Prob. Div. 103). In the present case the possibility of coal deteriorating before the grain is loaded cannot be absent from the shipowner's mind. Indeed, the practice is adopted, I imagine, from motives of economy. It probably is or ought to be present also to the merchant's mind, and Mr. Miller has contended that as it must be in the contemplation of both parties, shipowner and merchant, it cannot be regarded as unseaworthiness for which the shipowner is liable. No doubt in *Greenshields, Cowie, and Co.* v. *Stephens and Sons Limited* (10 Asp. Mar. Law Cas. 597; 99 L. T. Rep. 597; (1908) A. C. 431) shippers, whose coal had been shipped without negligence and had taken fire through its inherent nature, were held not to be debarred from claiming contribution in general average from the shipowners on the ground that the danger was equally within or outside the contemplation of both parties. But the distinction between that case and this is that in that case there was not a contract by the shipper containing a term comparable to the warranty of seaworthiness. The shipowner here warrants the fitness of his ship, and the more obvious the danger the more obvious seems the necessity to have the express exception if immunity is desired. But there is here in the contract no exception of unseaworthiness. The warranty of seaworthiness is absolute, not merely that they, the shipowners, should do their best to make the ship fit, but that the ship should really be fit: (per Lord Blackburn in *Steel* v. *State Line Steamship Company* (3 Asp. Mar. Law Cas. 516; 1877, 37 L. T. Rep. 642; 3 App. Cas. 72). Mr. Miller has also contended that even if the warranty is absolute there are degrees of fitness, so that such unfitness, as I have here found to have existed in the coal, is not a breach of the warranty because the factors involving danger in the coal are so shifting, inconstant, and incalculable that the occurrence of the danger and of the heating before loading was no breach of the warranty. As I have already explained, I do not so regard the facts, but even so the same might be predicated of so uncertain an occurrence as the development of a latent defect. Mr. Miller further seeks to support his contention by a citation of *Burges* v. *Wickham* (1 Mar. Law Cas. (O.S.) 303; 1863, 8 L. T. Rep. 47), where there was an insurance of a boat constructed for river navigation in India on the passage out from the builders in this country. In that case it was held that the standard of seaworthiness was relative to the nature of the adventure and hence was different from that applying to an ordinary seagoing vessel. That, however, was the case not of fitness to carry cargo, but to face the perils of the sea, and was a case of a known exceptional voyage and exceptional risk. The present is an ordinary commercial contract for the carriage of grain, and the question is one of fitness to carry cargo. I cannot see any reason why the ordinary degree of fitness should not be required, including the supply of safe bunkers. Mr. Miller also cited *McFaddon* v. *Blue Star Line* (10 Asp. Mar. Law Cas. 55; 93 L. T. Rep. 52; (1905) 1 K. B. 697), where the warranty was held to be broken by the defective packing of a valve chest which existed, unknown to the owner, though through someone's negligence, before the goods which were thereby damaged were loaded. In the present case, if the point were material to consider, the plaintiffs had the better means of surveying or investigating the condition of the coal, if they thought fit to do so, especially after the first fire, knowing, as they did, how long and in what climates the coal had been on board. But knowledge or ignorance is immaterial.

Mr. Miller relies on a passage in Carver on Carriage by Sea, sect. 18, which was quoted with approval by Channell, J. in *McFadden* v. *Blue Star Line* (*sup.*). A vessel "must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage, having regard to all the probable circumstances of it. . . . If the defect existed, the question to be put is, Would a prudent shipowner have required that it should be made good before sending his ship to sea, had he known of it? If he would, the ship was not seaworthy within the meaning of the undertaking." I think this is rather against Mr. Miller's contention, because I think if the owner had realised the actual condition of the coal before loading he would have dealt with it before loading or sending the ship to sea. Either he did not think of the matter at all, or he took the risk.

The onus of establishing unseaworthiness is on the defendants, but I have held that the onus is satisfied, as I understand the facts, having regard to the way these two pairs of fires occurred, their extent and the history of the coals from shipment at Rotterdam. Sir Robert Aske has contended that the mere unexplained occurrence of these fires is in itself sufficient to establish unseaworthiness on the same principles as in the case of a ship which sinks soon after leaving port with no weather or other circumstances to account for her loss. In that case unseaworthiness may be presumed—*Pickup* v. *Thames and Mersey Marine Insurance Co.* (4 Asp. Mar.

Law Cas. 43; 1878, 39 L. T. Rep. 341; 3 Q. B. Div. 594. In the present case nothing happened at or after loading the maize except what would normally be expected to occur. On this ground also I think that it is a reasonable presumption that it was the condition of the coal, and that alone, which caused the fires, thus arguing a defect or unfitness in the coal amounting to a breach of warranty.

I hold the ship was unseaworthy and, according to *Schloss* v. *Heriot* (1 Mar. Law Cas. (O.S.) 335; 1865, 8 L. T. Rep. 426; 14 C. B. (N. S.) 59), the plaintiffs cannot recover the general average contribution for sacrifices due to their own fault and breach of contract. This is subject to two contentions of law raised by Mr. Miller, (1) that the exception of latent defects, etc., justifies the claim, and (2) that Rule D of the York–Antwerp Rules, 1924, provides that a claim in general average is not to be barred because it arose by default of the carrier. I think both these contentions are unsound for reasons which I have fully discussed in the judgment I have recently given in *Tempus Shipping Company* v. *Louis Dreyfus and Co.*, and which I need not repeat.

There will be, therefore, judgment for the defendants with costs.

Judgment for defendants.

Solicitors: for plaintiffs, *Stokes* and *Stokes* for defendants, *Ince, Colt, Ince*, and *Roscoe*.

(Before ROWLATT, J.)

Tuesday, June 17, 1930.

CORPORATION OF TRINITY HOUSE *v.* OWNERS OF THE STEAMSHIP CEDAR BRANCH. (*a*)

Light dues — Foreign - going ship — Picks up cargo at one home port for another home port—Both ports lading stations for foreign venture—Action for light dues as "home-trade" ship—Nature of voyage not changed — Merchant Shipping (Mercantile Marine Fund) Act 1898 (61 & 62 *Vict. c.* 44), *s.* 5 *and Sched. II.*

A vessel registered at Swansea as a foreign-going vessel and paid light dues accordingly. She proceeded to various ports in the United Kingdom to pick up cargo for the foreign venture. At Glasgow she picked up cargo for Liverpool, her last port of call before going abroad, in addition.

Held, on a claim for dues as a home-trade vessel, that the action failed. The scheme of the list of 1898 *was to make dues payable by voyages, and the governing principle was that while a vessel was performing a foreign voyage she was not liable on any other sort of voyage she was doing at the same time.*

(*a*) Reported by R. A. YULE, Esq., Barrister-at-Law.

ACTION tried before Rowlatt, J. in the Commercial List.

The defendants were the owners of the steamship *Cedar Branch* of 2222 tons register. In Dec. 1929 the steamer registered at Swansea as a "foreign-going" vessel and paid light dues accordingly. She loaded cargo at Swansea and proceeded to the Tyne, London, Glasgow, and Liverpool for the rest of the cargo. At Glasgow she picked up a cargo for Liverpool, her last port of call before proceeding on her foreign venture. The plaintiffs, the Corporation of Trinity House, claimed 18*l.* 1*s.* as light dues, alleging that the steamer was a "home-trade" ship by reason of the cargo carried from Glasgow to Liverpool. The owners, the defendants, refused to pay, on the ground that the nature or character of the venture had not been changed and they were only liable for the one payment under par. 2 of the Second Schedule to the Merchant Shipping (Mercantile Marine Fund) Act 1898. The relevant portion of par. 2 of the schedule reads: "A ship shall not pay dues both as a home-trade ship and as a foreign-going ship for the same voyage . . . and a ship trading to a port outside home-trade limits and loading cargo . . . at any port within home-trade limits shall be deemed to be on one voyage as a foreign-going ship from the time she starts from the first port of loading of cargo or passengers destined for a port beyond home-trade limits."

Raeburn, K.C. and *A. T. Bucknill*, for the plaintiffs.

Clement Davies, K.C. and *Mr. Lennox McNair*, for the defendants.

ROWLATT, J.—This case is within a very narrow compass, but it is not without difficulty, and it is not very easy to express oneself upon the point which arises.

The scheme of the Act under which these charges are imposed is that abandoning the previous principle they are now made payable by the voyages; and I am bound to say, looking at what the charge is, namely, a charge in respect of the enjoyment by vessels travelling on the sea of the advantage of light on the voyage—you do not expect to find that she would be charged twice in respect of two categories which she might come into at the same moment. We find under rule 2 it is expressly provided that: "A ship shall not pay dues both as a home-trade ship and as a foreign-going ship for the same voyage." I do not know whether that was primarily intended to negative the idea that there could be concurrent voyages; but I think it is rather directed to providing that what is one voyage shall not be cut up into a succession of voyages one after the other. The rule is oddly drafted. It is not well conceived, and the word "but" is used in a confusing sort of way. But what it really aims at explaining is that a foreign-going ship shall be on only one voyage until, if she is an inward ship, she comes to the last

place at which she discharges her cargo, and, if she is an outward ship, from the time when she begins to take up her cargo; and that shall be a voyage as a foreign-going ship however short the foreign transit may be in comparison with the successive home transits. That is what I understand it to mean.

Now when one looks at the latter part of the rule nothing can be clearer but that this ship was on one voyage from Swansea to London, Newcastle, Glasgow and Liverpool and abroad, because she loaded cargo at all those four United Kingdom ports. She was there on that one voyage. She paid for that voyage dues as a foreign-going ship, and, of course, she was not a home-trade ship between any of those ports in respect of calling there and taking up cargo—that is what it says. Then because cargo is put on board from Glasgow to Liverpool she is really said to be for this purpose concurrently engaged in another voyage. I do not think that will fit in with the framework of the rule. I think you pay for one capacity only at the same time.

I do not think the cases that have been referred to—although some of them illustrate it in connection with other matters—really help us here very much. It seems to me that the governing principle here is that while you are doing what is said to be one voyage as a foreign-going ship, in the rule you are not liable as doing another sort of voyage at the same time.

I wish to leave open the point which may arise: supposing—taking this ship as an instance—that no cargo had been taken on board at Liverpool, so that Liverpool would not be a port which came within the description of the latter part of rule 2.

In those circumstances I think this claim fails, and there must be judgment for the defendants with costs.

Judgment for defendants.

Solicitors: *Sandilands* and *Co.*; *Botterell* and *Roche*, for *Botterell* and *Roche*, Sunderland.

Supreme Court of Judicature.

COURT OF APPEAL.

June 30, *July* 1 *and* 29, 1930.

Before SCRUTTON, GREER and SLESSER, L.JJ.)

TEMPUS SHIPPING COMPANY LIMITED v. LOUIS DREYFUS AND CO. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter - party — General average — Fire in bunkers — Expenditure at port of refuge —Claim for general average contribution—Unseaworthiness—York and Antwerp Rules 1924, *r. D—Exceptions—Fault—Privity—Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60), *s.* 502.

By sect. 502 *of the Merchant Shipping Act* 1894: "*The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely,* (*i*) *where any goods, merchandise, or other things, whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship.*"

The steamship Campus, *having carried coal from England to the Plate, was chartered to load a cargo of grain in the River Plate and bring it to certain British or Continental ports as ordered. The charter-party, which was dated the* 16*th May* 1928, *and described the steamer in the words* "*on passage Wales/Las Palmas since* 11*th inst., with cargo and after discharge proceeds in ballast,*" *was in the Chamber of Shipping River Plate Charter-party* 1914 (*Homeward*) *form and contained a number of clauses which included the following. By clause* 29, "*the steamer shall not be liable for loss or damage occasioned by . . . perils of the sea . . . fire, from any cause or wheresoever occurring . . . or any latent defect in hull machinery or appurtenances . . . even when occasioned by neglect default or error of judgment of . . . the servants of the shipowners* (*not resulting however in any case from want of due diligence by the owners of the steamer . . .*)"; *and by clause* 31, "*Average if any payable according to York-Antwerp Rules* 1924."

Rule D of the York-Antwerp Rules was as follows: "*Rights to contribution in general average shall not be affected though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure; but this shall not prejudice any remedies which may be open against that party for such default.*"

The steamer went to the River Plate and loaded a cargo of grain, as required, at Rosario and Villa Constitucion. In order to save the expense of coaling at the Plate the ship had carried sufficient bunkers on the outward voyage to take her home. Having loaded, the ship started for home. It was then found that the bunker coal was in a dangerous condition. Some of it had caught fire and she had to put into Montevideo as a port of refuge to have her fire extinguished. Port of refuge expenditure was incurred. In the result part of the defendants' cargo was damaged and part of it was lost.

The shipowners sued the cargo owners for contribution to general average expenditure, to which the cargo owners replied that as the expenditure was occasioned by the fault of the shipowners in sending an unseaworthy ship to sea, they could not recover such expenditure. The cargo owners claimed the value of the maize destroyed by fire. The shipowners replied that sect. 502 *of the Merchant Shipping Act* 1894 *protected them.*

(*a*) Reported by R. A. YULE and T. W. MORGAN, Esqrs., Barristers-at-Law.

Held, that having regard to Virginia Carolina Company *v.* Norfolk and North American Steam Shipping Company (105 *L. T. Rep.* 810; (1912) 1 *K.B.* 229) *it must be assumed that damage by fire caused by unseaworthiness was within the protection of sect.* 502 *of the* Merchant Shipping Act 1894, *if the shipowners established that such unseaworthiness was without their fault or privity, and there was nothing in the facts of this case which deprived the shipowners of the right to contribution claimed in the action. It was not suggested that the section relieved the shipowners from their liability to contribute, but only that it put them in such a position that they could not be deprived of their right to a contribution from the cargo owners on the ground that the expenses were incurred merely on their own behalf and not on behalf of the cargo owners. Nor was it contended that the shipowners were freed from making their own contributions to the general average, but only that there was nothing in the facts that deprived them of the right to say that as between them and the cargo owners the cargo owners must contribute to the general average expenditure which was incurred on behalf of all the interests concerned. So held by a majority of the court (Scrutton, L.J. dissenting).*

Held, also, as regards the counterclaim for the loss of the cargo, that the shipowners were protected by the exceptions in the charter-party of "fire" and "latent defects in appurtenances," and that as the damage by fire had occurred without their actual fault or privity they were protected by sect. 502 *from liability.*

APPEAL from a judgment of Wright, J. (*infrà*) in the Commercial List.

The following statement of facts is taken from his Lordship's considered judgment:

"In this case the shipowners, the owners of the steamship *Campus*, claim against the defendants, who are endorsees and holders of the bill of lading, a contribution in general average. The defence to that claim is an allegation that the ship was unseaworthy, and there are various questions of law raised in connection with that issue. There is also a counter-claim, in which the defendants are claiming against the plaintiffs for loss of or damage to the cargo, and to that counter-claim various answers are raised.

"The *Campus* is a modern vessel of 6650 tons dead weight; it has four cargo holds, and in addition a cross-bunker called No. 2A, which is separated by a wooden bulkhead from hold No. 2. Cross-bunker No. 2A is separated from the stokehold by an unprotected steel bulkhead. I shall refer to the bunker arrangements a little later.

"The *Campus* left Cardiff on the 11th May 1928 with a cargo of coal for Teneriffe, and she carried sufficient bunkers (1426 tons in all), which she had taken at Cardiff and which were calculated to be enough to bring her out to the Plate under the charter, and to bring her back at least to the Islands without further bunkering.

"The vessel arrived at the Plate without incident and thereupon proceeded to take up service under the charter-party under which these bills of lading were issued. That charter-party was dated the 16th May 1928. It was made between the plaintiffs as shipowners and an Argentine Company, Sociedad Anonima Commercial de Exportacion e Importacion (Louis Dreyfus and Cia) Lda., of Buenos Aires, as charterers. Those charterers are not identical in law with the defendants, although they are, as their name would indicate, a closely allied company. Under the charter-party the vessel was to load a cargo of various grain and was to proceed to one or other of various ports in the United Kingdom or on the Continent between Bordeaux and Hamburg at certain freight. There are only two clauses to which I need refer in this voluminous document which is a Centracon charter-party. One is the Exception Clause, clause 29, which provides: 'The steamer shall not be liable for loss or damage occasioned by the Act of God, by quarantine restrictions, by perils of the sea, or other waters, by fire from any cause or wheresoever occurring, by barratry of the master or crew,' and various other perils, 'or any latent defects in hull, machinery or appurtenances, by collision, stranding or other accidents arising in the navigation of the steamer even when occasioned by the negligence, default or error of judgment of the pilot, master, mariners, or other servants of the shipowners or persons for whom they may be responsible (not resulting, however, in any case from want of due diligence by the owners of the steamer, or by the ship's husband or manager).' The other is clause 31, which provides: 'Average, if any, payable according to York-Antwerp Rules 1924.' The '1924' has first been struck out and then replaced in type." [The statement of facts described the bunker arrangements in detail, and continued:] "No trouble is reported in connection with the coal on the way out. The vessel's first loading port was Rosario, where she loaded 4,280 tons of maize, filling *inter alia* cross bunker No. 2A. She finished loading on the 28th June, or early on the 29th June 1928, and she actually sailed to her next loading port, which was Villa Constitucion, during the course of the 29th June. In the early morning of the 29th June a fire broke out in the port pocket bunker, which then contained two-and-a-half to three tons, and the plates became red hot. The fire was shovelled out and extinguished with water, or was extinguished with water and then shovelled out, and the vessel went on her voyage. She began to load at Villa Constitucion, and while there a second fire broke out on the 29th June in the port casing. That fire was more or less limited in its area. The fire was put out, and about a ton of coal had to be shovelled out. The loading proceeded and was finished in due course, and

on the 1st July the vessel started off again on her voyage. The captain and the engineer, according to their evidence, went round the stokehold bulkhead and felt whether the stokehold bulkhead was hot or not in order to see if there was heating in the port reserve bunker. But they took no further steps to investigate the condition of the coal in that port reserve bunker, which was an important bunker, holding about 100 tons. It had a door into the stokehold, and the coal from that bunker was not being used; the top hatchway was covered up with the coal in the port reserve bunker.

"The bills of lading incorporating the terms of the charter-party were duly issued and were endorsed to the defendants, who thereupon became holders for value, though in essence the two concerns were closely allied, however independent in point of law.

"The ship got to the Martin Garcia Bar where she was held up for want of water. She arrived and anchored there on the 2nd July. On the 4th July while she was still waiting, those on board the ship experienced a strong smell from No. 2A cross-bunker, which they said was like heated maize or coffee. At first they put it down to wet maize. They took the hatch off and could not see anything wrong because the top appeared to be all in order and at that moment they did nothing further. On the next day, the 5th July, there was noticed a thick stream of smoke from the ventilator of the port reserve bunker, and the after-side of the bunker, that is to say the unprotected steel bulkhead in the stokehold, was found to be hot. The captain thereupon diagnosed that the coal was on fire, and he flooded the bunkers. The fumes at the same time continued to proceed from the maize. On the 6th July, from consultation by telegram or wireless to the surveyors and agents, it was decided to proceed to Montevideo. The crew at that time were working at the coal in the reserve bunker, which was burning, and flooding it with water. On the 8th July the vessel arrived at Montevideo. Meantime, fires kept breaking out in the reserve bunker. The coal was being worked out on to the deck and water was being constantly thrown on to it and some of the coal was thrown overboard. It was decided to discharge the grain from No. 2A, which was obviously a perfectly proper step to take, just as it was perfectly proper under the circumstances to proceed to Montevideo as a port of refuge. The coal in the port reserve bunker was burning and the maize was heating. In the two holds, Nos. 2A and 2, which were only separated by wooden bulkheads, there was 2,400 tons or thereabouts of maize, and it was obvious to anyone that the safety of the ship and cargo were being imperilled unless the fire was stopped in the reserve bunker, and the heated maize was taken out to be reconditioned or cooled. On the 9th July the coal was still burning, and there was a fierce heat from the reserve bunker. A commencement was made of working the maize into lighters. On the 10th July the coal was still burning and the discharge of the maize was still going on. On the 11th July there was a fierce fire in the bunkers, and the discharge was continued. On the 12th July the bunkers were still on fire, and the discharge of the grain into lighters was going on. On the 13th July they came to burning maize in the cross-bunker in the corner against the port reserve bunker. That evening there was still a fierce fire in the maize, but by two o'clock that afternoon the fire in the bunker had been completely extinguished. On the 14th July the discharge went on and was completed. On the 15th July the ship was left to cool down a little, and on the 16th July the bunkers were reshipped—that is to say, they had not been thrown overboard, but were put on deck and were brought back into the port reserve bunker—and a commencement was made of reshipping the maize. These operations went on on the 17th and 18th July, and they were finished on the 19th July, when the vessel sailed. About 500 tons were discharged into various lighters, and about 350 tons, or perhaps rather more, were reloaded. What was not reloaded was a quantity of about 131 tons which had been loaded into one of the lighters and that took fire on the 14th July. While it was in the lighter it had to be flooded with water to stop the fire, and it was in such a condition that the best thing to do was to sell it there and then. That was done, and the amount realised was 180*l*. The vessel took 60 tons of coal on board before she sailed from Montevideo. She took some further bunkers at St. Vincent on her way home, and she arrived at Hamburg on the 25th Aug. after this prolonged voyage. The only other incident which I have to notice is that on the 18th and 19th Aug. fumes were found to be coming from the maize in Nos. 2 and 3 holds, which undoubtedly was heating. That had nothing to do with the fire which I have already been describing; but that damage is the subject of an item in the counterclaim, with which I shall have to deal. It is not now disputed that the heat of the maize was due to the effect of the coal in the port bunker. I need not examine the circumstances which point to that conclusion, which was the conclusion arrived at by those on the spot, and I think it is beyond dispute."

Clement Davies, K.C. and *Simey* for the plaintiffs.

Sir *Robert Aske*, *Martin Vaughan* with him, for the defendants.

The arguments of counsel appear sufficiently from the judgment.

Cur. adv. vult.

March 12.—Wright, J. (after the above statement of fact) read the following judgment:

The plaintiffs' claim is for a general average contribution, to which the defendants' reply that, on the principle of *Schloss* v. *Heriot* (1 Mar. Law Cas. (O.S.) 335; 1863, 8 L. T. Rep. 246;

14 C. B. (N. S.) 59) such a claim cannot be sustained, as the ship was unseaworthy and the general average expenditure was caused by that unseaworthiness. The principle is well stated in *Kish* v. *Taylor* (11 Asp. Mar. Law Cas. 544; 106 L. T. Rep. 900; (1912) A. C. 604, 620) by Lord Atkinson, and it is also stated in *Strang, Steel, and Co.* v. *A. Scott and Co.* (6 Asp. Mar Law Cas. 419; 1889, 61 L. T. Rep. 597; 14 App. Cas. 601). What is alleged as unseaworthiness is the condition or character of the coal at the date or dates of loading in the port reserve bunker in close proximity to the grain in hold No. 2A, which was only separated from the grain by an unprotected steel bulkhead. It was contended that the ship was not unseaworthy in this respect, although perhaps not very strenuously. The coal no doubt was of a class usual for bunkers and of the recognised first-rate quality, but situated as it was, and at the time when the cargo was loaded and the voyage commenced, it was, in my judgment, unfit for safe carriage and rendered the ship unseaworthy.

No expert evidence was given as to the mode in which coal comes to suffer from spontaneous combustion. In the present case the coal in the port reserve bunker had remained confined in the ship since the previous May and had thus passed through the Tropics.

On the evidence in this case I cannot arrive at any conclusion save that the coal was unfit for the voyage and that the ship was, in that respect, unseaworthy.

Mr. Clement Davies then relied on the exception in the charter-party with regard to latent defects in the hull, machinery, or appurtenances. I do not think this exception helps him in this case. In the first place, these words cannot be applied to the liability of the bunker coal to spontaneous combustion without an unnatural and pedantic use of language foreign to a contract such as this, and, furthermore, whatever be the precise limitation of the term "latent defects," I do not think the character of this coal can be described as "latent" when regard is had to the two small bunker fires which had already occurred before sailing; an investigation of the coal in the reserve bunker could have been made, though it would have involved some trouble and perhaps delay, and the proximity of this coal to the maize was obvious, and small bunker fires are not unknown in the Plate. But in any case the term "latent defects," without express words applying it to the commencement of the voyage, does not exclude the warranty of seaworthiness: (see *The Christel Vinnen*, 16 Asp. Mar. Law Cas. 292, 413; 1924, P. 208; 132 L. T.Rep. 337). Furthermore, a specific exception in a charter-party or bill of lading such as "latent defects" does not affect questions of contribution in general average. It was so held in *Schmidt* v. *The Royal Mail Steamship Company* (4 Asp. Mar. Law Cas. 217; 1876, 45 L. J., Q. B. 646) in the analogous case of an exception of fire. The position is different where the ship-owner is excused by the contract from liability for negligence or breach of the warranty of seaworthiness as was held in *The Carron Park* (6 Asp. Mar. Law Cas. 543; 63 L. T. Rep. 356; 15 Prob. Div. 203) and *Milburn* v. *Jamaica Fruit Company* (9 Asp. Mar. Law Cas. 122; 83 L. T. Rep. 321; (1900) 2 Q. B. 540), because in such cases the shipowner is entitled to say that he stands free of the breach of duty which is not to be charged against him as barring his claim to contribution or any other purpose. An exception like fires or perils of the sea, or latent defects, does not give him rights to claim contribution, but merely, by express terms, relieves him from liability to loss or damage, as carrier.

Mr. Clement Davies has still two further points in answer to the defence of unseaworthiness. His first is that Rule D of the York-Antwerp Rules 1924, which are incorporated in the charter-party, applies. Rule D is in these terms: "Rights to contribution in general average shall not be affected, though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure; but this shall not prejudice any remedies which may be open against that party for such fault." Mr. Clement Davies contends that the word "fault" is *primâ facie* wide enough to cover a breach of warranty of seaworthiness. This clause, however, has only effect between the plaintiffs and defendants as a term of the contract of carriage, and must be read as a part of that contract. But on often repeated authority, for instance *Nelson Line* (*Liverpool*) v. *James Nelson and Sons* (10 Asp. Mar. Law Cas. 581; 97 L. T. Rep. 812; (1908) A. C. 16), the warranty of seaworthiness can only be excluded in such a contract by express and unambiguous words. No such words are to be found in Rule D, and hence the shipowners cannot avail themselves of the rule in a case of unseaworthiness where the contract is, as here, an unusual contract containing no express exception of unseaworthiness. The word "fault" is not apt to excuse a breach of warranty of seaworthiness. In addition, I think that in this case the last words of Rule D would apply so that if the shipowner could claim contribution, the cargo owners could claim back a similar amount as damages for breach of the contract, and hence the shipowners' claim would be dismissed to avoid circuity of action, as contemplated in *Schloss* v. *Heriot* (*sup.*). No doubt this would involve, by applying what I think to be the rules of the English law in interpreting contracts of carriage, that the second part of the rule would here nullify the first part. But the clause is a document which might be incorporated in contracts of sea carriage depending on other systems of law, in which different rules of construction may prevail. In any case, the final words of the rule are quite general and may well mean that if the goods' owner has to disburse money, even to the shipowner, as a

general average contribution necessitated by a breach of contract by the shipowner, his right to recover that loss or damage for the breach is not to be prejudiced.

This contention fails and equally, in my judgment, does the further contention of Mr. Clement Davies based on sect. 502 of the Merchant Shipping Act. Sect. 502 is in these words: "The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely, (1) where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship." No doubt in this case there was fire on board the ship and no doubt the general average expenditure occurred by reason of that fire. But the section is expressed and intended as a weapon of defence by a shipowner against whom claims are made for loss of or damage to goods. The plaintiffs seek to use it here as a weapon of offence to justify claims by them against the cargo owners, and, furthermore, not in respect of claims to loss of or damage to cargo, but loss to their pockets. The language of the section entirely fails in my judgment to meet such a case as this, and indeed it has been held in *Greenshields, Cowie and Co.* v. *Stephens and Sons* (11 Asp. Mar. Law Cas. 167; 99 L. T. Rep. 597; (1908) A. C. 431) that the section has no reference to claims in contribution to general average, which deal, not with claims for loss of or damage to goods, but with claims for the sharing of voluntary sacrifices or expenditure on the equitable principles of the sea law among the various parties to a maritime adventure.

Greenshields, Cowie, and Co. v. *Stephens and Sons* (*sup.*) is *a fortiori*, because there the claim was against the shipowner who sought to rely on the section as a defence, whereas here the claim is by the shipowner who seeks to rely on the section to support his claim.

I think the defence succeeds and that the plaintiffs' claim fails.

It now remains to consider that part of the counterclaim, which includes a claim for loss and damage to the cargo loaded on one of the lighters, either for the whole loss sustained to the 131 tons or thereabouts, or to the proceeds of the salvage, namely, 180*l*. The total of this claim is 1245*l*. The claim for the proceeds of sale is not resisted by the plaintiffs, but as to the other claim the plaintiffs rely on sect. 502 of the Merchant Shipping Act 1894. Sir Robert Aske denies the application of that section for various reasons, namely, that the damage, if by fire, was not by reason of fire on board, and indeed that there is no sufficient proof of fire on board the ship, but only of heating, so far as concerns these goods, and, therefore, that the plaintiffs have not established that the loss occurred without their actual fault or privity. It is established that the unseaworthiness of a ship does not debar the shipowner from relying on the section, even if the unseaworthiness causes the loss or damage: *Lennards Carrying Company* v. *Asiatic Petroleum Company* (13 Asp. Mar. Law Cas. 81; 113 L. T. Rep. 195; (1915) A. C. 705). In other words, the section is expressing the condition, "Without the owners' actual fault or privity," has excluded any other condition. It is clear that fire due to spontaneous combustion constitutes a case of fire within the bill of lading exception of fire or an insurance against fire (if questions of inherent vice are excluded) or of fire within sect. 502 of the Merchant Shipping Act.: *Greenshields, Cowie, and Co.* v. *Stephens and Sons* (*sup.*). In *The Knight of St. Michael* (8 Asp. Mar. Law Cas. 360; 78 L. T. Rep. 90; (1898) P. 30) a loss of freight through heating of cargo was held to be a loss (not indeed by fire, but within the general words of the policy as *ejusdem generis*. Mere heating, which has not arrived at the stage of incandescence or ignition, is not within the specific words "fire."

Sir Robert Aske has contended that there was no incandescence or ignition at any time material to the maize loaded into the lighter.

The facts to be considered here are that there was actual ignition observed in the reserve bunker as early as the 6th July, and I should, if necessary, be prepared to find as a matter of inference, that there was at least incandescence in the coal in that space before the 4th July, when the heating in the maize, which was caused by the coal, was observed. The discharge of the maize from hold No. 2A began on the 9th July, when the coal in the bunker was still bursting into flame. There is no evidence when this particular lighter was loaded, and the fire on it was not observed until the 14th July; but the discharge of the maize was necessary, because the maize in the hold was heating by reason of the fire in the coal, and the fire in the maize which broke out on the lighter must have been by reason of at least seeds of fire having been communicated to it by heating from the burning coal before discharge.

Precise proof cannot be expected, and Sir Robert Aske has contended that part of the heating of the maize may have been caused by the coal heating before it became incandescent so that it cannot be said that the heating of any specific part of the maize was due to fire and not to coal simply heating. This is a narrow ground, and the fairer inference seems to me to be that the heating of the maize was due to the incandescence of the coal originally at the back and corner of the bunker, and later to the actual burning coal some days before discharge. The words of the section require, indeed, a causal connection between the loss or damage and the fire on board. The causal connection need not be by immediate contact if it is operative in fact. Thus in *The Diamond* (10 Asp. Mar. Law Cas. 286; 95

L. T. Rep. 550; (1906) P. 282) damage due to smoke and water used to quench fire was held to be within the section as damage caused by reason of fire. I do not think the damage need be consummated on board the ship, since the words "on board" are to be construed with the word "fire," and not with "loss and damage." In the earlier statutes the words were "fire happening on board," and I do not think that the omission of the word "happening" was intended to change the effect of the section. In the present case I think the damage and loss of the maize in the lighter was the direct and necessary consequence of the coal on board being on fire, and I, therefore, think that, so far, the statute applies. The case cited—*Morewood* v. *Pollok* (1853, 1 E. & B. 743)—a case of a fire occurring on a lighter on its way to be shipped on the vessel, is oviously different.

There remains the question whether the plaintiffs have established that the loss occurred without their actual fault or privity. The onus to do so is on them; *Asiatic Petroleum Company* v. *Lennards Carrying Company* (*sup.*) and *Virginia Carolina Chemical Company* v. *Norfolk and North American Steam Shipping Company* (12 Asp. Mar. Law Cas. 82; 105 L. T. Rep. 810; (1912) 1 K. B. 229). The plaintiffs are a limited company. But it is now established that an incorporated body can, for the purposes of this section, be deemed guilty of actual, that is, personal, negligence such as can be attributed to the corporate entity, even though in a sense that body can only act through agents, whereas the actual fault postulated must not be the negligence or failure on the part of some servants or agents. In such cases it is established that the court must ascertain as a matter of fact, in all the circumstances of the case, what is the head or brain, or central or governing management of the company, and whether the erroneous or faulty decision falls within the purview of that authority. The plaintiff company have three directors, who are also members of the firm of Sir William Seager and Co., and who managed the company's affairs. I find that these three persons, either as directors or as managers, or more correctly in their dual capacity, are those whose fault or privity, if any, in managing the affairs of the company, may properly be ascribed to the plaintiff company as the company's actual fault or privity, and it is in that capacity, as I think, that Mr. G. L. Seager has given evidence.

Sir Robert Aske does not urge that the failure of the Master to investigate the condition of all the bunkers on the ship can, in itself, be deemed to be the actual fault or privity of the plaintiff company; that is clearly the fault of a servant, assuming it to be a fault. Nor can it, I think, be truly held, that there was any fault in bunkering the ship at Cardiff for the round voyage, or at least as far as back to the islands. No doubt there had been occasional fires in bunkers in the Plate, where bunkers had been shipped at Cardiff or other European points of departure; but there is no evidence that these had been serious or other than the master and his crew could cope with, neither ship nor cargo being in peril. That was how the master and engineer regarded the small fire before sailing. The managers followed the usual practice of the trade in regard to bunkering and shipped the best bunkers, of first-rate reputation. No doubt the motives of economy have determined this practice without which presumably freights in this trade would be higher. Sir Robert Aske, for the defendants, has said that the managers of the plaintiff company were in fault in not giving specific instructions to the master before sailing as to what he should do if fire appeared in the bunkers. On the evidence in my opinion survey might not have revealed the danger. If I am not able to say definitely that the master was in fault in doing as he did, I do not feel able to say that the managers were in fault in not imposing on the master a specific instruction.

The two cases principally relied upon by Sir Robert Aske were of a different character. In *Asiatic Petroleum Company* v. *Lennards Carrying Company* (*sup.*) the management were fully cognisant of the age and state of the boilers of the vessel and had information showing their inadequate and defective condition and yet did not order new boilers. That was a matter perfectly within the knowledge and scope of the management and was held to involve actual fault or privity of the owners. In *Standard Oil Company of New York* v. *Clan Line Steamers* (16 Asp. Mar. Law Cas. 273; 130 L. T. Rep. 481; (1924) A. C. 100), the master, though an experienced seaman, was, in fact, kept quite inexcusably ignorant that the steamer was liable to capsize if in a particular trim; there had been a disaster due to that liability in the case of another similar steamer some years before, but though the builders had sent a full explanation and warning to the owners, these vessels being of special construction, the owners had not passed it on to the master. It was held, that the failure to warn the master was actual fault or privity of the owners. In that case it was held that the matter in question involved a question of scientific calculation, which might well be beyond the scope of a ship's master. But in the present case, in my judgment, if the emergency arose of a bunker fire at the Plate, the managers might well feel that it could be left to the practical sense and experience of the master, charged as he was with the safety of the lives and ship and cargo, and with means of consulting surveyors on the spot. I find that there was no actual fault or privity in the plaintiff company, and that they have discharged the onus which rests upon them.

Sir Robert Aske has reserved for argument hereafter, if need be, the point decided by the Court of Appeal in *Ingram and Royle* v. *Service*

Maritimes du Tréport (12 Asp. Mar. Law Cas. 387; 108 L. T. Rep. 304; (1914) 1 K. B. 541), namely, that the terms of the contract of carriage such as this do not exclude the operation of sect. 502. There, as here, there was an express exception of fire, but no exception of unseaworthiness. The Court of Appeal held, that the shipowner was not barred from relying on sect. 502, rejecting the somewhat paradoxical argument that words intended to reduce the shipowner's liability, should be deemed to increase it.

I hold that the defendants' claim for 1245*l.* fails.

The second head of counterclaim is for 247*l.* 18*s.* 7*d.*, because certain maize from holds Nos. 2 and 4 was delivered in a damaged condition at Hamburg. The plaintiffs, by letter, admitted the fact and the amount of the damage, but reserved the right to dispute liability. The matter has been left in a curious position on the pleadings. The defendants are indorsees of the bills of lading, and are admitted to be owners of the goods. They are a separate firm—however closely allied—from the Argentine company, who were charterers and shippers, and hence, as independent indorsees, are entitled to rely on the estoppel contained in the bill of lading, namely, "Shipped in good order and condition," and on the undertaking to be delivered "in like good order and condition." The plaintiffs may then, if so minded, rely on an exception such as inherent vice or sea perils. But the plaintiffs have pleaded nothing of that kind, and simply put the fact in issue on the pleadings, afterwards, by letter, admitting the fact and the amount of damage found on discharge at Hamburg. There is little evidence that the damage was in the feeders of Nos. 2 and 4 holds, and had no relation to the fire or heating in No. 2A. The master said in evidence that the maize on shipment seemed to him in good condition. The ship arrived at Hamburg on the 25th Aug., having been delayed fourteen days or more by the deviation rendered necessary by what I have found to be unseaworthiness. On the 19th Aug., heating at places mentioned was observed in the maize. There was some rain while the ship was at Montevideo, and the hatches seem to have been open there from time to time for ventilation. It seemed impossible to me at the close of the case, when the matter was first gone into, to allow the plaintiffs to amend their reply and raise an issue of inherent vice, which was a new issue of fact, and would have involved evidence from the shippers in the Plate, and also would have raised further issues by way of answer. On the pleadings as they stand this claim is undefended, and the defendants are entitled to judgment for the amount claimed.

In the result, the claim is dismissed and judgment is entered for defendants with costs. On the counterclaim judgment is entered for defendants for 247*l.* 18*s.* 7*d.* and for 180*l.* 16*s.*, and they are also awarded the general costs of the action. But as defendants had failed on the counterclaim for 1245*l.* 11*s.* 10*d.* in respect of loss of or damage to their cargo, costs on that issue are awarded plaintiffs, except that costs incurred before the amendment pleading sect. 502 are to be paid by plaintiffs.

Judgment for defendants on claim and part of counterclaim.

The plaintiffs appealed against the order giving judgment for the defendants on the claim, and the defendants cross-appealed against the order dismissing their counterclaim for 1245*l.*

Raeburn, K.C., *Clement Davies*, K.C. and *Simey* for the appellants, the plaintiffs.

Sir *Robert Aske*, for the respondents, the defendants.

Cur. adv. vult.

July 29.—The following judgments were read:

SCRUTTON, L.J.—This appeal raises a question in the higher altitudes of the law of shipping and general average, which has been the subject of much difference of opinion in the Profession for many years. It can be stated shortly to be, what is the real meaning and limitations of sect. 502 of the Merchant Shipping Act 1894, which relieves the shipowner from certain liabilities in the case of fire, when applied to cases where the ship was unseaworthy at starting, and the unseaworthiness caused the fire and general average expenditure to avoid future fire?

Fortunately, the facts are not really in dispute. The steamship *Campus*, having carried coal from England to the Plate, was chartered to take a cargo of grain to Hamburg. The shipowner, to save the expense of coaling at the Plate, had carried sufficient bunkers on the outward voyage to take him home. But, as has happened in many other cases, the bunker coal at the Plate turned out to be in a dangerous condition. While the ship was loading, there were two small fires in two separate bunkers on the port side, which the captain, unfortunately, did not report to his agents or owners. On starting, before the vessel got over Martin Garcia Bar, another and more serious fire broke out in a third and larger bunker on the port side, and the maize next to that bunker was found to be heated and in danger of catching fire. It became necessary to put into Montevideo as a port of refuge, in which process port of refuge expenditure was incurred. The shipowner then sued the cargo-owner for contribution to this general average expenditure to which the cargo owner replied that as the expenditure was occasioned by the fault of the shipowner in sending an unseaworthy ship to sea, the shipowner could not recover such expenditure. The cargo-owner claimed the value of the maize destroyed by fire; to this and to the previous defence of the cargo-owner the shipowner replied that sect. 502 of the Merchant Shipping Act 1894 protected him. Wright, J. in a very careful judgment, held

that the section protected him against the cargo-owner's claim, but did not support or justify his own claim for general average contribution.

It is possible to deal shortly with the cargo-owner's appeals. Sect. 502 is in these terms: "The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely, (i) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship." If there were no authority it would, I think, be a difficult and important question whether the section protected the shipowner if the fire was caused by initial unseaworthiness. It is clear that in such circumstances the exception in the contract of affreightment "fire on board" would not protect the shipowner from the breach: (see *The Glenfruin*, 5 Asp. Mar. Law Cas. 413; 1885, 52 L. T. Rep. 769; 10 Prob. Div. 103; and *Tattersall* v. *National Steamship Company*, 5 Asp. Mar. Law Cas. 206; 1884, 50 L. T. Rep. 299; 12 Q. B. Div. 297). But whether the unseaworthiness of the ship causing the fire destroys the statutory protection has, in my opinion, been decided in the negative by authorities binding this court, though the question is well worthy of review in the House of Lords. In *Virginia Carolina Chemical Company* v. *Norfolk and North American Steam Shipping Company* (12 Asp. Mar. Law Cas. 83; 105 L. T. Rep. 810; (1912) 1 K. B. 229), two preliminary questions were ordered to be tried: (1) whether unseaworthiness of the ship causing fire destroyed the protection given by sect. 502; (2) whether a special contract as to unseaworthiness contained in the bill of lading prevented the shipowner from relying on sect. 502. As to the first question Bray, J., and the Court of Appeal held that such unseaworthiness did not destroy the protection of the statute. They held (2) that the special clause in the bill of lading did destroy the protection of the statute. The case was taken to the House of Lords which, on the 21st Oct. 1912, declined to decide the questions asked till it was ascertained whether the ship was in fact unseaworthy. On the case being tried on this issue—the trial of which, on evidence, the order for trial of preliminary questions had been intended to avoid—the ship was found seaworthy, and the questions became academic in that case and the House of Lords did not decide them. It respectfully seems to me a pity that the House would not answer the first question, as, if they agreed with the Court of Appeal, the unseaworthiness of the ship was immaterial, and the trial of an expensive issue of fact would have been avoided.

In 1913 I had to try a similar question in *Ingram and Royle* v. *Services Maritime du Tréport* (12 Asp. Mar. Law Cas. 387; 108 L. T. Rep. 304; (1913) 1 K. B. 538), and endeavoured to follow the decision of the Court of Appeal in *Virginia Carolina Chemical Company* v. *Norfolk and North American Steam Shipping Company* (*sup.*). On appeal, the court followed the *Virginia Carolina* case (*sup.*), on the first question, but held that I had misapplied its decision on the second question. The result is that this court is bound to hold that the protection given by sect. 502 of the Merchant Shipping Act 1894, against claims for loss of or damage to goods is not removed if unseaworthiness causes the fire, though in such a case the protection of the exceptions in the bill of lading is lost. The matter can only be dealt with by the House of Lords. The claim of the cargo-owner is then for damage caused to his goods by fire; this is the exact thing from which the words of sect. 502 protect the shipowner. The cargo-owner in his cross-appeal relies on two points: (1) That there is no sufficient evidence that the damage to the maize was caused by fire in the adjacent bunker, the maize being seen to steam before fire was actually seen in the bunker. I have considered the details of the evidence and am satisfied that there is no ground for interfering with the decision of Wright, J., on this point. (2) That the judge below should have found "actual fault or privity" in the managing director of the plaintiff company, destroying the protection of the statute. There is no ground for saying that improper bunkers were supplied to the ship, or that the owners knew of the two early fires, but it is said that there was actual fault in not giving instructions to the master as to what to do if signs of fire in the bunkers showed themselves. This seems to me not to be a case like *Standard Oil Company of New York* v. *Clan Line Steamers Limited* (16 Asp. Mar. Law Cas. 273; 130 L. T. Rep. 481; (1924) A. C. 100), where the owners had special information as to the stability of a particular type of ship, which a master could not be expected to know, and were held in fault for not communicating that information to the master. It is rather like our decision in *Cosmpolitan Shipping Company (Incorporated)* v. *Hatton and Cookson Limited (Liverpool); The Rostellan* (*ante*, p. 130; 1930, 143 L. T. Rep. 296), where we held that owners were not bound to give experienced and competent officers detailed instructions as to examination of hull and sails before starting on a voyage.

For these reasons the cross-appeal of the cargo-owners against the decision of Wright, J., dismissing their claim for damage to their goods by fire on the ground that sect. 502 protects the shipowner, must fail.

The appeal of the shipowner raises much more difficult questions, and requires a careful consideration of the nature of the claim and the words of the statute. The shipowner's protection is from liability where goods are lost or damaged by fire on board his ship; his present claim is for a contribution to general average

expenditure incurred to prevent ships and goods being lost or damaged by fire in the future. There is a marked difference between general average sacrifice of ship or goods, such as jettison, the whole of which can be recovered from the underwriter as a loss by perils insured against fire: (*Dickenson* v. *Jardine*, 3 Mar. Law Cas. (O.S.) 126; 1868, 18 L. T. Rep. 717; L. Rep. 3 C. P. 639), and general average expenditure, which cannot be so recovered: (*The Mary Thomas*, 7 Asp. Mar. Law Cas. 495; 71 L. T. Rep. 104; (1894) P. 108; see also Arnould on Marine Insurance, s. 976). The recovery of a contribution to general average expenditure does not relate to damage to goods, but to a matter peculiar to the law of the sea relating to general average. The authorities lay down that sect. 502 has nothing to do with general contributions and cannot be used as a defence against them.

In *Schmidt* v. *Royal Mail Steamship Company* (4 Asp Mar. Law Cas. 217n; 1876, 45 L. J. Q. B. 646) on the voyage, without fault of shipowner or cargo-owner, fire broke out, and in extinguishing it other goods were damaged by water thrown down the hold. When the shipowner was asked to contribute to the cost of this measure as a general average sacrifice he replied that sect. 502 freed him from damage by fire and, therefore, from this claim. Blackburn, J., and Lush, J., held that the section was no defence to a claim for contribution to the cost of sacrifices made for the general benefit to avert loss by fire.

This was confirmed in *Greenshields, Cowie, and Co.* v. *Stephens and Sons Limited* (11 Asp. Mar. Law Cas. 167; 99 L. T. Rep. 597; (1908) A. C. 431), by the House of Lords. There a fire broke out in the cargo of coal while on the voyage, without the fault of shipowner or cargo-owner, though from the fault of the cargo, and the vessel, as in the present case, put into a port of refuge to save the whole adventure. The cargo-owners claimed from the shipowner contribution to the general average sacrifice of the coal. The shipowner, among other points, took the point that as the claim was consequent on the fire, he was freed by sect. 502 from liability. The House of Lords, affirming the Court of Appeal, and approving *Schmidt* v. *Royal Mail Steamship Company* (*sup.*), held the statute was no defence. Lord Halsbury said (99 L. T. Rep. 597; (1908) A. C. at p. 435): "As to the point under the statute, I agree with the Court of Appeal that it is much too late to raise such a point now, even if there were more in it than I think there is. The real answer, however, is that the statute is not dealing with average at all, and this has been in effect decided long ago, either upon the words of this statute or words which would have raised the same point in other statutes." If the statute is held to be no defence to the shipowner against a claim for general average contribution to sacrifice or expenditure caused by, and used to, avert fire, it is difficult to see how it can be used to support such a claim. The argument is put in this way. By the law of the sea, apart from York-Antwerp Rules, a party to the adventure cannot recover a general average contribution to avert a peril which is caused by his own "fault." "Fault" has been interpreted as "actionable fault." Therefore, in *The Carron Park* (6 Asp. Mar. Law Cas. 543; 63 L. T. Rep. 356; 15 Prob. Div. 203) Sir James Hannen refused to allow the negligence of the ship-owner's servants to prevent the ship-owner from claiming a general average contribution to expenditure to avert a peril caused by such negligence. He did so for the reason that as in the charter the shipowner had an exception protecting him against the negligence of his servants, he was not legally "in fault." The Court of Appeal, in *Milburn and Co.* v. *Jamaica Fruit Importing and Trading Company of London* (11 Asp. Mar. Law Cas. 122; 83 L.T.Rep. 321; (1900) 2 Q. B. 540) in similar circumstances held the same thing. But the present case is quite different. Unseaworthiness has caused the fire, and the ship owner has no protection under the contract of affreightment against unseaworthiness. That the ship started unseaworthy prevented the shipowner from relying on the exception "fire on board" or any special provision of the York-Antwerp Rules 1924, altering the law of the sea. Indeed, counsel for the appellants agreed he could get no protection out of those rules, in view of the proviso to Rule D. The ship-owner then attempts to say in answer to a defence to the claim, which is "You are in fault for providing an unseaworthy ship where the unseaworthiness caused the fire," the reply: "But I am not in fault for sect. 502 protects me from liability for damage to goods by fire." But the answer of *Greenshields, Cowie, and Co.* v. *Stephens and Sons Limited* (*sup.*) is: "The statute has nothing to do with general average contribution to expenses incurred to avert fire in the future and is not a defence to such a claim." It is an answer to a claim for damage to goods caused by fire, though the ship is unseaworthy, if the decision in *Virginia Carolina Chemical Company* v. *Norfolk and North American Steam Shipping Company* (*sup.*) is right, but on the authority of the House of Lords in *Greenshields, Cowie, aand Co.* v. *Stephens and Sons Limited* (*sup.*), it has nothing to do with claims for general average contribution, though fire caused the sacrifice or expenditure. The point may be put in other words thus: there is no exception in the contract of affreightment against unseaworthiness, and as the fire was caused by unseaworthiness the exception "fire on board" and the inclusion of the York-Antwerp Rules do not protect the shipowner. As far as the contract of affreightment is concerned, he is "in fault" with no contractual protection. When, therefore, he tries to recover, not the loss of goods or ship's tackle, which under *Dickenson* v. *Jardine* (*sup.*) he might, perhaps, recover against underwriters as a loss by fire, but general average expenditure to avert future

fire, the whole of which, under *The Mary Thomas* (*sup.*) he could not recover from underwriters as a loss by fire, the cargo-owner meets him with a defence : "The general average expenditure was due to your fault for which the contract of affreightment does not excuse you, as it did in *The Carron Park* (*sup.*) and *Milburn* v. *Jamaica Fruit Importing and Trading Company of London* (*sup.*)." "That may be so," says the shipowner, "but sect. 502 of the statute excuses me, so I am not in fault." The answer is that the statute by its words does not excuse the shipowner from liability for general average contribution to expenditure, as was decided by the House of Lords in *Greenshields, Cowie, and Co.* v. *Stephens and Sons Limited* (*sup.*), and, therefore, the shipowner remains in his original fault under the contract of affreightment of unseaworthiness causing loss, not excused by a statute which does not free him from liability to contribute to general average expenditure caused to avoid future fire. The wording of sect. 502 does not seem to have any relation to claims for general average expenditure.

In my view, Wright, J. came to a correct conclusion on both the appeal and the cross-appeal. They should both be dismissed with costs, with a set-off of costs. But as my brothers take a different view on the appeal by the shipowner, the judgment of the court will be as they propose.

GREER, L.J.—The liability to contribute to general average arises when in the course of a voyage a sacrifice is made of some of the property at risk, or expense is incurred in order to avert some impending danger to all the property at risk. Though the obligation to contribute, and the right to demand contribution, may be controlled by contract, it did not in origin depend upon contract, but on an equitable rule adopted from the Rhodian laws to the effect that extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo in the time of peril should be borne proportionally by all who are interested : (see per Vaughan Williams, L.J., and A. L. Smith, L.J., in *Milburn and Co.* v. *Jamaica Fruit Importing and Trading Company of London* (11 Asp. Mar. Law Cas 122; 38 L. T. Rep. 321 ; (1900) 2 Q. B. 540).

"Before either the shipowner or the owner of the cargo can claim contribution as general average for a sacrifice of his property, or an expense incurred by him, in order to avert a total loss of ship and cargo, he must be in a position to prove in case of need that the total loss in question was not one for which he himself would have had to pay." This definition is quoted from Lowndes on General Average, 6th edit., at p. 35. I think it accurately summarises the essential elements involved in the conception in English law of a right to share in general average. Judges have from time to time stated in varying words the circumstances which give rise to a right to general average contribution. For example, Blackburn, J. in *Kemp* v. *Halliday*, said 2 Mar. Law Cas. (O.S.) 271 ; (1865, 14 L. T. Rep. 762 ; 6 B. & S. 723, at p. 746) : "In order to give rise to a charge as general average, it is essential that there should be a voluntary sacrifice to preserve more subjects than one exposed to a common jeopardy, but an extraordinary expenditure incurred for that purpose is as much a sacrifice as if, instead of money being expended for the purpose, money's worth were thrown away. It is immaterial whether a shipowner sacrifices a cable or an anchor to get the ship off a shoal, or pays the worth of it to hire those extra services which get her off." Lord Kingsdown in *Ex Galam Cargo*, said (33 L. J. Adm., 97, at p. 102) : "It is a loss incurred for the general benefit of the ship and cargo, to which those who have received the benefit are by law liable to contribute rateably." The effect of the judicial definitions given from time to time with regard to general average is stated in art. 108 of Scrutton on Charter-parties 12th edit., at p. 313, as follows : "All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo comes within general average, and must be borne proportionably by all who are interested. To give rise to a claim for general average contribution : (1) There must be a common danger which must be real, and not merely apprehended by the master, however reasonably. (2) There must be a necessity for a sacrifice. (3) The sacrifice must be voluntary. (4) It must be a real sacrifice, and not a mere destruction and casting off of that which had become already lost and consequently of no value. (5) There must be a saving of the imperilled property through the sacrifice. (6) The common danger must not arise through any default for which the interest claiming a general average contribution is liable in law. Therefore, the fact that the common danger arises from the nature of the cargo—for example, from spontaneous combustion of coal—does not prevent the cargo-owner from claiming contribution for sacrifice of the cargo, unless he was guilty of some breach of contract or of duty in shipping it."

The question has been discussed from time to time whether the liability to contribute arises out of contract or independently of contract. From the nature of the case it seems that in origin the right to contribution was quite independent of any contract. The law governs the relations of cargo-owners to shipowners between whom there is a contract of carriage, and the relations between one cargo-owner and another cargo-owner between whom no contractual nexus subsists. Though the origin of the rights to a general average contribution does not arise from contract, it may as between shipowner and cargo-owner be controlled by contract, and the York-Antwerp Rules were drawn up for the purpose of regulating the contractual rights of ship and cargo-owner so far as consistent with the express contract made between them. It might well

have been decided at one time that it was inequitable to allow a shipowner who had by his fault brought about the danger which gave rise to the general average sacrifice any right to any contribution in the nature of general average. It might have been held that the law disabled him from recovering if he was in fault quite irrespectively of the question whether the contract between him and the cargo-owner excused him from the consequences of such fault, and as pointed out by counsel for the appellants in argument, the late Mr. Carver adopted this view of the law until he felt himself precluded from maintaining it by the decision of the Court of Appeal in *Milburn and Co.* v. *Jamaica Fruit Importing and Trading Company of London* (*sup.*), which approved and affirmed the decision in *The Carron Park* (6 Asp. Mar. Law Cas. 543; 63 L. T. Rep. 356; (1890) 15 P.D. 203). The effect of these two decisions appears to me to be that in considering whether the shipowner is in fault so as to lose his right to contribution, the question is whether, having regard to his obligations to the cargo-owners, he has committed an actionable wrong which has given rise to the need for the general average sacrifice or expenses. In *Kish* v. *Taylor* (12 Asp. Mar. Law Cas. 217; 106 L. T. Rep. 900; (1912) A. C. 604) Lord Atkinson describes the shipowner who is disentitled to recover as a wrongdoer. In *The Carron Park* (*sup.*), the charter-party contained an exception of neglect or default of the master, crew, or other servants of the shipowner. The defendants incurred a general average expenditure to which they were held to be entitled to call on the cargo-owner to contribute on the ground that the loss would not have fallen on the shipowner, and the expenditure and sacrifice made by him was not made to avert loss from himself alone, but was made to avert a loss that would fall on all the interests involved. In that case the President relied upon the statement of Lord Watson in *Strang, Steel and Co.* v. *Scott and Co.* (6 Asp. Mar. Law Cas. 419; 61 L. T. Rep. 597; (1889) 14 App. Cas. 601), that the fault of the master would prevent the owner of a ship from recovering a general average contribution (61 L. T. Rep. 597, at p. 5; 14 App. Cas. at p. 609) "unless the conditions ordinarily existing between parties standing in that relation have been varied by special contract between them and their shippers." This case was approved and followed in the Court of Appeal in *Milburn and Co.* v. *Jamaica Fruit Importing and Trading Company of London* (*sup.*). The argument that prevailed in the latter case was very clearly stated by Walton, J.—then Mr. J. Walton, Q.C. The reason why by the law maritime the shipowner cannot obtain general average contribution in respect of a sacrifice or expense necessitated by his servant's negligence is that, in the absence of a negligence clause, he is in default, and has committed through his servant a breach of duty; and he cannot claim contribution towards the sacrifice or expense incurred by him in endeavouring to obviate the danger occasioned by his default. But, where the negligence of the master and crew is mutually excepted, the shipowner is not in default by reason thereof, and, therefore, there is no reason in such a case why the right to general average contribution should not exist in his favour.

It seems to me that the question which has to be asked in cases of this kind is: "Is the danger which occasions the sacrifice or the expense sought to be recovered one for which the shipowner is responsible to the cargo-owners, so that it can be said that he has made the sacrifice or incurred the expense not for the benefit of all concerned, but for his own benefit only?" I think it is not *ad rem* to say that the shipowner's non-responsibility for the danger is due to a statutory provision, and not to the terms of the contract. The fact remains that whether the responsibility is taken off his shoulders by a clause in an Act of Parliament, or by the terms of the contract of carriage, he is incurring general average expenses acting for the benefit of all concerned, and not for his own sole benefit. It was suggested in the course of the argument that the statute does not provide that the shipowner shall not be deemed to be in fault, but only provides that he shall not be liable to make good the loss or damage caused by reason of fire without his actual fault or privity. I do not think there is any substance in the alleged distinction between a statutory elimination of a duty, and a statutory provision that there shall be no liability for an act. In either case it seems to me the default is negatived. Assuming, as we must do, having regard to the decision in *Virginia Carolina Chemical Company* v. *Norfolk and North American Steam Shipping Company* (12 Asp. Mar. Law Cas. 82; 105 L. T. Rep. 810; (1912) 1 K. B. 229) that damage by fire occasioned by unseaworthiness is within the protection of sect. 502 of the Merchant Shipping Act 1894, if the owner establishes that such unseaworthiness was without his actual fault or privity, I am of opinion that there is nothing in the facts of this case to deprive the shipowner of the right to contribution claimed in this action.

Certain cases were relied upon by Wright, J. and in the argument for the respondent before us as inconsistent with this view, especially *Schmidt* v. *Royal Mail Steamship Company* (4 Asp. Mar. Law Cas. 217; 45 L. Jour., Q. B. 646) and *Greenshields, Cowie, and Co.* v. *Stephens and Sons* (99 L. T. Rep. 597; (1908) A. C. 431). Neither of these cases was a case in which the shipowner's liability to obtain contribution from the cargo-owners was in question. They were both cases in which the claim was by the cargo-owner against the ship. In *Schmidt* v. *Royal Mail Steamship Company* (*sup.*) it was held that an exception in the charter-party did not exempt the shipowners from the liability to contribution in general average, nor did sect. 503 of the

Merchant Shipping Act 1854. It is not suggested in the present case that sect. 502 of the Merchant Shipping Act 1894 relieves the shipowner from liability to contribute, but only that it puts him in such a position that he cannot be said to be deprived of his right to a contribution from the cargo-owners on the ground that his expenses were incurred merely on his own behalf and not on behalf of all the interests. It is not contended in the present case that the shipowner is freed from making his own contribution to the general average, but only that there is nothing in the facts of the case that deprives him of the right to say that as between him and the cargo-owners he was not in default, and, therefore, the cargo-owners must contribute to general average. It seems to me that neither *Schmidt* v. *Royal Mail Steamship Company* (*sup.*) nor *Greenshields, Cowie, and Co.* v. *Stephens and Sons* (*sup.*), have any bearing on any question we have to determine in this appeal. The appellant does not rely upon the statute as giving him a right to recover contribution from the cargo-owners, but he says that if the cargo-owner pleads that he is disentitled to recover by reason of the fact that the expenses were incurred solely for himself, he then can reply, that is not true, because by reason of the provisions of the Act which have not been altered by agreement he was not in default at all, and that when he incurred the general average expenses for which he is claiming, he incurred them not on his own behalf, but on behalf of all the interests concerned.

It is no doubt true, as Lord Halsbury said in *Greenshields, Cowie, and Co.* v. *Stephens and Sons* (*sup.*) that sect. 502 of the Merchant Shipping Act 1894 is not dealing with general average at all. It does not qualify the rule that if the shipowner is in default, and the expenses he seeks to recover are expenses he incurred to save himself from a loss that would fall on him alone, he is not entitled to call on cargo-owners for contribution. But the statute does alter the situation that arises when the decision is taken by the master to incur the expenses in question. By reason of the immunity from liability created by the statute, the expenses incurred by the master are incurred not for the ship alone, but for all the interests concerned. I do not think *The Ettrick* is a decision to the contrary. Sect. 502 is a section which does not take away the ship's responsibility for damages; it only limits the amount. Therefore, when general average expenses are incurred, it cannot be truly said that they are incurred for the benefit of the ship alone. Sect. 502 has nothing to do with the question whether the shipowner is in default or not; it only provides that where he is in default the amount of the damages that can be recovered from him is limited.

The respondents also relied upon the decision of the majority of the Supreme Court of the United States in *The Irrawaddy* (1898), 171 U.S. 195. The majority of that court decided that the Harter Act had no effect upon the right of the shipowner to recover contribution from the cargo-owners in a case in which a section of the Act relieved him from responsibility in damages. I think the decision of the majority turned on distinctions which exist between the law of the United States and the law of this country on the question of the liability of shipowner to cargo-owner. It is pointed out (171 U.S., at p. 195) that "whatever may be the English rulings as to the effect of contract immunity from negligence as entitling the shipowner to claim in general average, we do not think the cases are parallel. By the English law the parties are left free to contract with each other, and each party can define his rights and limit his liability as he may think fit. Very different is the case where a statute prescribes the extent of liability and exemption." It is not correct to say that sect. 502 of the Merchant Shipping Act 1894 prescribes the extent of the liability and exemption of each party. It only provides for what are to be the obligations in a certain event of the shipowner in the absence of any agreement to the contrary. In any event we are not bound by the decision in *The Irrawaddy* (*sup.*), and the reasoning of the judgment of the minority in that case seems to me more convincing than that of the majority.

With regard to the counterclaim, the learned judge had to determine upon the evidence whether the damage was due to fire, or merely to heat, and whether want of privity of the owner was established. He had to exercise his judgment on the probabilities of the case and I do not feel myself justified in saying that his conclusions of fact were wrong. On this part of the case I agree with the judgment of Scrutton, L.J.

In my opinion the appeal of the plaintiffs should be allowed with costs, and the cross-appeal dismissed with costs.

Slesser, L.J.—The points of claim in this case allege that the steamship *Campus*, the property of the plaintiff company, suffered fire on board during a voyage to Las Palmas which made it necessary for her to put into Montevideo, whereby expense arose.

The defendants, are, by indorsement of bill of lading, owners of cargo which was carried on the voyage, and it is alleged that expenditure in running to the port of refuge was incurred by the plaintiffs to avoid a total loss of all interests for which the defendants, owners of cargo, are liable in general average. The defendants plead, in so far as is material to this appeal, that the steamer was unseaworthy and unfit, and that the matters alleged as founding a claim to general average were occasioned by default of the shipowner, namely, by such unseaworthiness or unfitness; they give the particulars as to the treatment of the bunker coal as the cause of fire, which have been stated by my Lord. The defendants counterclaim that their cargo was burned or injured in breach of the contract of carriage by the plaintiffs, and assess their claim at 1572*l*. 4*s*. 10*d*.

The real issue which arises on the claim is whether the common danger, which is alleged, did not arise through a default for which the plaintiff company, claiming the general average contribution, is liable in law. The learned judge on the evidence says: "I cannot arrive at any conclusion save that the coal was unfit for the voyage, and that the ship was in that respect unseaworthy." There is in this contract no exception for unseaworthiness, and I agree with Scrutton, L.J., that the fact that "the ship started unseaworthy prevented the shipowners from relying upon the exception 'fire on board,' or any special provision of the York-Antwerp Rules 1924," here incorporated in the contract.

Were the matter to rest there, it is clear that the defendants, on the finding of the learned judge on unseaworthiness, would be entitled to succeed as to the claim and could properly say that the common danger was due to the default of the shipowner, and that, therefore, he would lose whatever right he might otherwise possess to general average contribution; but the real point here to be decided is whether, having regard to sect. 502 of the Merchant Shipping Act 1894 the shipowner is or is not saved from the consequences of default by that section, and so nevertheless is entitled to recover. Sect. 502, which thus becomes of vital importance in this case, is as follows: "The owner of any British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely (i.) where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship."

My Lords are in agreement that, on the facts of this case, it is not possible to say that there was actual fault or privity of the owners, and respectively I agree with them. Whatever error was made was the fault of officers, not alleged to be incompetent, and not of the owners' actual fault or privity: (see *Cosmopolitan Shipping Company (Inc.)* v. *Hatton and Cookson Limited (Liverpool)*, 143 L. T. Rep. 296). The section, therefore, stands to protect the shipowner from any liability to make good the damage to the cargo, but the question remains, does it extend to enable him to claim the general average contribution which otherwise he would have lost by his own default of unseaworthiness?

The decision in *The Carron Park* (6 Asp. Mar. Law Cas. 543; 63 L. T. Rep. 356; 15 Prob. Div. 203) and *Milburn and Co.* v. *Jamaica Fruit Importing and Trading Company of London* cases (11 Asp. Mar. Law Cas. 122; 83 L. T. Rep. 321; (1900) 2 Q. B. 540), make it clear that if the liability of the shipowners, which would otherwise arise, is excluded by exception in the contract, it has thereby been taken out of the provision that where the common danger arises from his own default, he cannot claim general average, and in such a case, not being directly liable for the default, his sacrifice—which, if it had not been made and the goods lost, would have laid upon him no actionable liability—is one for which he can claim contribution. It still remains to be decided whether sect. 502, which, in the absence of fault or privity, protects him from liability to make good the damage, does or does not extend to the point of saying that, therefore, the common danger does not arise through any default for which he is liable in law.

It is to be noticed that the section does not contain any absolute exception of liability, but is limited to protection to make good damage to goods, merchandise or other things. Is there still left, notwithstanding this saving of liability, a default or wrongdoing causing the common danger over and beyond which excludes the shipowner from making a claim to general average? No direct authority exists to conclude this problem, but certain cases turning on sect. 502 must be considered.

In *Schmidt* v. *Royal Mail Steamship Company* (4 Asp. Mar. Law Cas. 217; 45 L. J., Q. B. 646) there was fire on board without fault of shipowner or cargo-owner, and goods were damaged. The shipowner was sued in general average in that he had injured goods in saving the ship. He pleaded sect. 502, and argued that because he was freed of liability to damage to the goods, he was, therefore, not liable for general average contribution. It was held that the words of the section only protected him from damage to the goods, but had nothing to do with general average, and that, notwithstanding the section, he was liable. This was followed in *Greenshields, Cowie, and Co.* v. *Stephens and Sons* (11 Asp. Mar. Law Cas. 167; 99 L. T. Rep. 597; (1908) A. C. 431) in the House of Lords. These cases seem clearly to follow the actual words of the statute which in terms limit the liability of the shipowner to cases where he might otherwise be liable to make good damage to goods. The liability to general average, it was said, is not liability to damage to goods, and, therefore, was held to be unaffected by the section.

I cannot see how these cases really help to elucidate the present problem; they turn upon the extent of the immunity of the shipowner, and when the language of the section is considered, it is clear that it does not extend to an immunity on the part of the shipowner for general average; the problem here rather is—the shipowner not being entitled to claim general average where the common danger has arisen through his default for which he is liable in law—Is there any actionable default for which it can be said he is liable in law, except the actionable wrong of injuring the cargo-owners' goods from which he is expressly protected?

It is argued for the cargo-owners that there may be a default on the part of the shipowner over and above that for which he is not liable under sect. 502, and that directly there is any default whatever, there is no sacrifice, but I

asked in vain during the argument to have that actionable default defined. It must be admitted that whatever the shipowner did to save the cargo, if he had not done it, no action would have lain against him. If this be true, his whole behaviour was a voluntary sacrifice. This fact distinguishes this case from that of *The Ettrick* (1881, 6 P. D. 127), which was a contribution to salvage case decided under sect. 54 of the Merchant Shipping Act 1862, now substantially sect. 503 of the present Act. Brett, L.J., says (6 P. D., at p. 136): "But then it is said that the statute which limits the liability to 8*l*. purges the negligence and the default and puts the plaintiff on the payment of the 8*l*. into the position of a perfectly innocent person." As is there pointed out, under that section the owner's liability is limited in certain cases of injury or damage to 8*l*., but over and above that sum it may properly still be said that he has committed an actionable wrong which would exclude him from the contribution to salvage there claimed. Applying that section to this case, the owner on claiming general average, if he could only rely on sect. 503, would be met by the plea that he was still a wrongdoer to the extent of all damage beyond 8*l*., and that consequently the common danger caused by unseaworthiness could yet be said to arise through his default.

The case of *Virginia Carolina Chemical Company* v. *Norfolk and North American Steam Shipping Company* (12 Asp. Mar. Law Cas. 83; 105 L. T. Rep. 810; (1912) 1 K. B. 229) has decided that fire caused by unseaworthiness is within the protection of sect. 502 of the Merchant Shipping Act 1894, and the result in my judgment is that the statute has produced the same state of affairs as did the exception in the contract in *The Carron Park* (*sup.*) and *Milburn and Co.* v. *Jamaica Fruit Importing and Trading Company of London* (*sup.*), so that it is not possible to say that the common danger has arisen through any default for which the shipowner is liable in law.

For these reasons I agree with the judgment of Greer, L.J., that this appeal must be allowed as in the claim. It follows from my judgment, as to absence of fault or privity on the part of the shipowner, that the cross-appeal must be dismissed.

Appeal allowed.
Cross-appeal dismissed.

Solicitors for the appellants, *Botterell* and *Roche*, agents for *Vaughan* and *Roche*, Cardiff.

Solicitors for the respondents, *Ince*, *Colt*, *Ince*, and *Roscoe*.

July 24 *and* 25, 1930.

(Before SCRUTTON, LAWRENCE and GREER, L.JJ., assisted by Nautical Assessors.)

THE CHATWOOD. (*a*)

ON APPEAL FROM THE ADMIRALTY DIVISION.

Collision — River Scheldt — Vessels meeting in the vicinity of swinging or turning vessel—Duty of vessel navigating against the tide to stop her way over the ground—Obligation to take off way when vessel is aware of other vessels—Delay in taking off way until turning vessel is reached—Regulations relating to the navigation of the River Scheldt, 1926, *art.* 40, *r.* 3.

By art. 40, *r.* 3, *of the Regulations relating to the navigation of the River Scheldt, a vessel proceeding with the current which is desirous of swinging is required to make this known to vessels in the vicinity by sounding a prescribed whistle signal; every vessel in the vicinity proceeding against the current,* " *must in that event stop her way over the ground and each vessel in the vicinity proceeding with the current must reduce its speed until the vessel swinging does no longer afford any impediment for passing through.*"

Held, that art. 40, *r.* 3, *is not complied with by taking off way or reducing speed when the approaching vessels are about to pass each other. The obligation under the article is to act as soon as the approaching vessels are aware of the turning vessel and of each other.*

APPEAL from a decision of Lord Merrivale, P., assisted by Trinity Masters.

The plaintiffs (respondents) the owners of the steamship *Bruges*, claimed damages from the defendants (appellants), owners of the steamship *Chatwood*, in respect of a collision which took place in the River Scheldt shortly after 8 p.m. on the 11th Oct. 1929.

At the time of the collision the *Bruges*, a vessel 331ft. in length, was bound down river from Antwerp in the course of a voyage to Harwich with mails and passengers. The *Chatwood*, 306ft. in length, was bound up river laden with coal. Whilst the two vessels were approaching the entrance to the Kruisschans Dock a Swedish steamer, the *Atland*, 380ft. in length, was swinging in the river in order to enter Kruisschans Dock. The tide at the time was flood, and the *Atland*, about seven minutes before the collision gave the prescribed signal for a steamship turning in the River Scheldt. The mast head lights of the *Atland* and her tug were then visible to those on board the *Bruges* and the *Chatwood*, and each vessel could also see the lights of the other over the land. The case for the plaintiffs was that the *Bruges* then sounded one short blast, continuing on making about 14 knots. When the *Atland*, which was apparently swinging head to the westward in the west channel was heard to sound three short blasts, the *Bruges* again sounded and

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

repeated her signal of one short blast, and she continued on keeping well over to her own starboard side of the channel. When a signal of three short blasts, which was thought to come from the *Chatwood*, was heard about one minute before the collision, the engines of the *Bruges* were reduced to slow speed ahead. Shortly afterwards when the *Chatwood* continued to come ahead, keeping her green light open, the engines of the *Bruges* were stopped and put full speed astern about half a minute before the collision. The case for the *Chatwood* was that when the *Atland*, which was proceeding up river ahead of the *Chatwood* was heard to sound the prescribed turning signal of one long and one short blast, those in charge of the *Chatwood* reduced their engines to slow speed, and shortly afterwards sounded two short blasts and starboarded their helm a little and steadied in order to pass under the stern of the *Atland*, which had started to turn under port helm, with the assistance of her tug, and had sounded three short blasts. When the *Chatwood* saw the *Bruges* coming on instead of waiting above the bend, three short blasts were sounded as a warning, and the engines were stopped. When the *Chatwood* was clear of the *Atland*, the helm was put hard-a-port and the engines full speed astern, and three short blasts were sounded and afterwards repeated.

The regulations relating to the navigation of the River Scheldt from one kilometre above the southern end of the quays at Antwerp to the Dutch frontier, promulgated by Royal Decree of the King of the Belgians of the 26th Oct. 1926, provide as follows :

Art. 40—Meeting near a channel, bridge, &c., and signals to be sounded in connection therewith :

1. If vessels approach each other in a tidal channel near a channel, bridge or stopping place or bend where the passage is so narrow that to pass the other vessel there would involve danger, the vessel proceeding against the current must suitably stop her way over the ground until the vessel proceeding with the current has passed the narrows, bridge, bend or jetty.

2. If, in the fairway, where no current is running a vessel meets another vessel at a bend, so that risk exists that, if they should pass each other in the said bend, the vessel which has the larger curve at her starboard side must proceed on her way, and the other vessel, or the other vessels, must wait until the bend is clear.

3. If a vessel proceeding with the current is desirous of swinging, the said vessel must make this known to vessels in the vicinity by sounding one prolonged blast followed by one or two short blasts, according as to whether she wishes to swing to starboard or to port. Every vessel in the vicinity proceeding against the current must in that event, stop her way over the ground, and each vessel in the vicinity proceeding with the current must reduce its speed until the vessel swinging does no longer afford any impediment for passing through.

4. If a vessel is desirous to swing in a fairway where no current is running, she must make known such to vessels in the vicinity by sounding the signal referred to in the third paragraph of this article and vessels being in the proximity must, if needs be, make room.

Lord Merrivale, P. held the *Chatwood* alone to blame. The defendants appealed.

Dunlop, K.C. and *Alfred Bucknill* for the appellants.

Langton, K.C. and *Naisby* for the respondents.

The arguments of counsel and the material facts fully appear from the judgment of Scrutton, L.J.

SCRUTTON, L.J.—This is an appeal against a judgment of the President, with Trinity Masters, who has held, in a collision between the *Bruges* and the *Chatwood*, the *Chatwood* alone to blame, and absolved the *Bruges* from liability. The *Chatwood* appeals.

The efforts of counsel, assisted by certain works of fiction, on the part of the witnesses, caused this case to take six days in the court below, and involved a long judgment from the President, after consulting the assessors.

In the view I take of the case, the problem can be reduced to a short one, although it involves points of considerable difficulty, as to which my mind has fluctuated during the course of the hearing.

The simple elements of the problem are these : The collision is in the Scheldt at night. The *Bruges*—the regular Harwich mail steamer running a regular course twice a week between Harwich and Antwerp—was going down the river. The *Chatwood*, a moderately large tramp over 300ft. long, laden with coal, was coming up the river. The time was just before high tide, the flood was still running. The President finds—and I see no reason to dissent from his view—that it was a two-knot tide, but it was getting near high water.

But for the incident I am about to mention there would have been no trouble in the case at all. The *Bruges* would have come down, and the *Chatwood* would have gone up, on their respective proper sides, and would have passed —although it was on a bend—port side to port side. The trouble is that on the bend there is a dock—apparently a dock recently opened —and coming up ahead of the *Chatwood* was a heavily laden Swedish steamer, 380ft. long, although, of course, being night the other boats did not know exactly what length she was, except that she was showing two masthead lights, and, therefore, was over 300ft. long. That boat was—as she had a right to do —going to swing head to tide, and continue her turn either directly, or very shortly, across to the eastern bank of the river in order to go into the Kruisschans Dock. The trouble has arisen from the fact that both the down-coming steamer, the *Bruges*, and the up-going steamer, the *Chatwood*, did arrive in the neighbourhood of the *Atland's* turning at a time when she was undoubtedly blocking half the channel at least. Under these circumstances they contrived to run into each other, and the question is who is to blame—the one ship, or the other ship, or both of them, or neither of them ?

There is this further circumstance that navigation in the Scheldt is governed by a

by-law which is far more in favour of the turning ship, and far harder on the up- and down-going ships which are near it, than any by-law I have ever seen. It is far harder than the Thames by-law which imposes considerable liability on the turning ship itself. In my view this case largely falls to be determined upon the construction that the court puts upon art. 40, r. 3, of the Scheldt by-laws, apparently made by the Belgian Government, and applying to that part of the river which is in Belgian territory.

Questions have been raised before us—and were raised still more in the court below—as to the application and meaning of art. 40, r. 1, which, as I read it, is a by-law regulating the relations between the up-going and the down-coming ships in certain situations which are mentioned, without regard to other ships in the sense that they are very indirectly concerned. I am not stating this as an authoritative definition of its meaning, but it applies to cases where you are near a *chenal*—whatever that may be—or a bridge, or a stopping place, which may be a jetty, or may be merely a place where steamers tie up, or a bend where the passage is so narrow that there would be danger for both to go into it at the same time. The court below expressed an opinion about the application of that rule. In my view it is not necessary to deal with that clause of the article in this case at all, because the difficulty in this case is—what is the position when, in addition to the down-coming and the up-going ship, there is a ship turning between them. That particular case seems to have been expressly provided for by rule 3 and rule 4. There is no need to investigate what would happen under rule 1, because you have got the express case dealt with of a turning ship in the two further rules. The first of those deals with the case when there is a tide running, and the second with the case when there is no tide running—which must be a very limited time such as at the top of high water. Dealing with the last case first, at the very limited time when there is no tide, what the rule says is quite clear: the up-going or down-coming ships have to keep out of the way of the turning ship. They must, in case of need, give place to it, and that puts the turning ship, of course, in a much better position than it is in most by-laws, and in most rivers, with which I am acquainted. When there is no tide, ships coming up and going down must keep out of the way of the turning ship.

When you come to the case when there is a tide—which is the more usual case—you cannot do it in that simple way, because the ship coming with the tide will be in great difficulty. If it tries to stop itself over the ground, it will lose steering way. If it goes hard-a-starboard until it is holding its way over the ground in spite of the tide it will have lost, or comparatively lost, control of itself. On the other hand, the ship coming against the tide will be able to hold itself up over the ground by the use of its engines against the force of the tide that is running. So, in the case where there is a tide, rule 3 deals with the two ships differently. It deals, first of all, with the turning ship—I am using the word "turning" in the French. What the Dutch is I do not know, and I should not be any the wiser if I did know. The French is *virer* and *virer*—which looks like our word to veer—seems to me to mean turning or swinging. It is suggested that it may mean "heave to" also. It is particularly applicable to the case where a ship coming up with the tide wants to go into a dock on the other side of the river, and, as a preliminary, swings round to get its head to the tide. The ship that proposes to do that, which is what the *Atland* was proposing to do, must give notice of its intention to ships *à proximité*. *Proximité*, of course, is a word which has a pretty wide meaning. You have some difficulty in knowing when a ship is *à proximité*, but when a notice has been given, the vessel coming against the tide must stop its progress over the ground—*arrêter sa marche par rapport au fond*—and the vessel navigating with the tide must lessen its speed until the ship which turns no longer presents any obstacle "*au passage*." Now whether "*au passage*" means the passage of both ships, or the passage of the one ship in whose water the turning ship is not, may be a troublesome question.

But the view I take of this case is that it is not directed to the moment when the ships get up to the turning ship—when the up-going and down-coming ships get up to the turning ship. It is directed to the time when they are coming towards the turning ship, and do not know exactly where she will be when they get to her. They are told, it seems to me, by the express direction—just as they were told in rule 4—to give place to her in case of need, and that seems to me to mean this: you see a ship turning ahead of you; she occupies a certain part of the channel, and you cannot be sure what; you are some way from her, and to avoid any risk of speculating whether she will or will not be clear when you get to her, the ship coming against the tide has to stop herself over the ground. Then she will not get into any trouble. The ship which is coming down with the tide—which is in the difficulty of stopping herself over the ground, is to lessen her speed so as, as far as possible, to give way to the turning ship. The material time seems to be not when you get there and say "halloo, this is all right, I have chanced it and it has come off," but before you get there and when you do not know what exactly is happening, you are to hold yourself up so that there may not be any trouble by your getting there at the wrong time. That I take to be the meaning of art. 40, r. 3. That applies before you get to the place of the turning ship and is to avoid your interfering with the turning ship when you get there, and, of course, incidentally is to save you from being in the passage at the time when the other ship, coming the other way, is also in the passage. Each ship is to

keep away from the turning ship so that the width of the channel being interfered with by the turning ship, you are not to have any difficulty of two ships trying to get through the same limited channel. That is my view of the meaning of art. 40, r. 3.

It is common ground—because one now comes to see what the two ships did—that each of them knew seven minutes before the collision that the *Atland* was turning. The collision happened seven minutes after they, either by signal or sight, knew that the *Atland* was turning off the Kruisschans Dock.

What did they know about the *Atland*? She was in fact a ship 380ft. long, and the width of the channel there is about 1100ft. They did not know the 380ft., but they knew she was over 300ft., because they saw the masthead lights on two masts which would tell them she was over 300ft. long. They saw she had a tug, and the President finds, with the advice of the Elder Brethren, that 30 fathoms of tow rope is about the length the tug would be having—there is 180ft. more. The tug according to the President—with the assistance of the Elder Brethren—is about 70ft. long. If you add those three figures together, and if for this time so to speak the tug was in a straight line with the *Atland*, you have got 630ft., considerably more than half the channel. Now, of course it is improbable that the combined line will be 630ft., because if the vessel is turning the tug will be towing on one bow and you cannot be sure of the angle. The angle between the two being considerable it may be that it is much less than 630ft. Also you cannot be sure of the exact angle across the river. You will find when you get up to this turning ship that you cannot be sure where in the river she will be because it is found, and accepted, that the ordinary way for a vessel of that sort, coming up that way with the tide to turn, would be to get over to the east side of the river out of her proper water and then begin to turn, the tug towing on her starboard bow, the tug, at a certain stage, holding her head, while the tide swings her stern round.

That would mean, as one will see by thinking about it, that when her head has got eight points round, and she is right athwart the river, half her length—195ft.—would have swung out towards the eastern side, possibly into the western side, but possibly partly into the east. At the time of this actual collision she had swung round twelve points, and she would have reduced that 190ft. by 95ft. It seems to me that the dangerous time—the time they have got to think about—is when she has got to the eight points, when she is taking up most of the river. One has to bear in mind—when I say "one" I mean the two approaching ships have to bear in mind—that they cannot be sure when they see her turn where she will have got to when they have got to her. Her engines may, or may not, be working. In this case a three-blast signal was heard, showing she was going astern. When I say "going astern," it may be they were checking her headway, but she was using her engines for the purpose of going astern and it seems to me quite impossible for a boat some way off, knowing that the ship is turning, to be sure where they will find her when they got to the place where she is. In my view this rule is not meant to allow them to speculate and to go on and say, "I think she will be all right when I get there, and so I will go on." When they find her ahead of them so as to block a considerable part of the channel, they must act then. The ship coming against the tide must stop then; the ship coming with the tide must diminish then, and not . . . say, "yes, it is quite true I never stopped at all, but by good luck when I got there there was room for me to get through." That in my view is a breach of art. 40, r. 3, though, luckily, it might end in no damage. That is my view of what you must be prepared for when you have a turning ship, with this addition, that there is nothing requiring the turning ship to stop when she is straight and not go into dock. She is turning for the purpose of going into dock, and it may be when you get there you will find her coming across into the dock, and you must take that into account as part of the turn which you may find when you get up. So much for the rule, and so much for what the vessel that gets notice of the turning ship may have to expect or to consider.

Now, what did the two boats do when they got either to hear the turning signal or a sight of the turning ship? I say that because the master of the *Bruges* says that he never heard the turning signal, but he did see the turning ship. The pilot of the *Bruges* says that he did hear the turning signal. Now, what did they do? The *Bruges* seven minutes before the actual collision, as we know now, went full speed ahead at fourteen knots for six minutes about. I say "about," because the times are taken to half a minute, and they may be between the minute and the half minute, and I say "about" therefore a minute. For six minutes she went full speed ahead at fourteen knots. She had seen that there was a boat coming up the river with the tide, behind the *Atland*, so she knew that there might be danger of another boat, a boat that had only to diminish speed and not to stop over the ground. For six minutes she went on at full speed, fourteen knots, till about a minute before the collision. There was a difference of opinion between the master and the pilot as to what should be done. The pilot was going to say "half speed." The master said, "No, slow." She did not stop and she went on at slow till just before the collision, and she only stopped and reversed within half a minute before the collision, and she is found to have some three or four knots headway. She went on and did some damage—not so much as is alleged by the *Chatwood's* witnesses—to a very substantial looking dolphin which was ahead of her.

Now, does that comply with the rule that every vessel near, going against the tide, shall

stop her way over the ground? It seems to me pretty clear it does not. She had so regulated her speed that she is arriving at the place of collision close to the turning ship. She has not stopped at all till the *Chatwood*, coming down, is very nearly into her. Now, why did the captain of the *Bruges* do that? He expresses his views on the subject at question 592 and onwards: "Was there anything to prevent you from waiting above the place of collision? A. Nothing to prevent me. 593: Q. You have twin screws? A. Yes. 594. Q. And you could have kept her under complete control? A. Yes. 595: Q. And could have brought yourself up, according to you, within a very short distance if you had been so minded? A. Yes. 596: Q. But you were determined to go on and pass through the gap? A. I had my passage to make—mails and passenger trains to catch. 597: Q. And you wanted to make the best passage you could with your mails and with your passengers? A. Yes. 598: Q. And you had a fast ship? A. Yes." He continues on the next page. Mr. Dunlop is suggesting to him that if he had waited by slowing sooner this collision would not have happened—the *Chatwood* would not have collided with the *Bruges*. "A. Not with the *Bruges*, no; but do you realise, sir, that I took account that we overtook and passed nineteen ships from Antwerp to Flushing, and passed twenty-three ships that were going up the passageway? 629: Q. You are very proud, are you, of your speed? A. No; but I only wish to impress it upon you that had we stopped for every ship we should never have caught the mail or passenger train. 630: Q. But if the rule requires you to stop and wait and stem the tide? A. Naturally, if I thought there was any danger of collision, or risk of collision, I would most decidedly risk losing the train rather. 631: Q. Do you mean that, unless there is in your view a risk of collision, you are at liberty to keep on because you are carrying passengers and mails? A. If we can do it without any risk to other ships." And again, when he is asked: "Why in your deposition when you state the circumstances of the collision do not you mention the existence of the *Atland* at all?" he says, at question 314: "The *Atland* I took it as clear of me, and it would not affect me." In my view the master of the *Bruges* took quite a wrong view of his position under the rules. He treats himself as a vessel which, carrying mails and passengers, should not slacken speed unless she is absolutely obliged to because she has got to catch the trains on the English side. He speculates, he takes the risk, he goes on fast, and hopes it will go all right. He does not read the rule as requiring him to stop if there is a turning vessel ahead of him at a distance when he cannot be sure where he will find the turning vessel when he gets to her. He seems to have thought it sufficient—and the learned President and Trinity Masters below seem to have thought it sufficient—if when he gets there there is in fact room, no matter what has been happening during the previous time, and no matter what the risk was of the turning ship being in the way in going into the dock, that will be enough if he has speculated and the risk has come off. In my view that is quite a wrong reading of the rule. The rule requires you when there is a risk some way off—when you do not know what is to happen, and see a turning ship, to lessen that risk, if you are going against the tide, by stopping your way over the ground, and if you are going with the tide, going slow until you are sure what the position is. From that point of view, on the admitted facts (I will say something about the advice we have received from our assessors in a moment), it appears to me that the *Bruges* broke the rule.

Now, what about the *Chatwood*? The *Chatwood* is in a more difficult position, coming up with the tide, than the boat that is going down against the tide, because the boat going down against the tide can stop its way over the ground by means of its engines. The boat coming down with the tide, as I have said, if it tries to stop its way over the ground will be in the position that it has lost steering way and will find itself in considerable difficulties. As I read the learned judge's judgment, he says this: "In the particulars I have mentioned, as it seems to me, there can be no doubt that the *Chatwood* was to blame." He is condemning the *Chatwood* for two things. First of all, as appears in the middle of p. 175, the learned President was induced by an argument of Mr. Langton—of which Mr. Langton has now repented in sackcloth and ashes—to form the opinion that the *Chatwood* made what the learned judge called "a violent alteration," "a great divergence," from its course of 7 points to port of her up-river course, and holding that view the learned President has condemned the *Chatwood* for the violent diversion of 7 points to port of her up-river course. And, secondly, finding there was this violent diversion he has said "You never signalled your starboard helm." It is true that you blew a starboard helm signal when first you heard the turning signal, but when you made this violent divergence you made no signal at all, and all you say is—as Mr. Dunlop has said to us—"Well, but what is the good of blowing any signal to the *Bruges*? She does not pay any attention to it, if she hears it, so I need not blow a signal"—which again is speculation as to what the master of the *Bruges* will or will not hear—speculation of a dangerous character. The trouble we have had about this is that it turns out, both as a matter of arithmetic and as a matter of looking at the chart, and seeing what must have happened, that that violent divergence of seven points to port was all wrong—it cannot have happened. It was got at in this way. Mr. Langton said to the captain of the *Chatwood*, "Assume the angle of the blow—which the President afterwards found—as three-and-a-half points, and you say that when you ultimately starboarded your helm you got round three-and-a-half points; add

these two three-and-a-half's together and you have got seven points, and you must therefore at some time have been seven points off your up-channel course." The difficulty about that, and what is wrong with that is, that it assumes that the *Chatwood* was off her up-channel course, whereas it was quite clear from the course made, and from the repeated statements of her captain, that she never diverged from that course, that she was on an up-channel course, but was heading to starboard of it, heading for the Beacon light, and on an up-river course. Once that is so the seven points is gone. Mr. Langton gave up a point and a half of it—he may have to give up more, but at any rate there was not a seven points divergence. It seems to me there is something much stronger that that. When you look at the position—at the course that the *Chatwood* must have been following, when you remember that before Buoy No. 56, where the bend began, she must have been coming along as she says in mid-channel, on a pretty straight course, which would have taken her ashore well above the Kruisschans, she must have over-ported her helm. Nobody but a lunatic would have gone straight on because it would have taken them straight ashore in a very short time. She must have therefore, when she got to Buoy No. 56 over-ported, as she could, by the proper calculating of porting, have gone through between the *Atland* and the eastern shore, without any starboarding at all. Yet she says she starboarded not seven points but slightly — a point.

It is pretty obvious from that—and we got Mr. Langton to lay down on the chart what he thought was the course of the *Chatwood*—and the course that he laid down exactly confirms what we have suggested that the *Chatwood* must have over-ported which if continued would have taken her ashore on the eastern bank, that she had to starboard so much by reason of her over-porting that she could not get round straight up the river but went into the *Bruges*. When one looks at the course which Mr. Langton laid down on the chart, as representing his argument as to what happened—a chart which of course will go with the papers if this case should go to any superior tribunal—it is clear that the fault of the *Chatwood* was not a seven-point starboarding (which cannot have happened unless you assume that the *Chatwood* goes up nearly touching the *Atland* and there gets round nearly at right angles, which, looking at the chart, seems absurd)—she has over-ported, she has made a faulty judgment in over-porting, and then has to starboard to try and correct her over-porting, but, starboarding at that time, has not been able to get round again without hitting the *Bruges*, which is well over to the eastern side of the river. It appears to me that the *Chatwood* is first of all to blame for that over-porting and consequent starboarding which has put her into the difficulty which landed her into the *Bruges*. Secondly, when she starboards she does not give the starboard helm signal, and it was all the more necessary that she should give the starboard helm signal because when you look at the chart, and visualise the position of the *Atland* and the *Bruges*, you see that the *Atland* was between the *Bruges* and the *Chatwood*, and consequently the *Bruges* would not have the opportunity of sighting very accurately or of judging what the *Chatwood* was doing, and would require a sound signal—a helm signal to tell her that the boat which is coming up, and which she cannot see because of the *Atland*, has starboarded. So one has two things to consider—first of all, you have laid a wrong course down because you have over-ported, having regard to the *Atland* ahead of you, and you have starboarded at such speed that you cannot get round but must go right over to the eastern side; and, thirdly, when you did that starboarding you did not give a helm signal to tell the boat above what you were doing. Mr. Dunlop, as I understood him, has two answers to that when the difficulty which was in the mind of the court was made clear to him. He said first—which was the most important thing—"What was the good of blowing a signal to the *Bruges* because she will not hear it, or will not pay any attention to it." But, as I have said, I do not think that that is a valid excuse for not blowing a signal, even if you think the other man is an ass or will not understand it. But he said—and as to which I have come to a clear conclusion—"that the *Atland* gave her turning signal when we were so near her that the necessity for starboarding was forced upon us suddenly." That, of course, turns upon how far the *Chatwood* was from the *Atland* when the *Atland* gave her turning signal, and the learned President has found that to be at least half a mile—I think it was quite possibly a little further.

If that was the position the *Chatwood* was practically at Buoy No. 56, and had ample time to judge of the situation and to make the right kind of porting. Therefore, it appears to me that the *Chatwood* is obviously also to blame. The real blame on both of them is that neither of them paid any attention to the rule. The rule tells them to give way to the turning ship and keep out of the way as long as she is turning, and they both of them came on at a time when the turning ship was obstructing at least half the river, and when you could not be sure which half, or which part of it, it was. If, as might easily have happened, the *Atland* had completed her turn, and had started off to go into dock, the *Bruges* would have been in a very bad position. The *Bruges* could not possibly tell that that was not what she would do; in the same way the *Chatwood* could not be sure of what the *Atland* was doing. She had blown a three-blast signal showing that her engines were working astern, and she had started on the east side of the river, and just at the time when the *Chatwood* had to decide, probably the *Atland* had made her eight-point turn, and was more across the river than she would be at a later period.

For these reasons, on the construction of the rule, and the admitted facts, I came to the conclusion myself that both vessels were to blame, and I saw no ground for distinguishing the blame between the two; they seemed to me to have equally disregarded the rule. Of course, the construction of the rules is for the court, and not for the assessors, though no doubt sometimes the assessors may make very valuable remarks which may assist the court in the construction of the rules. But we thought it right, although the construction of the rules is for us, to ask our assessor ; for, unfortunately, illness during the course of the case, deprived us of the very valuable assistance of Captain David, and the parties agreed to go on with one assessor rather than delay the case while another assessor was brought in to whom Mr. Dunlop would have had to repeat all his argument on the first day—we asked the assessor, who, of course, had the advantage of conversation with Captain David during the first part of the case, although Captain David had not the advantage of hearing the argument addressed to us by Mr. Langton—we asked him, first of all, this question : (1) Was the *Bruges* justified in keeping full speed of fourteen knots till about a minute before the collision, while the *Atland* was turning and the *Chatwood* was coming up-stream ? (2) In not stopping and reversing till just before the collision when the *Atland* was still turning and the *Chatwood* was on the eastern side of the channel (*a*) as a matter of good seamanship, assuming art. 40, r. 3, applies, (*b*) as a matter of good seamanship, assuming art. 40, r. 3, does not apply ? And our assessor answered in this way : "(*a*) Assuming that art. 40, r. 3, does apply—(1) The *Bruges* was not justified ; (2) The *Bruges* was not justified in postponing reversing her engines until after the risk of collision was apparent. (*b*) Assuming art. 40, r. 3, does not apply (1) the *Bruges* was justified in maintaining her speed until the risk of collision became apparent, but although she was justified in doing so, she would have shown a better interpretation of good seamanship and prudence if she had allowed as much room as possible to oncoming ships by taking more drastic action when the necessity did arise by getting sternway." The second question that we asked our assessors was this : "Was the *Chatwood* justified when she saw the *Atland* turning in proceeding on such a course and at such a speed that she passed the *Atland* in the eastern half of the channel at a time when the *Bruges* was close approaching in the same half of the channel, and came into collision with her in the extreme east of the channel." The answer that our assessor gives to that is : "The *Chatwood* was not justified in the manner in which she shaped her course and speed across the river, which made her a danger to the *Bruges* or any other approaching vessel." As we have held that art. 40, r. 3, does apply, the answers of our assessor confirm the view to which I myself had come, and the result, therefore, is that both ships are held to blame, and in equal proportions.

LAWRENCE, L.J.—I entirely agree ; and do not think I could usefully add anything to the judgment given by my Lord.

GREER, L.J.—I agree that the judgment of this court should be that both vessels were to blame for the collision and its consequent damage.

I think it is unnecessary to say anything on the question as to whether the *Chatwood* was in fault because the court below, and the Trinity Brethren, and my Lord and our assessor, have come to the conclusion that the *Chatwood* was to blame, and it would be a waste of time for me to add anything further on that subject.

The important question is whether the other vessel—the *Bruges*—which was coming from Antwerp was also to blame for this collision, and that depends not merely on the true meaning of art. 40, r. 3, but it depends, or may depend, upon the question—whatever the meaning of that article—did not the *Bruges* behave in such a way as the court deems to amount to negligent navigation under circumstances for which she was to blame. With regard to the meaning of art. 40, r. 3, I am inclined to take a somewhat wider view of its meaning than that which was indicated in my Lord's judgment. These regulations are regulations relating to the navigation of the Scheldt and I suppose it is right to say that, like the regulations which in this country are called Regulations for the Prevention of Collisions at Sea, they are at any rate regulations for the prevention of accidents arising in the course of the navigation of the Scheldt. The Scheldt is in places a narrow highway—a narrow highway which is very much used by vessels large and small. An illustration of that was given by the evidence of Captain West, the captain of the *Bruges*, when he said that on his way from Antwerp to Flushing he overtook and passed nineteen vessels and he met and passed twenty-three vessels coming the other way. It is a matter of grave importance that there should be regulations which will enable vessels coming up and down safely to navigate the river. One of the difficulties that vessels coming up and down may have to encounter is the difficulty created when they are approaching a vessel which is turning in the river, which is swinging in the river to get round. I cannot help thinking that this regulation is a regulation for the purpose of, so far as possible, ensuring the safety of vessels navigating the river at a time that these turning movements take place, just as much as it is directed to the safety of the turning or swinging vessel. The rule has got to be applied until the turning vessel no longer presents an obstacle to the passage—"*au passage*." I think that that is directed to secure that the rule shall be obeyed until no difficulty remains in the navigation of the river by reason of the turning movement. The turning movement may have gone so far that there is no risk to either vessel even though

the turning movement has not in fact been completely made, and if it has gone so far that there is no risk to any vessel coming up and down then I think the rule no longer has any application.

That being the rule this case, so far as concerns the conduct of the *Bruges*, seems to me to depend upon certain vital facts which may be stated in this way: seven minutes before the collision both vessels heard the signal of the *Atland* and knew that a turning movement was about to take place—a turning movement by the *Atland*. Neither vessel knew how long it would take the *Atland* to perform that turning movement. Neither vessel could know where exactly the moving obstacle would be in the channel when they got up to it, and, from the moment they realised that a turning movement was going to take place, it was the duty of those in charge of both vessels to exercise the very greatest care in their navigation from that time. But from that time until just shortly before the collision the *Bruges* did nothing except continue her full speed in the hope that there would be sufficient room for both vessels where the turning movement was taking place. In not slowing before she did I think that she was to blame. But there are other facts which make her conduct more seriously to blame than the fact that she did not slow in time. She could stop in her own length when at full speed; her own length was 331ft. If she was slowing at the time when she reversed her engines she could obviously stop in something less than 331ft. But what happened was that she did not stop until practically at the moment of the collision when the stopping and reversing could have been of no importance at all except, possibly, to diminish the force of the blow when the two vessels came into contact.

The next vital fact, as it seems to me, is this: If the captain of the *Bruges* is to be accepted as a witness whose statements can be treated as somewhere near the facts, it is plain from what he said, as recorded on pp. 29, 30, and 31 of the evidence, that when he was at least—and it may be more—at least a quarter of a mile away he saw that the *Chatwood* was coming round the stern, or commencing to come round the stern, of the *Atland*; that he did not immediately do anything even then, though it must have been apparent that at that time he was within the area indicated by the word "*proche*" in the rule; he did not even slow. I think it is quite clear that he ought to have stopped and reversed; but what he did was he waited till he heard the signal which almost immediately followed his seeing the vessel coming round the stern of the *Atland*; he waited until he heard the signal from the *Chatwood* that the *Chatwood* was going astern; and it was only when he got the signal from the *Chatwood* that the *Chatwood* was going astern that he then slowed his engines.

If, even at that time, having regard to his power of stopping, he had stopped and reversed there would have been no collision.

It seems to me impossible, under these circumstances, to find that the *Bruges* was not to blame for this collision and its consequent damage.

Mr. Dunlop invited the court to find, on the principle that we follow in dealing with common law cases as laid down in *Davis and Mann* (1842, 10 M. & W. 546), that the *Bruges* ought to be held alone to blame because she was guilty of the final negligence which occasioned this collision and its consequent damage. At one time that argument rather appealed to me, but, in the result, I have come to the conclusion that the vessels had got so near to one another at the time when the extent of the negligence of the *Chatwood* was apparent, or would be apparent to those on board the *Bruges*, that this is one of those exceptional cases which are referred to in *The Volute* (15 Asp. Mar. Law Cas. 530; 126 L. T. Rep. 425; (1922) 1 A. C. 129), when things are happening so rapidly that it is right to say that the collision, and the consequent damage, were the joint effect of the negligence of the two vessels. I agree with my Lord that the circumstances here are such that we ought not to distinguish between the two vessels and that they ought to bear the result of their negligence in equal proportions.

Appeal allowed. Both vessels held to blame in equal degrees. Appellants to have costs of the appeal. Each party to bear own costs of trial.

Solicitors: for the appellants, *Botterell* and *Roche*; for the respondents, *Parker, Garrett, and Co.*, agents for *Botterell, Roche,* and *Temperley*, Newcastle-on-Tyne.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Friday, June 20, 1930.

(Before ROWLATT, J.)

BERGENS DAMPSKIBS ASSURANCE FORENING *v.* SUN INSURANCE OFFICE LIMITED. (*a*)

Insurance—Marine—"Arranged total loss"—No actual claim—Settlement by agreement.

The owners of a Norwegian steamship were insured with the plaintiffs and other underwriters. The plaintiffs re-insured their risk with the defendants. The insured steamship stranded in the Black Sea but was floated off and eventually reached Constantinople. Owing to the absence of adequate repairing facilities at this port, it was extremely doubtful that the vessel's condition would permit her to reach a port where repairs could be carried out without the risk of her becoming a total loss. In these circumstances the owners and underwriters agreed to settle the matter: the vessel was to be regarded as a total loss and the underwriters were to pay

(*a*) Reported by R. A. YULE, Esq., Barrister-at-Law.

an agreed sum which in fact was more than her full repaired value at the time. The plaintiffs claimed a proportionate part of the sum so paid from the defendants. The material portion of the policy of re-insurance was as follows: "Insurance . . . upon hull and machinery, &c. valued as in original policy. Being against total and (or) constructive and (or) arranged total loss of vessel only as per Bergens Damp Club policies and to follow their settlements."

Held, that the action failed. On the true construction of the contract there must be either a constructive total loss or a genuine claim for one which claim is settled by arrangement. The word "arranged" really meant compromised and did not cover an artificial total loss created by the will of the parties.

ACTION tried by Rowlatt, J. without a jury.

The plaintiffs and other underwriters insured the owners of a Norwegian steamship, the *Sverre* against, *inter alia*, perils of the sea during the year 1927. The plaintiffs' share of the risk was 120,000kr. and they re-insured themselves with the defendants to the extent of 12,500kr. In Feb. 1927 the *Sverre* stranded in the Black Sea and was severely damaged. She was floated off and eventually reached Constantinople. Here there were not adequate repairing facilities and the vessel's condition was such that it was doubtful if she would reach any port where the necessary repairs could be carried out. Owing to the risk of her becoming a total loss and the probability that repairs would cost more than her repaired value, the owners and underwriters agreed to settle on the terms that the vessel should be regarded as a total loss and that the underwriters should pay a sum agreed at 435,000kr. which actually was more than the full repaired value. The plaintiffs claimed from the defendants the due proportion of that sum.

For the plaintiffs it was contended that the agreement arrived at by the underwriters with the owners was an "arranged total loss" within the meaning of the policy. For the defendants it was contended that the arrangement come to was only valid if there had been a claim made on the underwriters for a total loss or there was evidence of a total constructive loss. In the present case there was only a heavy particular average loss.

Simey, for the plaintiffs.

David Davies for the defendants.

ROWLATT, J.—This is a very puzzling case; but the situation has been greatly relieved by two very excellent arguments by counsel on either side, which has made the hearing of it, so far as I am concerned, quite a pleasurable exercise.

I think I can first of all state exactly what my view of the facts is, because I think the case falls to be decided upon what the real transaction between the parties was, and is not to be influenced by the mere nomenclature which the parties may use in labelling the steps that they took. I do not think upon the facts that there ever was a real claim for a constructive total loss. Before the valuations were received, when the vessel was still aground, and shortly afterwards no doubt, there were expressions used indicating the view, that was certainly true, that the vessel was not as a chattel worth repairing, but the writers of the letters had not in mind, as is fairly conceded by Mr. Simey, on those occasions the circumstance that the figure to be dealt with in the particular claim was 800,000kr.—quite an artificial figure with regard to the true value.

When matters had proceeded a little further, and the valuations came in, it became apparent to everybody that if this vessel was going to be repaired it would be a very expensive business, and a business in which one could not be quite certain that one saw the end of the expense, because, supposing she was temporarily repaired to take the sea, after all she would have to come to a United Kingdom port or Holland for repair still insured, and she might go to the bottom and become a total loss, and there would be no mistake about it. At any rate, it was obvious that the expense would be very great to the underwriters and it became obvious that the underwriters could afford to offer to the owners a sum which at any rate would limit their loss to a fixed sum, and it would be worth while for them to have the sum fixed, and still give the owners something more than the ship would be worth if they got it restored to them, repaired. That was the business purpose. Under those circumstances this settlement was made. That was the attitude, I think, of the underwriters, the plaintiffs, when they had their board meeting. They made an offer on those lines. Then comes what is a most valuable letter for Mr. Simey, representing the plaintiffs here—the letter which is on pp. 35 and 36, which is the answer to an offer designed to screw it up a little, if I may use that expression. The letter begins: "We should be prepared to accept an arrangement based on the underwriters taking over the vessel as if the latter were condemned." That is to say, as if it were a constructive total loss: "The compensation offered by the underwriters is, however, much too low, and we think that 500,000kr. plus the remaining insurance premium of about 36,000kr., should be the minimum. As a matter of fact, the question as to whether the vessel is not, legally, fit for condemning, might be raised." Now that is all that is said—"might be raised"—and then they go on to discuss it, and then it is pointed out that the underwriters might accept the claim set out, "because the risk they would run thereby would be quite small as compared with if the vessel were condemned, with the consequence that the insured value of 800,000kr. would have to be paid." I do not think that was a claim. I do not think they ever did put forward a claim. The evidence of the plaintiffs goes to show that in the minds of the underwriters there was some idea of the possibility of a claim that could not be

quite valued. I do not think it comes to more than that. I have no evidence from the documents that they thought that really the vessel could not be moved at all—that she was fixed at Constantinople as a hopeless derelict, or about to become a derelict. I do not think they ever thought that, and it has not proved to be the fact. I do not think they thought there was any real danger of it being proved after having the valuations that the cost would amount to 800,000kr. in any way. I have been told that they had in their minds the possibility of par. 10 of the plan being evoked so that the valuation might be revised. That certainly means only that the valuation could be revised as at the date of the policy. I cannot help thinking that that paragraph would be very sparingly used to rebut the valuations.

I have no evidence before me of the value of the ship at the date of the policy, or how that valuation was reached, or anything about it. I do not think there was more than the vaguest conception in the minds of the underwriters that they were really going to be faced with a claim for 800,000kr. ; but what they did see very clearly was that they were going to be liable on the basis of a particular average loss to a very large and a very uncertain amount of expenses. Therefore, I do not think that this was a compromise of a claim for a constructive total loss ; but what the parties did by the arrangement that they made was, they dealt with it as a constructive total loss on a different value. To put it quite shortly, instead of paying 800,000kr. they paid 435,000kr., and took over the ship. What, then, is the application of the words of the policy to that state of facts ? I have to construe the words. I have not to imagine what the people had in their minds. There are three apparently separate things : a total loss, a constructive total loss, and an arranged total loss. It is very curious. Of course the words would quite clearly be satisfied if they are held to refer to a case where there is a claim for a total loss—a real claim for a total loss, and it is compromised, and a less payment is made in compromising that. That would be covered, although possibly if the facts were gone into afterwards it might be held to be proved that really there was not a constructive total loss. It would cover a claim where a total loss was compromised, as in *Street's* case (1914, 111 L. T. Rep. 235). But now does it go further, and does it mean that if you arrange that a vessel shall be treated as a constructive total loss by way of settling the claim, although it could not be arguably put forward that she was—if you transfer it by mere agreement into the category of total loss, does the policy cover that ? Mr. Davies has said that this is a policy which is against a total loss—a total loss of a ship which is valued, and the value governing it in this case is 800,000kr. ; and it cannot mean that by the agreement of the parties it can be treated otherwise than as a partial loss, that it can be transferred by agreement to the category of a total loss, and brought within this policy by virtue of the word " arranged." I think that is the right argument. I think that is the dominant consideration. This is a policy against total loss, and what, if I may use the expression, comes under " total loss." I do not think it can include a case where by the agreement of the parties a different case is put upon the basis of a total loss by mere arrangement, just as it might have been put upon any other basis. I think there must be either a constructive total loss, or a claim for a constructive total loss, which claim is arranged. Although the wording in *Street's* case was different, I think that it bears upon the matter. It shows that the word " arranged " really only means compromised. It does not mean an artificial total loss created by the will of the parties. On those grounds, therefore, I think the plaintiff fails in this case, and there must be judgment for the defendants with costs.

Solicitors : *Waltons* and *Co.* ; *Parker, Garrett,* and *Co.*

Thursday, Oct. 23, 1930.

(Before Swift and Acton, JJ.)

Great Western Railway Company v. Kassos Steam Navigation Company. (a)

Deck cargo — Measurement of space occupied — Appropriate method of measuring — Measurement made by another method— Memorandum by Customs officer—Effect— Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), *s.* 77, *sub-ss.* (1), (2), *s.* 85, *sub-ss.* (1), (3).

Measurement of the space occupied by deck cargo on a ship must, in accordance with the provisions of sect. 85, *sub-sect.* (3), *of the Merchant Shipping Act* 1894, *be made in the manner directed by rule* 1 *of the Second Schedule of the Act. A memorandum by an officer of Customs that the proper measurement has been made, if, in fact, that measurement has been made by some other method, is of no effect.*

Appeal from Cardiff County Court.

The plaintiffs, the Kassos Steam Navigation Company, were the owners of a Greek steamship called the *Chelatros*, and the defendants, the Great Western Railway Company, were the owners of a dock at Barry, Glamorganshire. In Aug. 1929 the *Chelatros* was in the defendants' dock for the purpose of loading a cargo of coal and coke. As some of the cargo was loaded on the deck, it was necessary that the tonnage space devoted to the carrying of that cargo should be ascertained for the purpose of calculating dock dues. Pending measurement, the plaintiffs paid the defendants on a basis that 454 tons of tonnage space had been

(a) Reported by T. R. F. Butler, Esq., Barrister-at-Law.

occupied by the deck cargo. Afterwards, upon a certificate being granted to them by an officer of the Customs, they came to the conclusion that the amount on which they ought to have paid was only 370 tons. The plaintiffs, accordingly, brought an action in the County Court, in which they claimed 5*l.* 1*s.* 6*d.*, the difference between the dues chargeable on 370 tons and 454 tons. The County Court judge gave judgment for the plaintiffs.

The defendants (the railway company) appealed.

The further facts and the arguments appear fully from the judgments.

W. N. Raeburn, K.C., *Wilfrid Lewis*, and *G. K. Rose* for the appellants.

Trevor Hunter, K.C. and *C. T. Miller* for the respondents.

Swift, J.—This is an appeal from a decision of His Honour Judge Thomas given at the County Court for the county of Glamorgan, held at Cardiff on the 8th April last, by which he adjudged that the plaintiffs should recover, as against the defendants, the sum of 5*l.* 1*s.* 6*d.*, with costs.

The action arose in this way. The plaintiffs, the Kassos Steam Navigation Company, are the owners of the Greek steamship *Chelatros*, and the defendants, the Great Western Railway Company, are the owners of the dock at Barry. In August of last year the *Chelatros* was in the dock at Barry and was loading a cargo of coal and coke. She not only filled that portion of the ship which was appropriate for the carriage of cargo, but also loaded some cargo upon the deck. It thereupon became necessary, in order that it might be ascertained how much should be paid to the railway company for dock dues, that the quantity of cargo on the deck, or the tonnage space which was devoted to the carrying of that cargo, should be ascertained and added to the registered tonnage of the ship. Pending that being done, the owners of the vessel by their agents paid the railway company on a basis of 454 tons of coal, or on a basis that 454 tons of tonnage space had been occupied by cargo which had been put upon the deck. After they had paid in respect of the 454 tons, the plaintiffs came to the conclusion, upon a certificate which was granted to them by an officer of the Customs, that the amount upon which they ought to have paid was only 370 tons. Thereupon the plaintiffs sought to recover from the defendants the sum of 5*l.* 1*s.* 6*d.*, being the difference between the dues chargeable on the 370 tons and on the 454 tons.

The action came before Judge Thomas in the Cardiff County Court, who, having heard the evidence in regard to the matter, and having considered the arguments put before him, gave judgment for the plaintiffs. From that judgment this appeal is brought, and, in my opinion, this appeal should be allowed.

The contention of the parties may, I think, be stated in this way. There can be no doubt that sect. 77 of the Merchant Shipping Act 1894 provides for the measurement of a ship which is about to be registered, and sub-sect. (2) of that section provides for the measurement of a ship for purposes other than registration, if occasion arises for it to be measured after it has been registered. Now, that section sets up two methods of measuring a ship, the first, according to a rule in the schedule, which is known as rule 1 and which comprises sub-rules 1 to 5, and the second according to rule 2, which comprises sub-rules 1 and 2. Those are both methods of measuring a ship in order to arrive at its tonnage. The method which is to be adopted is that which is appropriate to the particular ship, having regard to the terms of sub-sect. (1) and sub-sect. (2) of sect. 77. By that means the registered tonnage of the ship is to be ascertained. But cargo may be carried on a ship in excess of the registered tonnage of the vessel. That is well known. From time to time cargo is put upon the deck and is carried by the ship and dues ought to be paid in respect of it. Sect. 85 of the Act of 1894 provides in sub-sect. (1): "If any ship"—with certain exceptions which do not apply in this case—"carries as deck cargo, that is to say, in any uncovered space upon deck, or in any covered space not included in the cubical contents forming the ship's registered tonnage, timber, stores, or other goods, all dues payable on the ship's tonnage shall be payable as if there were added to the ship's registered tonnage the tonnage of the space occupied by those goods at the time at which the dues become payable." If, therefore, there is space occupied by cargo which is above and beyond the cubical contents forming the ship's registered tonnage, that space has to be paid for and what that space is has to be ascertained. Now, as I say, there are two methods of measuring a ship. So far, we have had nothing to do with measuring space or a portion of a ship as opposed to the whole of the ship; but when cargo is carried outside that portion of the ship, the cubical contents of which have been calculated in the registered tonnage, one must consider by what means that space is to be measured in order that one may arrive at the dues which are payable in respect of that extra cargo. Having said, first of all, in sect. 85, sub-sect. (1), that such extra cargo shall be paid for, the Act of Parliament in sub-sect. (3) goes on to say how the measurement is to be made. Now, there are two methods of measuring a ship. The Act of Parliament might have said: "You shall adopt one of these methods of measuring, or you shall adopt some quite different method which has nothing to do with the methods which we have laid down for the measuring of a ship as a whole." But what it in fact has done is this. It has said, in sub-sect. (3): "The tonnage of the space shall be ascertained by an officer of the Board of Trade or of Customs in manner directed as to the measurement of poops or other closed-in spaces by rule 1 in the Second Schedule to this Act." Therefore, this deck

cargo on the *Chelatros* was, according to the Act of Parliament, to be measured according to the method and the rules laid down by rule 1 of the Second Schedule to the Act. It is beside the question to say that rule 2 would have been a very much more convenient method of measuring, or to say that some other very much better method of measuring could have been found. Parliament, in its wisdom, has said that, when this space has to be measured, for the ascertainment of what dues are to be paid, the space shall be ascertained in the manner directed by rule 1 in the Second Schedule to the Act. With regard to the cargo on this vessel, that was not done. Possibly through no fault of his own, indeed probably through no fault of his own, the officer who ought to have measured, and who ought to have measured in accordance with the method laid down by rule 1, in fact measured in accordance with the method laid down by rule 2, and he did so, as he told the court, because he had received instructions from his superior officers, the Customs authorities, that that was the way in which he was to measure. But that is not a proper method of measuring under the Act.

The position which follows is this, that the plaintiffs, having paid a certain sum for dock dues, when they come to recover something which they say they have overpaid, have got to bring evidence before the court that, measuring the space on which deck cargo was carried in the proper manner, they have paid too much. They never measured it in the proper manner, however, and, therefore, they cannot say they have paid too much. They do not know what the figure would have been if they had measured it in the proper manner. There was before the learned County Court judge no evidence upon which, in my opinion, he could come to the conclusion that the plaintiffs had really measured and had really paid more than the true measurements rendered them liable to pay. There was no measurement later on. It is suggested that before the trial Mr. Nicol, the officer of Customs, measured under rule 1, sub-rule (5), and that the results show that if he had measured in the proper way originally according to the Act of Parliament the measurement would have been practically the same. The answer to that is, he never did make any such measurements. The ship had gone long before this case came on for trial. He measured once, and he measured once for all. Unfortunately, he did not measure in such a way as to enable him to make the calculations under rule 1, sub-rule (5). He had not got the materials to do that. The evidence which he gave to the learned County Court judge with regard to that matter was, even if it were arithmetically correct, which I am satisfied it was not, perfectly worthless, because it was not the measurement of the space, nor was it based upon the factors which the Act of Parliament requires. It was said by Mr. Hunter: "Well, this memorandum of the officials is conclusive," but having regard to the decision in the case of *The Franconia* (4 Asp. Mar. Law Cas. 1; 39 L. T. Rep. 57; 3 Prob. Div. 164) and the case of *Richmond Hill Steamship Company* v. *Trinity House Corporation* (8 Asp. Mar. Law Cas. 164; 75 L. T. Rep. 8; (1896) 2 Q. B. 134), both of which were cited to us, it is obvious that the memorandum is not conclusive at all in itself. Mr. Hunter then said: "If it is not conclusive as to the space measured it is, at any rate, conclusive as to the figures." I do not follow that, because it does not seem to me to be conclusive of anything and it does not seem to me that it prevents the dock authorities from saying that the memorandum was wrong in either that the measurements had never been made at all, or that the figures which were calculated as the result of those measurements were in truth wrong. Speaking for myself—it is quite immaterial for the purpose of deciding this case—I should doubt very much whether there ever was a certificate given at all under sect. 85 of the Act of 1894. That section requires a memorandum which is to be given to the master of the ship when the ship is coming into dock. It is quite obvious from the printed form upon which this memorandum has been put that that was the intention of the draftsman of it before it was printed. In this case that form has been utilised for quite a different purpose; it has been made to apply to the cargo of a ship which was going out of dock, and not coming in, and there is no evidence whatever that it was ever given to the master of the ship at all, and it was certainly, so far as we know, never produced by the master of the ship who, so far as I can ascertain the facts, was on his way to Buenos Aires long before any question in regard to this matter arose and probably long before the certificate was given. The certificate says the inspection was made upon the 8th Aug., and it is dated the 13th Aug.—some days later. Be that as it may, it seems to me that there was no evidence before the learned County Court judge upon which he could come to the conclusion that the plaintiffs had overpaid the defendants *5l.* 1*s.* 6*d.* Whether the plaintiffs had overpaid the defendants or not depended entirely on the measurement of the space for the purpose of calculating the tonnage on which they ought to pay under sect. 85. It is admitted that no such calculation was ever made until long after the payment was made, and, if one was made at all, it was only just before the County Court action. In those circumstances, in my opinion, there was no evidence upon which the learned County Court judge could find as he did, and I think his judgment ought to have been for the defendants. I think, therefore, that this appeal should be allowed, and that the judgment for the plaintiffs should be set aside and judgment entered for the defendants, with costs.

Acton, J.—I agree. I think that the error into which the learned County Court judge fell can be made clearly apparent by a reference

to some comparatively short passages in his judgment. In his judgment he said: "It appears that this vessel carries cargo in what has been described, and properly described, as unregistered spaces. The registration of the capacity of vessels, so far as Greek ships are concerned, is confined to the spaces below the decks, and as there are in this ship spaces above the deck upon which cargo may be and is carried, the plaintiffs are liable to pay the charges with reference to those spaces." Then the learned judge refers to sect. 85 of the Merchant Shipping Act 1894 as the important and proper section to be considered, and then he continues: "Therefore, that section provides in clear language that dues are to be payable upon goods shipped above the main deck." I think it would be more correct to say "upon space occupied by goods shipped above the main deck." He then refers to what was, of course, common ground in the case, that the practice appears to have been that the payment should be made not, in the first place, on measurement, but on a demand made by the defendants, and that upon such demand the plaintiffs paid to the defendants the sum of money which was supposed to represent the legal charges which the defendants were entitled to exact from the plaintiffs. He then goes on to say, and to say as a ground for the decision at which he arrived, that he finds that the officer of Customs, Mr. Nicol, made the necessary measurements as required by the Act. He says that, after drawing attention to the Second Schedule of the Act, rule 1, sub-rule (5). Then, in the course of his judgment, he says that it was admitted by the Customs officer, Mr. Nicol, who gave evidence, that he did not make his measurement in accordance with the Second Schedule, rule 1, sub-rule (5); he based his calculations upon rule 2, sub-rule (2), of the schedule, in conjunction with some instructions which were issued to officers like himself by the Board of Trade for their guidance. In saying "the Board of Trade," the learned judge, as everybody agrees, was in error, for such instructions as there were were issued by the Customs authorities, not by the Board of Trade. Those instructions, he says, were given in evidence, "and I hold that under the statutory enactments which were referred to they were properly admissible in evidence, and that the Custom House officer was entitled to base his calculations upon the method of measurement disclosed in the second rule of Sched. 2 and the instructions which were given to him by the Board of Trade officers"—where he was again falling into the same error as he had fallen into a few sentences previously.

Now, for the reasons which my Lord has given, it seems to me quite clear, and clear beyond argument, that in that the learned County Court judge was in error; he was in error certainly for the reasons already given by my Lord and also for the reason that I have drawn attention to, namely, that he made a mistake about the instructions being the instructions of the Board of Trade. The only difficulty in the course of the argument which presented itself to my mind was this, that there was evidence before the learned judge of what the correct measurement would have been if the method or principle indicated by rule 1, sub-rule (5), had been observed, instead of the method indicated by rule 2, sub-rule (2), of the schedule to the Act of 1894. I think, however, that the answer to that is the answer which has already been given by my Lord, that, in fact, that measurement had never been taken at all, and the opportunity of taking any such measurement had gone by; and, in the circumstances, it can form no answer to the objection taken in regard to the wrong method of measuring having been applied that if the right method of measurement had been applied the result would have been practically the same. The answer to that is that such measurement never was taken, and, therefore, I agree that this appeal should be allowed and judgment should be entered for the defendants.

Appeal allowed.

Solicitors for the appellants, *A. G. Hubbard.*

Solicitors for the respondents, *Ingledew, Sons,* and *Brown,* agents for *Ingledew* and *Sons,* Cardiff.

Wednesday, Nov. 5, 1930.

(Before WRIGHT, J.)

OWNERS OF STEAMSHIP ISTROS *v.* F. W. DAHLSTROEM AND CO. (*a*)

Charter-party — Clause providing that the captain shall prosecute all voyages with the utmost despatch—Exception clause—Construction—Claim for hire—Counter-claim for loss caused by delay in prosecuting a voyage—Arbitration.

The plaintiffs were the owners and the defendants the charterers of a steamer under the Baltic and White Sea Conference Uniform Time Charter 1912–20. *Under the agreement the captain was to prosecute all voyages with the utmost despatch, and if the charterers were dissatisfied they were to lodge a complaint and after investigation the owners were to make a change in the appointment. The owners made themselves liable for themselves or their manager for delay or loss in making the steamer seaworthy and fitted for the voyage or any other personal act or omission or default on their part or that of their manager, but the owners were not to be liable in any other case nor for damage or delay whatsoever and howsoever caused, even if caused by the neglect or default of the owners' servants. On a voyage which started from the Tyne the steamer met with unusually heavy weather and the captain put in at four ports of refuge whereby the voyage was unduly delayed. The owners made a claim for balance of hire and the charterers counter-claimed damages for the*

(*a*) Reported by R. A. YULE, Esq., Barrister-at-Law.

loss sustained by reason of the delay in prosecuting the voyage. The arbitrator found that the delay was due to the default of the captain, and holding that the owners were exempt from liability under the contract made an award in favour of the owners but stated a case for the opinion of the court.

Held, that the arbitrator was right. The delay caused by the default of the captain would have made the owners liable unless there was a clause in the contract expressly excluding this liability. The arbitrator had found that the delay was not due to want of diligence on the part of the owners or their manager in making the ship seaworthy and fitted for the voyage nor to any other personal act or omission on their part. The case of the owners clearly fell within the exception clause of the charter-party and the award must be affirmed.

Suzuki and Company Limited *v.* T. Beynon and Company Limited (17 *Asp. Mar. Law Cas.* 1; 134 *L. T. Rep.* 449) *referred to.*

Special case stated by an arbitrator.

The plaintiffs were the owners of the steamship *Istros* of 5660 tons, and the defendants were the charterers under the Baltic and White Sea Conference Uniform Time Charter 1912–20, the charter-party being dated the 3rd Aug. 1929 and the period four calendar months. The vessel duly went on service, and on a voyage which started from the Tyne on the 24th Dec. 1929 she met with bad weather. The captain put in at three ports of refuge: Margate Roads on the 29th Dec., Torbay on the 1st Jan. 1930 till the 6th Jan. 1930, and Corunna on the 9th Jan. to the 15th Jan. These circumstances caused a delay in the prosecution of the voyage. By clause 8 of the charter-party it was provided that the captain was to prosecute all voyages with the utmost dispatch and to render customary assistance with the ship's crew and also that if the charterers had reason to be dissatisfied with the conduct of the captain they were to report the same to the owners who were to investigate the complaint, and if necessary or practicable, make a change in the appointment. Clause 12 was an exception clause: "Owners to be responsible . . . during the currency of this charter if such delay or loss has been caused by want of due diligence on the part of the owners or their manager in making steamer seaworthy and fitted for the voyage or any other personal act or omission or default of the owners or their manager. Owners not to be responsible in any other case nor for damage or delay whatsoever and howsoever caused even if caused by the neglect or default of owners' servants." On a claim made by the owners for balance of hire and a counter-claim for loss caused by the delay in prosecuting the voyage, the arbitrator found that though the weather was unusually tempestuous and it might have been prudent for the captain to heave the vessel to on occasion, there was nothing to justify the captain of a well-found and laden vessel in putting into ports of refuge in the way that he did. The arbitrator also found that there was no evidence that "any delay or loss had been caused to the charterers by want of due diligence on the part of the owner or his manager in making the steamer seaworthy and fitted for the voyage or by any other personal act or omission or default of the owner or his manager." He therefore made an award in favour of the owners holding that they were protected by clause 12 of the charter-party, but stated a case for the opinion of the court.

The charterers, respondents, were absent and unrepresented.

Sir *Robert Aske*, for the shipowners, referred to *Suzuki and Co.* v. *T. Beynon and Co.* (*ubi sup.*) and pointed out that it was authority for the proposition that unless there was a clause clearly excepting the owners they would be liable. In the present case there was such a clause and the owners were therefore not liable.

Wright, J.—This case comes before me in the form of a special case for the opinion of the court stated by a very experienced business arbitrator, Mr. F. Newson. The claim was for a balance of hire and the claim was made by the owners of a Greek vessel called the *Istros*, which had been chartered under the Baltic and White Sea Conference Uniform Time Charter 1912, as revised in 1920, a charter dated the 3rd Aug. 1929, under which the owners chartered the vessel to a firm of F. W. Dahlstroem and Co., Hamburg, on a time charter for about four calendar months. The vessel duly went on the service and the only point with which I am concerned to-day has reference to what happened on a voyage which she made under the charter-party. The voyage in question started from the Tyne on the 24th Dec. 1929. The weather was very bad, and in fact the captain in prosecuting that voyage put into three ports of refuge; he put into Margate Roads on the 29th Dec., and stayed there for two days; he put into Torbay on the 1st Jan. 1930, and stayed there until the 6th Jan., and he put into Corunna on the 9th Jan. and lay there until the 15th Jan. These circumstances involved some delay in the prosecution of the voyage, and the charterer claims that that delay constituted breach of the contract and that he was entitled to set off against the owners' claim for balance of hire so much of the hire as was applicable to those periods of delay. The arbitrator has found that, though the voyage was unusually tempestuous, "the wind rising at times to almost hurricane force" so "that there were occasions when it might have been. and probably was, prudent for the captain to heave the vessel to, there was nothing in the weather encountered to justify the captain of a well-found and laden vessel in putting in to ports of refuge" in the way that he did. The arbitrator further finds that the vessel was properly seaworthy and properly efficient, and he also finds that there was no evidence that "any delay or loss had been caused to the

charterers by want of due diligence on the part of the owner or his manager in making the steamer seaworthy and fitted for the voyage or by any other personal act or omission or default of the owner or his manager." In effect his finding amounts to this, that there was on the part of the captain some failure of due care and due competence in putting in to the ports of refuge as he did, and that these were improper or negligent acts on the part of the master. In those circumstances it is necessary to consider whether the owners are entitled to claim that they are free from responsibility for these negligent or improper acts of the master by reason of the terms of the charter-party. Under clause 8 of the charter-party the captain is to prosecute all voyages with the utmost despatch and to render customary assistance with the ship's crew. By improperly putting into these ports of refuge it is clear, according to the finding of the arbitrator, that he did not prosecute this voyage with the utmost despatch. Clause 8 also goes on to provide that if the charterers have reason to be dissatisfied with the conduct of the captain they are to report the same to the owners who, on receiving the complaint, are to investigate that complaint promptly and, if necessary or practicable, make a change in the appointments. But apart from that, if there were a breach of clause 8 the owner would be liable in damages for the loss to the charterer by reason of that breach unless he were protected by the exceptions or qualification to be found in the charter-party—the case in which he was so held liable is the case of *Suzuki and Co. Limited* v. *T. Beynon and Co. Limited* (reported in 17 Asp. Mar. Law Cas. 1; (1926) 134 L. T. Rep. 449). But in this case the owners rely on the protection which they say is afforded to them by clause 12, which is in these terms: "The owners to be responsible only for delay"—I read those parts of the clause which appear to me to be material—"during the currency of this charter if such delay or loss has been caused by want of due diligence on the part of the owners or their manager in making steamer seaworthy and fitted for the voyage or any other personal act or omission, or default of owners or their manager. Owners not to be responsible in any other case, nor for damage or delay, whatsoever and howsoever caused, even if caused by the neglect or default of owners' servants." In terms that clause appears to me to be clear and wide enough to protect the owners against any claim in this case; and on that clause the arbitrator has come to the conclusion that the owners are not in law liable for the delay. He has made his award in their favour on this point, but subject to the opinion of the court as to whether or not he is right in law. The charterers have not thought fit to appear on the hearing of the special case, but I have had the benefit of an argument from Sir Robert Aske, who has very properly and candidly laid before me such considerations on both sides as appear to him to merit consideration, and has referred me to the authority which I have just cited.

In my opinion, the award of the arbitrator is right in law, and I therefore order that that award shall stand. Clause 12 appears to me, so far as the facts of this particular case are concerned, to be quite clear. There has been in this case no want of due diligence on the part of the owners or their manager in making the ship seaworthy and fitted for the voyage, and there has been no other personal act or omission, or default on their part. Any neglect or default that there has been has been that of the owner's servants. The arbitrator has found that there has been such neglect or default by the master, and that that has caused the delay. That seems to me to come within the precise words of clause 12. It is not necessary here to consider whether every possible case that may arise under clause 8 of a failure on the part of the captain to prosecute all voyages with utmost despatch is covered by clause 12. I have not in my mind at this moment any specific type of case of a breach of clause 8 by the act of the captain for which, notwithstanding clause 12, the owner would be responsible. But there may be such cases. In any view, it seems to me that clause 12 must receive effect where the case comes within its clear terms. If the effect of that is to render the owners free from any liability for loss or delay where there is a failure on the part of the captain to prosecute the voyage with the utmost despatch, then I think the owner is entitled to the full benefit of that clause. Clause 8, it may be said, has then no practical effect. It has a practical effect to this extent, that it contains clear recognition of the duty of the captain so to act, and the effect of clause 12 is not to modify or qualify the existence of that duty, although it may operate if an action is brought against the owner for damages as a defence. In one sense, every exception clause is *pro tanto* inconsistent with the primary obligations or the express obligations which at law and by contract rest upon an owner or a master in respect of the goods entrusted to his charge, and the duties arising under a charter-party; but they receive in due course, if the circumstances require it, their appropriate effect as a shield to a claim for damages; and I see nothing in the circumstances of this case to prevent the owner from relying here on the protection afforded to him by clause 12 of the charter-party. As I have said, the award will be upheld, and the owners will have the costs of this hearing before me.

Award affirmed.

Solicitors, *Holman*, *Fenwick*, and *Willan*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Nov. 14, 15, and 17, 1930.

(Before LANGTON, J.)

THE LONDON. (a)

Collision—Lis alibi pendens—*Action in Scotland —Subsequent action in England by party who is defendant in action in Scotland in respect of the same subject matter—Application by defendant to stay proceedings in England—Discretion.*

In an action for damage by collision the plaintiffs were at the time when they began their action defenders in proceedings pending in Scotland in which the defendants in the action were pursuers. The proceedings in Scotland were in respect of the same collision as the English action.

Held, that the court would not exercise its discretion to stay the action in England.

The Peshawur (5 *Asp. Mar. Law Cas.* 89 ; 1883, 48 *L. T. Rep.* 796 ; 8 *Prob. Div.* 32) *considered and not followed.*

SUMMONS (adjourned into court).

The plaintiffs, owners of the steamship *Granli*, claimed damages in respect of a collision which took place on the 27th Oct. 1930 in the Firth of Tay between the *Granli* and the defendant's steamship *London*. The owners of the *London* began proceedings *in personam* in the courts in Scotland in respect of the damage sustained by the *London*. Subsequently, the owners of the *Granli* began an action *in rem* in England in which the owners of the *London* were defendants. Upon the plaintiffs threatening to arrest the *London*, an undertaking for bail was given. The defendants then applied by summons to stay the action, but the registrar refused to do so. The defendants then applied to the judge. Langton, J. adjourned the summons into court for argument.

Carpmael, for the defendants.—The action in England is oppressive and vexatious whilst the proceedings in Scotland are pending. The principle is that where an action is pending in a court of concurrent jurisdiction in England, Scotland, Ireland, or the Dominions, the court will, as a matter of course, stay any proceedings in England in respect of an identical subject-matter. Where an action is pending in a foreign court, different considerations would apply. [Reference was made to: *McHenry* v. *Lewis* (1882, 47 L. T. Rep. 549 ; 22 Ch. Div. 397) ; *The Bold Buccleugh* (19 L. T. (O. S.) 235 ; 7 Moo. P. C. 267) ; *The John and Mary* (Swa. 471) ; *The Lanarkshire* (2 Spinks, 189) ; *The Catterina Chiazzaro* (3 Asp. Mar. Law Cas. 130 ; 34 L. T. Rep. 588) ; *The Peshawur* (5 Asp. Mar. Law Cas. 89 ; 48 L. T. Rep. 796 ; 8 Prob. Div. 32) ; *The Christiansborg* (5 Asp. Mar. Law Cas. 491 ; 56 L. T. Rep. 612 ; 10 Prob. Div. 141) ; *Thornton* v. *Thornton* (54 L. T. Rep. 774 ; 11 Prob. Div. 176) ; *The Iasep* (12 Times L. Rep. 375, 434) ; *The Reinbeck* (6 Asp. Mar. Law Cas. 366) ; 60 L. T. Rep. 209 ; *The Mannheim* (8 Asp. Mar. Law Cas. 210 ; 75 L. T. Rep. 424 ; (1897) P. 13) ; *Logan* v. *Band of Scotland* (94 L. T. Rep. 153 ; (1906) 1 K. B. 141) ; *Egbert* v. *Short* (97 L. T. Rep. 90 ; (1907) 2 Ch. 205) ; and *The Janera* (17 Asp. Mar. Law Cas. 416 ; 138 L. T. Rep. 557 ; (1928) P. 55).]

Hayward, for the plaintiffs.—The plaintiffs are entitled to commence an action in this court. They have done nothing to disentitle themselves from proceeding here, and they ought not to be prevented from doing so. It is conceded that there is jurisdiction, but it is submitted that in the circumstances the discretion of the court should not be exercised against the plaintiffs. *The Peshawur* (*sup.*) is a doubtful authority. Notice of appeal appears to have been given against the decision of Sir R. Phillimore, but the case was settled before the appeal had been heard. In *The Christiansborg* (*sup.*) Sir R. Phillimore's decision was treated as of doubtful authority. There is really little difference between this case and *The Janera* (*sup.*), where Hill, J. said that a plaintiff ought not to be stayed merely on the ground that he was a defendant elsewhere. It is true that in that case the plaintiff was defendant in proceedings in a foreign court, but it is submitted that there is really no difference in principle, and the language used by Hill, J. is sufficiently wide to be applied to the present case.

Carpmael replied.

Nov. 17, 1930.—LANGTON, J.—This is a matter arising out of a collision which took place in Scottish waters on the 27th Oct. 1930, between the steamship *London* and the steamship *Granli*. The collision took place in the Firth of Tay. In those circumstances the owners of the *London* commenced an action in the Scottish Courts against the owners of the *Granli*. At a later date, on the 31st Oct., the owners of the *Granli*, finding the *London* within the jurisdiction of this court, threatened an arrest. Upon an undertaking being given the arrest was not actually completed, but an action was commenced in this court.

Mr. Hayward appears here for the *Granli* and, Mr. Carpmael for the *London*, and Mr. Carpmael moves the court to stay the action that has been commenced on behalf of the owners of the *Granli* in this court.

The matter struck me as one of importance and one in which the same circumstances might frequently recur, and I accordingly adjourned the summons into court for the purpose of having the whole matter fully argued. Mr. Carpmael has put before me, with his usual industry and candour, the whole of the relevant authorities that bear upon this point, and, though none of the time has been wasted, I think it is sufficient to deal with the

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

three or four principal authorities on the point at issue. Of these authorities, the nearest to the point seems to me to be *McHenry* v. *Lewis* (1882, 47 L. T. Rep. 549, 22 Ch. Div. 397). Mr. Carpmael advanced as his main proposition that where there is an action pending in England, Scotland, Ireland, or the British Dominions overseas, the court will, as a matter of course, stay any second action commenced in respect of the same subject-matter, whether the plaintiff is or is not the same in both actions. *McHenry* v. *Lewis* (*sup.*) was the first of the authorities that he advanced in support of that proposition.

At first sight there is something to be said for the citation of this authority. The headnote says: " When a plaintiff sues a defendant for the same matter in two courts in this country, such a proceeding is *primâ facie* vexatious, and the court will generally, as of course, put the plaintiff to his election and stay one of the suits. And the same principle applies where one of the actions is in the Queen's Courts in Scotland or Ireland, or any other part of the Queen's Dominions." Mr. Carpmael frankly recognised that that authority, useful to him as it was upon one part of his proposition, could not be said to be a case directly in point, since in that case the plaintiff was the same in both actions; and it is not immaterial to notice in passing, that, as the statement is there couched in the headnote, the principle laid down is that the court will put the plaintiff to his election and stay one of the suits. In the present case, of course, we are confronted with a position in which the plaintiffs in one case are defendants in another, and *McHenry* v. *Lewis* (*sup.*) by itself would not carry nor did Mr. Carpmael contend that it would carry him the whole length of the way that he wants to go.

The next case seems to me to be near this point, so near as to call for mention, *The Peshawur* (5 Asp. Mar. Law Cas. 89; 1883, 48 L. T. Rep. 796; 8 Prob. Div. 32): it is a judgment of Sir Robert Phillimore, in a matter in which two proceedings were afoot. One was an action *in rem*, in this court, and the other was an action in the Vice-Admiralty Court of Ceylon. The subject-matter was a collision between ships. The plaintiffs in one case were the defendants in the other. That case is considerably nearer to the facts which I am now considering and have to consider in this present case. Unfortunately Sir Robert Phillimore, in giving judgment, put the matter entirely upon his discretion and did not throw any light upon the grounds which guided him to his decision; he put it purely as a question of discretion, and exercised his discretion in favour of stopping all the proceedings in this court until after the suit at Colombo had been heard. Mr. Hayward pointed out to me that from a note in the Law Reports one sees that the defendants, the owners of the *Peshawur*, appealed, but before the appeal came on for hearing the action in this court was settled by arrangement between the parties. If this decision stood, and stood in every way unimpugned, I should have difficulty perhaps in distinguishing it. It is conceded that the present case is one for my discretion, but I agree that I should have some difficulty, as a matter of discretion, in saying that the present case was a harder case for the party whose action is here asked to be stayed, than the case of *The Peshawur* (*sup.*); but that case does not stand entirely unimpugned. There is the point that it was under appeal but was never reviewed, and Mr. Hayward also reminds me that so far as he can discover the only case in which it was ever cited, or has been cited as an authority is *The Christiansborg* (5 Asp. Mar. Law Cas. 491; 1885, 53 L. T. Rep. 612; 10 Prob. Div. 141), where it received certainly no great honour and indeed was seriously impeached by the Master of the Rolls. In *The Christiansborg* (*sup.*) Lord Esher in dealing with *The Peshawur* (*sup.*) says this (5 Asp. Mar. Law Cas. at p. 495; 53 L. T. Rep. at p. 616; 10 Prob. Div. at p. 149): " Take the case of *The Peshawur* (*sup.*) which was an action *in personam* against the owner of the ship. It appeared, as stated in the headnote, that a . . . ' cause of damage *in rem* relative to the same collision had prior to the proceedings in this court been instituted by the owners of the *Peshawur* against the *Glenrory* in a Vice-Admiralty Court abroad, and was then pending.' That is all that was shown to the court. Sir R. Phillimore stayed the proceedings here, but he gives no reason for so doing, so that it is a decision contrary to the decision of the Court of Appeal. But it seems that the parties intended to appeal, but settled the dispute before doing so, and I cannot regard this case as any authority." It is true that Lord Esher was giving judgment in the particular case in hand *The Christiansborg* (*sup.*), but, in view of all the circumstances, I do not feel that I can regard *The Peshawur* (*sup.*) as a binding authority. Here we have the owners of the *Granli* saying to this court: " We have taken no step at all towards a proceeding in Scotland, and, in fact, in the only other matter arising out of this collision in which we could manifest our intentions—namely, a salvage action by a Scottish tug—we have appeared here in England and we want that case and this case tried here in England."

I think that, *primâ facie*, parties who come to this court have a right to have a trial in this court, and I think I am not justified in depriving them of this right until a very clear case has been made out against them.

Another case which was cited, and which bears upon the subject, is the case of *The Janera* (17 Asp. Mar. Law Cas. 416; 138 L. T. Rep. 557; (1928) P. 55). Hill, J. there said: " It seems to me quite clear that the court ought not to stay a plaintiff in the courts of this country on the ground that he happens to be a defendant elsewhere." If in that case the second action had been an action either in Scotland or some British Dominion, that dictum of Hill, J. would, of course, be fully

and directly applicable to this case, and I should not have had any of the difficulty that I have had in considering this case. I should very willingly have followed what Hill, J. there lays down. However, the second action in *The Janera* (*sup.*) was an action in Egypt, and, therefore, not in the British Dominions, and I do not think it would be fair to read the learned judge's judgment in that case in the sense for which Mr. Hayward contended, namely, in the widest sense of "elsewhere," as meaning not only in a foreign country, but in any British Dominion. I think it might be unfair to read the sentence in that way. Everyone who knows Hill, J. knows the care with which he used language, and knows the scrupulous care which he devoted to making his judgments appropriate to the case in hand, without travelling unnecessarily outside the matter. At a further stage he said this: "I cannot think that I ought to stay a proceeding properly brought in this country solely because the people who have brought that action are defendants in proceedings in Egypt." I do not think it would be fair to say that Hill, J. had in mind necessarily a case in which the second proceedings had been brought in Scotland. What he would have said upon that matter I cannot speculate upon, and I do not think I can shelter myself under Hill, J.'s judgment and say that he has laid this matter down as law. Nor, indeed, do any of these judgments, of course, conclude this case as a matter of law, where the matter is one of discretion. There may be a variety of small points, pointing one way or another, which would distinguish the cases from one another, and I do not desire that anything that I am saying now shall be in the nature of a binding decision for the future upon other cases to which other considerations may apply, even though the two proceedings are respectively a proceeding in this court and a proceeding in Scotland. It is only because that class of case might easily recur that I thought it might be useful to have the matter argued in open court.

The conclusion therefore at which I arrive is this: that this application fails, and that I shall not exercise my discretion in the way I am asked to stay the action which has been brought by the owners of the *Granli*. The appeal, of course, will fail, with costs.

Solicitors: *Wm. A. Crump* and *Son*; *Thomas Cooper* and *Co.*

House of Lords.

Nov. 10 *and* 27, 1930.

(Before Lords BUCKMASTER, DUNEDIN, BLANESBURGH, WARRINGTON and THANKERTON, assisted by Nautical Assessors.)

THE TOVARISCH. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision—Sailing vessel—Lights—Green pyrotechnic light shown to a steamship—"Flare-up" light—Whether green pyrotechnic light authorised by the regulations—Regulations for Preventing Collisions at Sea, 1910, *arts.* 1, 12.

Art. 1 *of the Regulations for Preventing Collisions at Sea*, 1910, *provides that no lights which may be mistaken for the prescribed lights shall be exhibited. Art.* 12 *provides that a vessel may, if necessary, in order to attract attention, in addition to the lights which she is by the rules required to carry, show a flare-up light.*

In a collision action,

Held, that art. 12 *did not prohibit the exhibition of a green light. It permitted any light excepting those that were specially referred to. The light, under the rule, was to call attention, and to do no more.*

Held further, on the facts, that the manœuvres of the respondent vessel had not contributed to the collision.

Decision of the Court of Appeal (ante, p. 58; 142 *L. T. Rep.* 372; (1930) *P.* 1) *affirmed.*

APPEAL from the decision of the Court of Appeal (Scrutton, Lawrence and Greer, L.JJ.) (reported 142 L. T. Rep. 372; (1930) P. 1) in an action in respect of a collision between the Russian sailing vessel *Tovarisch* and the plaintiffs' steamship *Alcantara*, which took place in the English Channel on the night of the 24th Feb. 1928, and in consequence of which the *Alcantara* sank with all hands but one survivor.

The collision took place in the following circumstances: When first sighted both side lights of the *Alcantara* were seen by those on board the *Tovarisch*, but subsequently the red light of the *Alcantara* closed, and although the vessels were then in a position to pass each other all clear, starboard to starboard, those on board the *Tovarisch* exhibited on the starboard side of the bridge a green pyrotechnic "flare-up" light. The light was not exhibited in a lantern, or screened, but was of the type which is held in the hand of the person exhibiting it, and shows an all round light. The *Tovarisch*, at the same time that the flare was lighted, commenced to starboard. Upon seeing the green "flare-up" light, the *Alcantara* apparently ported or hard-a-ported, bringing the two vessels into collision.

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

The Regulations for Preventing Collisions at Sea, 1910, provide as follows :

Art. 1. The rules concerning lights shall be complied with in all weathers from sunset to sunrise, and during such time no other lights which may be mistaken for the prescribed lights shall be exhibited.

Art. 12. Every vessel may, if necessary in order to attract attention, in addition to the lights which she is by these rules required to carry, show a flare-up light or use any detonating signal that cannot be mistaken for a distress signal.

The Court of Appeal held, reversing the decision of Hill, J. (*ante*, p. 58), that a green pyrotechnic light, of the type which is held in the hand of the person exhibiting it, displayed upon the starboard side of a sailing vessel, is not a light which can be mistaken for a prescribed light ; that the " flare-up " lights, the use of which is authorised by art. 12, are not limited to white lights but may include a green light ; and that there had been no breach of the regulations.

The owners of the *Alcantara* appealed.

Digby, K.C. and *Cyril Miller* for the appellants.

Dunlop, K.C., *Harold Stranger*, and *Krougliakoff* for the respondents.

The House took time for consideration.

Lord BUCKMASTER.—This is an appeal by the owners of the Italian steamship *Alcantara* against the owners of a ship known as the *Tovarisch*, a training ship used for cadets by the merchant marine of the Soviet Government, asking for damages consequent upon a collision that took place near to Dungeness on the 24th Feb. 1928.

It was a disaster which resulted in grave consequences, for the *Alcantara* was wholly sunk and all her crew but one were lost. The *Tovarisch* was damaged but suffered no loss of life.

The *Tovarisch* is a four-masted sailing ship 284ft. in length, and she was coming down channel on the night in question on a course S. 60 degrees W. at about 6½ knots. The *Alcantara*, a vessel 289ft. in length, was proceeding up channel from Carloforte in Sardinia to Calais with a cargo of 2700 tons of mineral ore, her course was N. 79 E. and she was making about 6½ knots. It is accepted by the learned judge that the *Tovarisch* was carrying the proper regulation lights, but they were not electric lights as were those of the *Alcantara*. None the less there is no evidence whatever to suggest that they were not visible at a sufficient distance to warn the *Alcantara* were those on board keeping a proper look out. It is in fact no longer alleged that those in charge of the *Tovarisch* were negligent in improperly failing to exhibit side lights. The two vessels approached starboard to starboard. The learned judge has held inferentially rather than by direct finding, that the green light of the *Tovarisch* was not seen by those on board the *Alcantara*, and if she did indeed see them, her conduct was certainly extraordinary, for she ported her helm with the result that a collision took place at an angle of about 45 degrees. Upon the evidence it appears to be impossible to hold that the green light of the *Tovarisch* was not visible to the *Alcantara*. The learned judge himself said on the evidence " I find that the green light was burning. The lamp is a good type of lamp and I am unable to find that the green light, in fact, was not being exhibited according to the rules." Did the matter rest there little ground would be afforded even for argument, but a further incident occurred in relation to which the greater part of the controversy arises. The *Tovarisch* as she was drawing near lit a green pyrotechnic flare from the starboard side of the bridge, which was about 72ft. forward of the wheel, its object being, as was said, to show the length of the ship. It is suggested that this light may have obscured the green starboard light, but there was no evidence called to show that this would be its effect, and that it did so is a pure conjecture. But it is further urged that the exhibition of the light was in defiance of the regulation for preventing collisions at sea, and that its result was to make the *Alcantara* think that she must instantly take some action, whereas, in fact, if she had pursued her normal course the collision would have been avoided.

Art. 12 of the regulations is in the following words :

Every vessel may, if necessary in order to attract attention, in addition to the lights which she is by these rules required to carry, show a flare-up light or use any detonating signal that cannot be mistaken for a distress signal.

I agree with the judgment of the Court of Appeal in thinking that this does not prohibit the exhibition of a green light. It permits any light excepting those that are specially referred to, and I find myself unable to believe that these regulations intended for the use of men at sea, have to be construed by working backwards and seeing what other regulations have provided on previous occasions. The light, under the rule, was to call attention. It was to do no more and there is no foundation for the argument that it called upon the *Alcantara* to do anything except that which it was their duty to do when they saw a sailing vessel approaching with the lights green to green. Finally, the appellants contend that the manœuvres of the *Tovarisch* contributed to the accident. They did, in fact, first starboard and then port their helm, but the result, according to the finding of the learned judge, did not materially alter her course, and I cannot see that it in any way contributed to the accident. That lamentable event was due to the *Alcantara* attempting to cross the bows of the *Tovarisch*, and for this I cannot find any justification. I have throughout assumed that the *Alcantara* saw the green light of the *Tovarisch* before the flare was shown. I have stated my reasons for that conclusion. I also think that it follows that the *Tovarisch* was

known to be a sailing ship, and these are, to my mind, the two critical and material matters upon which responsibility for this disaster depends. In differing, as I do, from Hill, J., I think it right to say that the difference is due first to the question of the exhibition of the flare and secondly to the question of the visibility of the green starboard light of the *Tovarisch*. The learned judge nowhere holds that it was not in fact displayed or seen, but seems to conclude that the action of the *Alcantara* was so foolish that it can only be referable to the fact that it had not been seen. I fear I cannot go with him to that conclusion. The reasons that may have led to the *Alcantara's* action cannot now be accurately determined, but experience shows that it is not safe to assume that a thing cannot have been done because its commission would be an act of folly.

Lord Dunedin.—I concur. The whole argument of the *Alcantara* depended upon the assumption that the green flare was equivalent to an invitation or even an injunction to the other vessel to change its course. Now that assumption is not based on any of the nautical rules which have become embedded in positive law, nor, according to the advice given to us by our assessors, is it founded on any well-recognised practice of seamanship.

Lord Warrington.—I have had the opportunity of reading and considering the opinion of the noble Lord on the Woolsack and concur in it.

Lord Buckmaster.—Lord Blanesburgh desires me to say that he concurs.

Lord Thankerton.—I concur.

Appeal dismissed.

Solicitors for the appellants, *Richards, Butler,* and *Co.*

Solicitors for the respondents, *Middleton, Lewis,* and *Clarke.*

Nov. 4 *and Dec.* 9, 1930.

(Before Lords Dunedin, Blanesburgh, Warrington, Tomlin and Macmillan).

The Croxteth Hall; The Celtic. (*a*)

on appeal from the court of appeal in england.

Seamen's wages—Wreck—Right to receive wages during period of two months from the date of the wreck if unemployed—Voyage terminating within the period of two months—Payment of wages whilst unemployed during period subsequent to date when voyage was due to end — Merchant Shipping (International Labour Conventions) Act 1925 (15 *&* 16 *Geo.* 5, *c.* 42).

By the Merchant Shipping (International Labour Conventions) Act 1925, *s.* 1, *sub-s.* (1), *it is provided that "where by reason of the wreck or loss of a ship on which a seaman is employed his service terminates before the date contemplated in the agreement, he shall, notwithstanding anything in section one hundred and fifty-eight of the Merchant Shipping Act,* 1894, *but subject to the provisions of this section, be entitled, in respect of each day on which he is in fact unemployed during a period of two months from the date of the termination of the service, to receive wages at the rate to which he was entitled at that date." And by sub-sect.* (2) *it is further provided that "a seaman shall not be entitled to receive wages under this section if the owner shows that the unemployment was not due to the wreck or loss of the ship and shall not be entitled to receive wages under this section in respect of any day if the owner shows that the seaman was able to obtain suitable employment on that day."*

Held (Lord Blanesburgh dissenting), that under sub-sect. (1) *a seaman whose service by reason of the wreck or loss of his ship terminated before the date contemplated in the agreement of service could claim wages during two months from such termination for each day on which he was in fact unemployed and the effect of the qualification to be found in sub-sect.* (2) *was to enable the shipowner to prove certain things which if proved would disentitle the seaman to all or some part of that which otherwise he would have taken under sub-sect.* (1). *In no part of the section was anything to be found which introduced a cutting down of the two months' period by reference to the date at which but for the wreck or loss the service would have been terminated. Upon this view of the matter the respondents, who had proved that they were out of employment during the two months, were entitled to two months' wages from the date of the wreck or loss of the ship.*

Decision of the Court of Appeal (ante, *p.* 121; 143 *L. T. Rep.* 316; (1930) *P.* 179) *affirmed.*

Appeal from the decision of the Court of Appeal (Scrutton, Greer and Slesser, L.JJ.) in two wages actions (reported *ante*, p. 121; 143 L. T. Rep. 316; (1930) P. 197), which had been referred to the Admiralty Division under sect. 165 of the Merchant Shipping Act 1894.

The plaintiff in the first action signed articles as an able-bodied seaman and quarter-master on board the defendants' steamship *Croxteth Hall* for a voyage not exceeding two years' duration from the 29th Oct. 1928, terminating at such port in the United Kingdom or Continent of Europe within home trade limits as might be required by the master. The *Croxteth Hall* was wrecked near Flushing on the 27th Feb. 1929. and the plaintiff was returned to Liverpool on the 4th March 1929 at the defendants' expense and paid his wages up to the 4th March 1929. Had the *Croxteth Hall* not been wrecked she would have completed the voyage in respect of which the plaintiff had engaged at Middlesbrough on the 11th March 1929. The plaintiff

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

was unemployed for a period of two months from the 27th Feb. 1929. He claimed wages at the rate provided for by the articles and subsistence allowance at the rate of 4*s.* per day. In the second action the plaintiff was an able-bodied seaman on board the defendants' steamship *Celtic.* The voyage described in the articles under which the plaintiff served was from Liverpool to New York, via Queenstown, Boston, and (or) if required to any ports within the North and South Atlantic Oceans, trading as might be required until the ship returned to a final port of discharge in the United Kingdom. On the 10th Dec. 1928 the *Celtic* was wrecked near Queenstown whilst homeward bound for Liverpool, which would have been her final port. Had the *Celtic* not been wrecked she would have reached Liverpool on the 11th Dec. 1928. The plaintiff, with the other members of the crew, was brought to Liverpool by the owners on the 13th Dec. 1928 and was paid his wages under the articles up to and including the 11th Dec. From the 11th Dec. the plaintiff, who was one of the regular crew of the *Celtic*, was unemployed. The plaintiff claimed wages for a period of two months from the 11th Dec. and subsistence allowance at the rate of 4*s.* per day.

The Court of Appeal affirmed the decision of Lord Merrivale, P. and held (Slesser, L.J. dissenting) that a seaman was entitled to wages for a period of two months from the date when his services terminated by reason of the wreck, notwithstanding that the voyage to which his agreement related would have come to an end but for the wreck within the period of two months.

The defendants appealed.

Sir *Leslie Scott*, K.C., *Dunlop*, K.C., and *A. J. Hodgson* for the appellants.

Lynskey, K.C. and *Fraser Harrison* for the respondents.

The House took time for consideration.

Lord Dunedin.—The facts in the first appeal, so far as material, are capable of being stated with the utmost brevity.

The ship *Croxteth Hall*, on board of which the respondent Murray was a seaman, was wrecked and lost on the 27th Feb. 1929. At that time she was homeward bound, and, if nothing untoward had happened, the crew would have been paid off at Middlesbrough on the 11th March 1929. The crew were brought home to Liverpool, and on the 4th March the respondent was paid off. The respondent claimed wages for two months from the 27th Feb. He was, in fact, unemployed for that period, and, though he had tried, he had not been able to secure employment. The appellants expressed their willingness to pay, and did pay, the wages up to the 11th March, the date on which the payment for the voyage would have taken place if it had been terminated in due course, but they refused to pay any more.

The respondent started proceedings to recover the two months' wages, so far as unpaid, in a court of summary jurisdiction in Liverpool. The case was referred to the Probate, Divorce, and Admiralty Division of the High Court, under the provisions of sect. 165 (iii.) of the Merchant Shipping Act 1894. Lord Merrivale, the President of that court, gave judgment in favour of the present respondent. Appeal was taken to the Court of Appeal, who, by a majority, Slesser, L.J. dissenting, confirmed the judgment. There had been, in fact, certain other points mooted before Lord Merrivale, but they have disappeared from the case and need not be mentioned. From that judgment there is the present appeal.

At common law, if a ship was lost on a voyage, a seaman who, although through no fault of his own, could not, in fact, perform his share of the contract of service could recover nothing. This was altered by sect. 158 of the Merchant Shipping Act 1894, which gave wages up to the time of the wreck that terminated the service. Then comes the statute on the interpretation of which the matter turns. It is the Merchant Shipping (International Labour Conventions) Act 1925, and sect. 1, the relevant section, is as follows:

(1) Where by reason of the wreck or loss of a ship on which a seaman is employed his service terminates before the date contemplated in the agreement, he shall, notwithstanding anything in section one hundred and fifty-eight of the Merchant Shipping Act 1894, but subject to the provisions of this section, be entitled, in respect of each day on which he is in fact unemployed during a period of two months from the date of the termination of the service, to receive wages at the rate to which he was entitled at that date.

(2) A seaman shall not be entitled to receive wages under this section if the owner shows that the unemployment was not due to the wreck or loss of the ship and shall not be entitled to receive wages under this section in respect of any day if the owner shows that the seaman was able to obtain suitable employment on that day.

(3) In this section the expression "seaman" includes every person employed or engaged in any capacity on board any ship, but, in the case of a ship which is a fishing-boat, does not include any person who is entitled to be remunerated only by a share in the profits or the gross earnings of the working of the boat.

I confess that I have had considerable difficulty in coming to a conclusion in this matter, but in the end I have come to think that the judgment of the Appeal Court is right. It is necessary to say that in the inquiry held before Lord Merrivale it was shown that it was the custom for men who had been on this ship to be allowed to sign on for the next voyage. In other words, if nothing untoward had happened, it would have been more likely than not that the respondent would at once have been taken on for the next voyage, and so would not have remained in unemployment. The appellants were very anxious to point out that the convention, to give effect to which the Act was passed, uses the word "indemnity," and the only proper indemnity that could therefore be given was the wages, so far as they could be due under contract, which contract

was frustrated by the wreck. I do not think there is anything in this argument, and for this reason. If "indemnity" is used in a loose sense, what is given by this Act is an indemnity whichever of the two views be taken, but if it is used in a strict sense—and unless it is so used it is of no use to the appellants—then it is very significant that although the framers of the Act are well aware of the word, for they refer to it in the preamble, when they come to the operative section they do not use it. I think, therefore, we must take the Act as it stands.

Now, I do not think that there is any doubt whatever as to the meaning, for I find no ambiguity, in sub-sect. (1) of sect. 1. There must be a wreck which terminates the service, which service is spoken of as being under an agreement; and, if so, it is obviously possible that the agreement provides for a definite termination. If that is so, then there must be in fact unemployment for two months, and, if all these facts concur, then the seaman is entitled to two months of his old wages running from the termination of the service, that is, the wreck. That is all expressed quite absolutely, and the question would be at an end were it not for the words "subject to the provisions of this section." That indicates that there is something else to come. That something else comes in sub-sect. (2), but here the onus, so to speak, is shifted. The seaman must show the various things that I have enumerated to bring him under sub-sect. (1). If he does that, his portion is accomplished. Then the shipowner, to get out of that position, must show what is demanded in sub-sect. (2): "if the owner shows. . . ." It has been found as a fact in this case that the owners cannot show that the seaman was able to obtain employment on any day within the two months.

The sole question, therefore, left is: Can the owners show that the unemployment was in fact not due to the loss of the ship? I do not think they can. The onus is on them. It is not for the seaman to show that he would have been employed. It is for the owners to show that he would not have been employed, and, on the face of the evidence as to what would have happened if the ship had still been in being, I do not think that the owners can do so.

But, as Scrutton, L.J. says, each case must depend on its own facts. On the facts in this case, I think that the respondent has clearly brought himself within sub-sect. (1), and the appellants have not discharged the burden imposed upon them in sub-sect. (2) to take the respondent out of the operation of sub-sect. (1).

I move, therefore, that the appeal be dismissed.

The second appeal is governed by the first.

My Lord Warrington authorises me to state that he concurs in the opinion I have delivered.

Lord Blanesburgh.—By sect. 7 of the Merchant Shipping (International Labour Conventions) Act 1925 it is directed that the Act is to be construed as one with the Merchant Shipping Acts 1894 to 1923. The Act—I will now refer to it as the Act of 1925—thus becomes a constituent part of a statutory code with special meanings attached to some of its terms by definition and to others by accepted usage or judicial decision. The result of course is that a meaning may necessarily be attributable to its provisions very different from that which would attach to the same words in an independent enactment.

And the incorporation of the Act in the code with that result supervening is of its very essence. It is passed, as its preamble states, to give effect (*inter alia*) to the convention set forth in its first schedule; and, as a reference to sect. 1 immediately shows, the method adopted to achieve that purpose is not, as it might have been, to transfer the international language of the convention to the body of the Act *simpliciter*, but it is to translate that language into the phraseology of the Merchant Shipping Acts and to give statutory effect to the convention in that form of words, for better or for worse.

Sect. 1 in the result is a pregnant section. It does not carry its full meaning upon its face. It is only by reference to the provisions of what I may call the code that its real effect can be ascertained, and most particularly is this true of the term "wages," the fundamental word of the section, three times repeated, almost insistently, and always without periphrasis or qualification. What does that word connote in the language of the code? Can it have attributed to it in its setting or at all the meaning which must be placed upon it if the respondents' claims, sustained by the Court of Appeal, are to succeed, or is its necessary interpretation such as to exclude those claims altogether?

And following an investigation of the provisions of the code, I have reached the conclusion that, whatever may be the meaning of the word in a dictionary sense, or even in a section of an isolated Act of Parliament, "wages," in a Merchant Shipping Act, has a perfectly definite signification which is quite inappropriate to quantify the respondents' present claims. It is, be it at once noted, neither compensation nor an indemnity nor a gratuity that the seaman is to receive under the section. He is to have "wages" and nothing else. The use of the word, I have satisfied myself, is deliberate. It is full of meaning as a code word. When that meaning is ascertained the first paragraph of the section, which on its face, as I quite agree, is unqualified, becomes at once restricted, inasmuch as it is now disclosed that there can be no "wages" properly so called receivable by a "seaman" properly so called beyond those provided for in his agreement with the owner current at the date of the wreck of his vessel and referred to in the section.

That conclusion, if it be right, enables me to place upon this section of the Act of 1925 a construction which appears to be at once consonant with the declared purpose of the Legislature, not inconsistent with sound sense, and in entire accord with the convention. Accordingly, I crave your Lordships' indulgence if I endeavour to justify it as concisely as I can, but nevertheless at greater length than I care for. I do so because I see in this case a problem of first importance both to the seamen and to the owners of lost ships, and it is fitting that it should be ventilated in your Lordships' House from every point of view.

In the sections of the code relating to seamen no provisions are so elaborate as those dealing with their "wages." The expression "seamen's wages," in their essential characteristics has been for generations a term of art in maritime law. Possibly for this reason the expression is not, in the code, made the subject of full definition, "wages" being there defined only to the extent of saying that the term includes "emoluments" (Merchant Shipping Act 1894, s. 742). And incidentally I may observe as illustrating by an early example the precision of meaning held to be attached to the word throughout the code, that even the addition to "wages" of "emoluments" does not bring "maintenance" within their ambit: (*Palace Shipping Company* v. *Caine and others*, 10 Asp. Mar. Law Cas. 529; 97 L. T. Rep. 587, at p. 589; (1907) A. C. 386, at p. 393). And the content of "the term 'wages' as used in the Act," to adopt Lord Macnaghten's phrase in the case cited, is, in all essentials, not to be mistaken. To a seaman's wages, invariably so called, there are annexed in the code privileges, incidents, restrictions, safeguards, elsewhere unknown to the law, and not even made incident to any advantage from his service accruing to a seaman under some other description.

A seaman's wages, for example, whether due or accruing, are not subject to attachment or arrestment; an assignment of them prior to accruer is not binding on the seaman; a power of attorney or authority to receive them is not irrevocable; payment of wages to a seaman is valid in law notwithstanding any previous sale or assignment, attachment, incumbrance or arrestment of the same wages (Merchant Shipping Act 1894, s. 163). Before 1906 a seaman might not insure his wages, even if earned: (see now the Marine Insurance Act 1906, s. 11).

On the other hand a seaman had and has in respect of wages two privileges the enjoyment of which furnishes, as will be seen later, a valuable clue to the true construction of the Act of 1925. He has for his wages, but for them only, a maritime lien upon his ship and he may also recover any wages due to him in a court of summary jurisdiction which, incidentally, may be situate in or near the place "at which his service has terminated" (Merchant Shipping Act 1894, s. 164)—words strongly indicative that there will be no "wages" coming to him after that date.

But what are the essential qualities of the "wages" to which these incidents—privileges and restrictions alike—are attached? These are, as I have already indicated, unmistakable. Beginning with the Merchant Shipping Act 1853, when the old doctrine that freight was the mother of wages was finally superseded (see now the Merchant Shipping Act 1894, s. 157), the word "wages" as used in Merchant Shipping Acts is in full consonance with Lord Stowell's well-known description of them in *The Neptune* (1 Hagg. Adm. 227)—a description peculiarly apposite in the present case. "The natural and legal parents of wages," Lord Stowell says there, at p. 232, "are the mariner's contract, and the performance of the service covenanted therein; they in fact generate the title to wages."

This description is now embodied and amplified in sects. 113 and 114 of the Merchant Shipping Act 1894. The seamen's wages are a principal subject-matter of the written agreement with the crew thereby made compulsory. That agreement, to which the old description of ship's articles still clings, must be in a form approved by the Board of Trade, and it must contain among its provisions: (*a*) particulars of the nature and duration of the voyage; and (*e*) "the amount of wages which each seaman is to receive"—the two cardinal points in the ship's articles on which, as Mr. Maclachlan observes (5th edit., p. 225), Lord Stowell was occasionally obliged to interpose for the protection of the seaman against the fraudulent devices of dishonesty—a task now entrusted to the Board of Trade.

And the seaman is entitled as "wages" to no sum which is not, as such, entered in that agreement. "Under sects. 113 and 114 of the Merchant Shipping Act 1894," said Coleridge, J., in *Thompson* v. *H. and W. Nelson Limited* (12 Asp. Mar. Law Cas. 351; 108 L. T. Rep. 847; (1913) 2 K. B. 523), paraphrasing earlier cases to the same effect, "a seaman can only recover as wages the amount specified in the articles."

Further, it is with reference to these wages alone, as has been already indicated, that in its application to seamen the word is used throughout the code. "Maintenance," as we have seen, is not "wages." The "double pay" for which the owner may be liable under the Merchant Shipping Act 1894, s. 135, is not "wages"; the compensation, "not exceeding one month's wages," recoverable under the Merchant Shipping Act 1894, s. 162, is not "wages"; nor is the compensation in like circumstances recoverable by a seaman who has signed a fishing-boat's agreement: (Merchant Shipping Act 1894, s. 411).

It should, however, be added that while the service covenanted in the articles, to repeat Lord Stowell's words, still remains one of their parents, "wages" in the statutory sense may nevertheless be payable to a seaman who has not rendered service in respect of them, *e.g.*, where he has been disabled by accident during the voyage: *Chandler* v. *Grieves* (2 H. Bl. 606*n*.).

But not for any time beyond the stipulated voyage, *ibid.* Accordingly, if the Act of 1925 be so limited in its operation, it has made no new departure in the use of the term. But not otherwise.

Now what are the *soi-disant* "wages" which each respondent is asking for in this case? They represent a sum claimed from the owners of a ship that has been lost, with whom the respondent has no agreement for its payment, in return for no service to be rendered by himself, with no voyage in contemplation, and no ship to undertake one. It is only as "seamen," of course, that the respondents are under the Act entitled to receive anything. But in relation to these claims the respondents are not even such. "A seaman" (Merchant Shipping Act 1894, s. 742) is a "person . . . employed or engaged . . . on board any ship."

Is it not, therefore, now plain—I suggest to your Lordships it has become so—that to assert with regard to such a claim, as the respondents must, that it is a claim to receive "wages" as a "seaman," is a statutory contradiction in terms?

And this examination of the code instructs a statement of the rival views of the Act of 1925 which may at this point be helpful. The appellants' view is that subject to the provisions of sect. 1, a seaman is entitled, during unemployment, to receive his "wages" for a period of two months after the wreck of his ship if his service contemplated by the articles would but for the wreck so long have continued; the respondents' view is that the seaman is so entitled to receive his "wages" whether these are in any sense covered by the articles, even, indeed, if they are altogether outside the articles or other agreement with the owners.

More briefly expressed, the maximum period over which wages may under the section be received is two months from the date of the wreck if, in the appellants' view, there are for so long under the articles wages to be paid—whether, in the respondents' view, there are wages so to be paid or not.

Now, in contrasting these rival views of this section the appellants have, I suggest, one initial advantage. They reach their conclusion without the addition to the section of any words not already there. Their construction would, of course, have been clear to demonstration if the section had run "in respect of each day of the contemplated term of service." But, if the draftsman is using the word "wages" in what I may call the sense of the code, he is entitled to have it said that words to the effect of the inserted words are already implicit in "wages" and that to repeat them would strictly be redundant, if not tautologous. And this draftsman is assuredly a man of few words.

The respondents are, in this matter, less fortunate. If wages are used in the sense of the code, then words of extension, or words making "wages" merely referential are, as it seems to me, essential, if the section is to be expanded to cover their demand. For instance, if a claim like theirs had ever been in contemplation at all, the precedent set by another section of the code—the Merchant Shipping Act 1894, s. 162—almost in *pari materia* and already referred to, would surely have been followed, and the seaman declared entitled to receive not "wages" but "compensation," or, if you prefer it, "an indemnity" or "a gratuity" "at the rate of the wages to which he was entitled at that date." By the addition of some such descriptive word, with the term "wages" merely referential, the respondents' construction of the section would have been established. But none of these descriptive words are to be found, nor is anything said from which their presence may be implied. On the contrary, the other provisions of, and the omissions from, as well as the form of, the section are, I think, eloquent to show that no such implication was ever intended—in other words, that the respondents' present claim is intended to be and is in fact outside the section altogether.

I will first refer to an omission from the section in justification of this statement. The scheduled convention, to which it is the avowed purpose of the Act of 1925 to give effect, provides in art. 3 that seamen are to have the same remedies for recovering their "indemnities" as they have for recovering arrears of wages earned during service. The remedies there pointed at are, so far as British seamen are concerned, those provided for in the Merchant Shipping Act 1894, s. 164, already summarised. Now there is no reference at all in the Act of 1925 to any such remedies. It is quite unnecessary, of course, that there should have been, if it is only code "wages" which are under the Act being made recoverable. But if, as the respondents contend, the word "wages" extends to something which is not code wages at all—*e.g.*, compensation, indemnity, gratuity—then the Act fails altogether to give effect to the Convention in this respect. It was suggested on behalf of the respondents, faced with this difficulty, that it was got over by the fact that the receipts under the Act are there described as "wages," a description of itself sufficient to attract to them all the code procedure relating to the recovery of wages properly so described. But here once again the respondent is called upon to recognise that the Act of 1925 is itself part of a code. And that code does not provide for such a case in that way. Sect. 1, if such were its effect, would be in this code quite *sui generis*. Where it is desired that something which is not "wages" shall be recoverable as such. the code says so in express terms. I refer as typical examples—the list might be greatly extended—to sect. 135, sub-sect. (3), and sect. 411 of the Merchant Shipping Act 1894 and to sect. 42, sub-sect. (2), of the Merchant Shipping Act 1906. This omission from the statute, not, as I think, to be explained if the respondents' view of the enactment be correct, is, I cannot doubt, strongly confirmatory of

the appellants' contention as to the true meaning of sect. 1.

But the provision of the section to which I now proceed is even more illuminating in this same direction. The Act of 1925, by sect. 1, becomes operative only if by reason of the wreck of the ship on which he was employed a seaman's service " terminates before the date contemplated in the agreement." The significance of these last words will not be lost when it is noted that, in point of effect, they are identical with and have been taken from sect. 158 of the Act of 1894, itself referred to in sect. 1. Indeed, if the two sections are laid side by side it is at once seen that they are completely complementary each to the other. A vessel is wrecked in the course of a voyage. Her seamen's wages under the articles prior to the wreck are dealt with in sect. 158; these wages, or some of them, subsequent to the wreck in sect. 1. But nothing except these wages is being dealt with in either section. True it is that in relation to " wages " one great extension, in point of principle, is made in 1925, beyond the stage reached in 1894—an extension which is never to be forgotten in this case, if the exceptional character, even of the admitted burden now laid upon owners, is to be fully appreciated. The wages for which, under sect. 158, the owner is made liable are in respect of services which, albeit fruitlessly, had at least been rendered to him by the seaman. Under sect. 1 of the Act of 1925 the owner is being made to pay " wages " although no service whatever need in return either be rendered or tendered to him by the seaman receiving them. Apart from this distinction, which certainly does not instruct judicially the extension of the owner's liability beyond express definition or clear implication, the correspondence of the two sections seems complete. The event is the same; the agreement in relation to any one seaman is the same; the " wages " in the Merchant Shipping Act 1894, s. 158, are indubitably " code wages," and if it remains in any way doubtful whether the " wages " in sect. 1 of the Act of 1925 are other than the same " wages " which but for the wreck would have been payable under the same agreement—the limitation established, as I suggest *aliter*—note how that doubt is weakened if not, indeed, resolved by the fact that to make either section operative the wreck of the vessel must have taken place before the termination of the seaman's contemplated service, and not later. To sect. 158 that condition was of course essential, for the reason that had it been omitted the whole section would have been otiose and superfluous. But the condition is transferred almost textually to sect. 1 of the Act of 1925, and for no other imputable reason, as I suggest, than that its presence in that section, on its only true construction, was essential if the section was to be in no circumstances inoperative. There must be at least one day's " wages " to be received under it if the section is to be of any use at all to the seaman.

But, on the other hand, if the " wages " to be receivable under this Act of 1925 have in point of duration no relation to the provisions of the current articles it is, I suggest, difficult to understand why a person whose remuneration now is based upon the profits of the voyage should be excluded from the benefit of the Act, sect. 1, sub-sect. (3), while it is inconceivable that the above condition could have been deliberately transferred over from sect. 158. In relation to such an enactment as is now hypothesized the condition is alike arbitrary and senseless. This is well illustrated by the case of the *Celtic*, the subject of the second appeal. The *Celtic* foundered off Queenstown on the 10th Dec. 1928, her voyage being contemplated to end at Liverpool on the next day, the 11th Dec. The respondent to that appeal, Comerford, has, by the Court of Appeal which accepted his contention, been awarded two months' wages from the earlier date. If, however, his vessel, instead of foundering off Queenstown on the 10th, had foundered off Liverpool on the 11th Dec., all benefit to Comerford must, under the section, have been refused, and yet one can descry no alteration of circumstance which could rationally instruct so amazing a change.

It almost seems that Scrutton, L.J. was conscious of this anomaly. He felt himself dispensed from facing it, however, by an assertion which, with the profoundest respect for the Lord Justice, I am quite unable to follow. " It is obvious," he says, " that the wreck or loss of a ship on which a seaman is serving will always happen before the date contemplated for the termination of his service." Why is it obvious? I would ask. Is that the reason why the same condition was inserted in the Merchant shipping Act 1894, s. 158? In a statute which applies to any voyage without reference to circumstance is there any greater likelihood that a ship will be lost on any one day of the voyage rather than on any other day? In the case even of the *Celtic* might not her foundering have *a priori* just as well happened off Liverpool on the 11th as off Queenstown on the 10th Dec. 1928?

I regret that the Lord Justice for a reason which seems to be no reason, felt dispensed from dealing with this matter. I should have been helped by his views upon it. All I can say, for want of any answer so far made, is that I see in this condition, and in the close correspondence both as to subject-matter and otherwise between sect. 158 of the Act of 1894 and sect. 1 of the Act of 1925, the strongest further indication that this Act of 1925 has no reference at all to such a claim as the respondents'.

I find also in the second paragraph of the section indications pointing to the same conclusion. Note, on this view of the section, how neatly it fits into the scheme: how appropriate for the decision of a court of summary jurisdiction is the only question that can now arise before it. On proof by a seaman that his vessel was lost on the voyage, on production

of the articles, and on further proof that he was in fact unemployed upon days included in the articles and within two months from the wreck, his case is established and he is entitled to judgment unless the owner can disprove his case by proof of such things personal to the seaman as Scrutton, L.J. refers to, or by proof, to borrow the language of unemployment insurance, that he has not been genuinely seeking work. There is no room or occasion for proof of any special circumstance in relation to the ship, *e.g.*, that if she had not been lost she would have been laid up or sold to another owner or otherwise disposed of, or in relation to the seaman himself that he would have been or would not have been again engaged, at the same or a lower wage, in the same or in another position. It is to my mind not without significance that in the section there is neither directly nor indirectly any reference to these vague and indefinite considerations which, if the respondents' view of it is right, are vital to every such claim as they now make.

But I do not further expand these considerations in a judgment already too along. I leave my analysis of the section at the point that I have reached, content, so far as I am concerned, with the results attained.

Three things only will I add. First, as I read Slesser, L.J.'s judgment, he arrives at the same conclusion as I have done by reliance primarily on the second paragraph of the section. I desire to say that for myself I doubt if I could have reached the same conclusion had I not been able to find the basic justification for it in the first paragraph, and I should also have distrusted its correctness, had it involved the placing of any qualification upon the words in the first paragraph "in respect of each day on which he is in fact unemployed." These words appear to me to be quite unambiguous, and they must, I think, in any true interpretation of the section have their ordinary meaning assigned to them.

Next, having reached the above conclusion without reference to the scheduled Convention to which it is the purpose of the Act of 1925 to give effect, I would now inquire, merely as a matter of interest, whether the conclusion is or is not in accord with the Convention. I cannot doubt that it is in complete accord therewith. The difficulty in comparing the Convention with the Act consists in the fact, already alluded to, that the draftsman has not transferred to the Act the words of the Convention, but he has translated them into the technical language of the Merchant Shipping Acts. And, if the Act be interpreted as I have sought to interpret it, his translation is to my mind in this matter entirely accurate. It seems to me clear that the "two months' wages" to which by art. 2 the "indemnity . . . may be limited" are not two months taken out of the life of the seaman, but two months taken out of the "contract for service," where the unexpired term of that contract exceeds two months. I do not find any suggestion in the Convention that the owner is to be made liable either at the contract rate of wages or at any other rate for days of unemployment covered by no contract at all with himself.

If, therefore, the respondents' construction of the Act is to be accepted it means that Parliament under no international obligation in that behalf, in a statute which contains no hint of any such intention, has gratuitously gone out of its way to impose on an owner a liability to a seaman for wages for which he has never contracted and, apart from the statute, is under no conceivable liability to pay. He is to have no return for the payments so to be made, and Parliament has chosen as the occasion for imposing upon him this liability, in relief it would seem, if the respondent *Comerford's* case may be regarded as typical, of the Unemployment Insurance Fund to which he has already contributed, at the moment when the owner is already confronted with the total loss of his ship.

Parliament can, of course, do anything, and I hope that judicially I shall never be other than obedient to its directions, whatever, when they are clearly expressed, these directions may be. But I should, as I conceive, be rendering a disservice to Parliament if without compelling words I were to impute to it an enactment which as sought to be interpreted by the respondents is as entirely discordant with legislative precedent as, in my judgment, it is opposed to good sense and fairness.

I do not suggest that this Act of 1925 is clear, I do not suggest that sect. 1 bears its meaning, as I have interpreted it, upon its sleeve. It yields up its secret only to the patient inquirer; its truth lies at the bottom of the well. It is obscure; it remains oblique, but it is not in the result ambiguous. The truth from the well is found, at the end of the search for it, to have been leaking out of the section itself all the time, just as the truth, in the words of a learned judge whom we all have in remembrance, may leak out sometimes even from an affidavit.

If the decision rested with me I would allow both appeals.

Lord Tomlin (read by Lord Thankerton).—The only question on these appeals is as to the construction of the Merchant Shipping (International Labour Conventions) Act 1925, which I shall refer to as the Act of 1925.

At common law where a ship was lost on a voyage the seamen could recover nothing.

By sect. 158 of the Merchant Shipping Act 1894 it was enacted as follows:

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

On the 9th July 1920 the general conference of the International Labour Organisation of

the League of Nations adopted a draft Convention concerning unemployment indemnity for seamen in case of loss or foundering of their ship.

Art. 2 of the draft Convention was in the following terms :

In every case of loss or foundering of any vessel the owner or person with whom the seaman has contracted for service on board the vessel shall pay to each seaman employed thereon an indemnity against unemployment resulting from such loss or foundering.

This indemnity shall be paid for the days during which the seaman remains in fact unemployed at the same rate as the wages payable under the contract, but the total indemnity payable under this Convention to any one seaman may be limited to two months' wages.

The Act of 1925 is intituled "An Act to give effect to certain draft Conventions adopted by the International Labour Conference relating respectively to an unemployment indemnity for seamen in the case of loss or foundering of their ship" and other matters.

The preamble of the Act of 1925 recites the adoption of the Conventions referred to in the title and that such Conventions contain the provisions set out in the First Schedule to the Act. Art. 2 of the Convention of the 9th July 1920 is included in the First Schedule.

The preamble further recites that it is expedient that for the purpose of giving effect to the draft Conventions such provision should be made as is contained in the Act.

Sect. 1 of the Act of 1925 then enacts as follows :

(1) Where by reason of the wreck or loss of a ship on which a seaman is employed his service terminates before the date contemplated in the agreement, he shall, notwithstanding anything in section one hundred and fifty-eight of the Merchant Shipping Act 1894, but subject to the provisions of this section, be entitled, in respect of each day on which he is in fact unemployed during a period of two months from the date of the termination of the service to receive wages at the rate to which he was entitled at that date.

(2) A seaman shall not be entitled to receive wages under this section if the owner shows that the unemployment was not due to the wreck or loss of the ship and shall not be entited to receive wages under this section in respect of any day if the owner shows that the seaman was able to obtain suitable employment on that day. . . .

On the 29th Oct. 1928 the respondent in the first appeal was engaged by the appellants to serve on board the steamship *Croxteth Hall* as a quarter-master and able-bodied seaman at a wage of 9*l.* 10*s.* per month.

The articles under which the respondent was engaged were for a voyage of not exceeding two years' duration to any ports or places within the limits of 75 deg. north latitude and 60 deg. south latitude commencing and proceeding as mentioned in the articles and to end at such port in the United Kingdom or Continent of Europe (within home trade limits) as might be required by the master.

On the 27th Feb. 1929, before the date contemplated in the articles for the end of the voyage and while proceeding homewards on her voyage from Antwerp to Middlesbrough the ship was wrecked off Flushing.

Had the ship proceeded on her voyage without accident she would have reached Middlesbrough not later than the 11th March 1929. There the voyage would have ended and the crew would have been discharged from further service under the articles.

After the wreck the respondent was out of employment.

As the result of the judgments of the President and of the Court of Appeal (Slesser, L.J. dissenting) the appellants have been ordered to pay two months' wages from the date of the wreck and to satisfy the judgment by paying to the Ministry of Labour the amount which the respondent received in respect of unemployment pay from the Labour Exchange and by paying the balance, if any, to the respondent.

The appellants contend that upon the true construction of the Act of 1925 the statutory right of the seaman to recover wages is not a right to two months' wages, but only a right to wages till the time when the voyage would have terminated if there had been no wreck, but not in any event more than two months' wages.

To my mind sect. 1 of the Act of 1925, upon which the question depends, is free from ambiguity.

Under sub-sect. (1), disregarding for the moment the words "subject to the provisions of this section," I think that a seaman whose service by reason of the wreck or loss of his ship terminates before the date contemplated in the agreement of service can claim wages during two months from such termination for each day on which he was in fact unemployed. But there is a qualification introduced by the words "subject to the provisions of this section." That qualification is to be found in sub-sect. (2), and the effect of the sub-section in question is, in my opinion, to enable the shipowner to prove certain things which if proved will disentitle the seaman to all or some part of that which otherwise he would have taken under sub-sect. (1).

I cannot find in any part of the section anything which introduces a cutting down of the two months' period by reference to the date at which but for the wreck or loss the service would have terminated.

Nor do I think, assuming there is any divergence between the draft Convention and the Act, that it would be proper to resort to the draft Convention for the purpose of giving to the section a meaning other than that which in my judgment is its natural meaning. Upon this view of the matter I think that *primâ facie* the respondent, who has proved that he was out of employment during the two months, was entitled to two months' wages from the wreck. Further, the appellants have not upon the evidence discharged the onus thrown on them by sub-sect. (2), and the respondent's *primâ facie* right has therefore not been displaced.

The facts in the second appeal do not in any respect material to the matters which have been argued before your Lordships' House differ from those in the first appeal.

In my opinion both appeals fail, and should be dismissed.

Lord Macmillan (read by Lord Thankerton).—I am unable to find in sect. 1 of the Merchant Shipping (International Labour Conventions) Act 1925 the ambiguity which is said to lurk in it although counsel for the appellants sought diligently to persuade the House of its existence. It was suggested that it resided in the words " in fact unemployed " in sub-sect. (1), which were said to be susceptible of meaning either " out of work generally " or " not employed under the aforesaid agreement of service," and it was argued that the use of the word " wages " to describe the payment to the seaman supported the latter reading because the payment of wages connotes the existence of a contract of employment. In my view the words in question do not give rise to any such ambiguity. The uncompromising expression " in fact unemployed " seems to me to make it as precise as language can make it, that the statute requires no more of the seaman than that he shall have been actually out of work on each day of the two months for which he claims.

It is no doubt true that where the language used by the Legislature presents a choice of two or more meanings equally tenable it is admissible within certain limits to have resort to the aid of extraneous considerations and certainly to the context of the statute itself in order to discover which meaning was most probably intended: (see for example *Victoria City* v. *Vancouver Island, Bishop*, 1921, 2 A. C. 384), per Lord Atkinson, at pp. 387–8 and authorities there cited). But the terms of the statute in the present case offer no such choice to my mind, and only a sophisticated reading could import any ambiguity into them.

The object of representing the sub-section to be ambiguous, as your Lordships were frankly told, was to pray in aid of its interpretation the language of the preamble and of the scheduled Convention, to give effect to which the statute bears to have been enacted. But if it were legitimate or necessary to go outside the terms of the subsection and resort to these aids I do not think that they assist the appellants' case. For the word " indemnity," which both in the preamble and in the Convention is used to describe the payment to the seaman and which was specially relied on by the appellants, is certainly not applicable in its technical sense to the benefit which sub-section (1) confers on the shipwrecked mariner. If he has signed on for a six months' voyage and the vessel is wrecked at the end of the first month he will not receive five months' wages but a maximum of two months' wages, which may be an arbitrary compensatory payment but is not an indemnity.

The judgment of Slesser, L.J., who dissented in the Court of Appeal, approaches the question through the second sub-section. If I follow his reasoning, the learned Lord Justice holds that if the owner shows that any days included in the two months' claim are beyond the date on which the seaman's contract of employment would have terminated if there had been no wreck and the voyage had reached its natural end, then in law his unemployment during such days cannot be said to be " due to the wreck or loss of the ship." Hence the words " in fact unemployed " in sub-sect. (1) must be read as meaning " unemployed during what would have been the currency of the seaman's contract of employment subsisting at the time of the wreck had it not been frustrated by the occurrence of the wreck." With all respect to the learned Lord Justice I doubt the soundness of his reasoning. Sub-sect. (2) qualifies the right of the seaman to two months' wages, conferred by sub-sect. (1) " subject to the provisions of this section," by affording the shipowner two forms of defence to a claim for two months' wages. The first defence, on which Slesser, L.J. relies, permits the shipowner to escape liability if he can show, the onus being on him, that the unemployment which the seaman has in fact experienced " was not due to the wreck or loss of the ship." If the shipowner had been permitted to avoid liability by showing that the unemployment was not due to the premature termination of the seaman's service the argument might perhaps have had more force. But I am by no means satisfied, having regard to the common practice of re-engaging seamen for successive voyages in the same ship, that the Legislature intended that no unemployment extending in time beyond the date of the natural expiry of the frustrated contract could be regarded as " due to the wreck or loss of the ship." By the wreck of his ship the seaman is disappointed of the prospect of re-engagement for her next voyage which in the ordinary case he may reasonably entertain, and he must set about finding a new ship on which to serve, and this may not always be easy. It may well be that this was in the view of the Legislature when the arbitrary limit of two months was fixed, irrespective of the date on which the contract current at the date of the wreck would in any case have expired.

The facts in the case of the appeal relating to the steamship *Celtic* do not differ from those in the case of the appeal relating to the steamship *Croxteth Hall* in any respect material to the question argued at your Lordships' bar, and I concur in the motion that both appeals be dismissed with costs here and below.

Appeals dismissed.

Solicitors for the appellants in both appeals, *Hill, Dickinson*, and *Co.*

Solicitors for the respondent in the first appeal, *Pattinson* and *Brewer*, agents for *G. J. Lynskey* and *Sons*, Liverpool.

Solicitor for the respondent in the second appeal, *Alexander Smith*, agent for *D. H. Mace*, Liverpool.

Nov. 11, 13, 14, *and Dec.* 9, 1930.

(Before Lords Buckmaster, Dunedin, Blanesburgh, Warrington, and Thankerton.)

THE OTRANTO. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision — Vessels on crossing courses — Failure of "give-way" ship to take action— Action taken by the "stand-on" ship— Starboarding without taking off way—Negligence—Regulations for Preventing Collisions at Sea 1910, *Arts.* 19, 21 (*note*).

The respondents' steamship O. *sighted the appellants' steamship* K. M. *at a distance of about seven miles on her port bow. The* O. *accordingly kept her course and speed until about three minutes before the collision, when, the* K. M. *having taken no action to avoid her, the master of the* O. *determined that the* K. M. *could not avoid the* O. *by her own action alone, and he accordingly starboarded, and then hard-a-starboarded, and sounded two short blasts. The* K. M. *was then seen to be porting, and the* O. *thereupon went full speed astern on both engines. About a minute later the vessels came into collision.*

Held, that although the captain of the O. *was entitled to act, his action was not in accordance with the requirements of good seamanship. First, and before all things, he ought to have stopped and reversed his engines, and in addition to that, whatever action he took ought to have been under a port helm.*

Decision of the Court of Appeal (ante, *p.* 99; 142 *L. T. Rep.* 544; (1930) *P.* 110) *reversed.*

Appeal from the decision of the Court of Appeal (Lawrence and Greer, L.JJ.; Scrutton, L.J. dissenting) (reported *ante*, p. 99; 142 L. T. Rep. 544; (1930) P. 110) in a damage action.

The plaintiffs, owners of the Japanese steamship *Kitano Maru*, claimed damages from the defendants, owners of the steamship *Otranto*, in respect of a collision between the *Kitano Maru* and the *Otranto*, which took place at about 8.48 p.m., shortly after sunset, on the 11th Aug. 1928, in the North Sea, some miles from the mouth of the river Humber. The weather at the time was fine and clear. The *Kitano Maru*, a vessel of 7952 tons gross, 474ft. long, was in the course of a voyage from Middlesbrough to Antwerp with about 2000 tons of cargo. The *Otranto*, a vessel of 20,032 tons gross, 12,021 tons net, 658ft. in length, was on a voyage from Immingham to Copenhagen and other northern capitals, with a large number of passengers. The facts as found by Hill, J. were that the *Otranto* was travelling at about 16 knots, and saw about seven miles distant the *Kitano Maru* on a bearing which was accurately taken by the officer on watch; that the bearing continued the same for about ten minutes; and that the officer then sent a message to the master, who came on the bridge and took charge from the second officer. Eight minutes before the collision the *Kitano Maru* was judged to be two or two-and-a-half miles away, and about 3½ points on the port bow. The bearing continued almost the same, varying only by one degree. Three or four minutes before the collision, when the distance, as the master judged, was a quarter to half-a-mile, and was judged by the second officer to be hardly three-quarters of a mile, the *Kitano Maru* had not altered her course or her speed or given any signal. The master of the *Otranto* therefore recognised that the position was very dangerous, and he decided to take action, and approximately about three minutes before the collision he gave an order, "starboard," and immediately afterwards "hard-a-starboard." That order was carried out, and he gave two short blasts. He brought the *Kitano Maru* a little on the port bow, and then the *Kitano Maru* began to turn to starboard, and gave a short blast. Immediately upon that he gave an order "hard-a-port," but before it could be carried out he countermanded it, and repeated "hard-a-starboard," and followed that by full astern on both engines about a minute before the collision.

The Court of Appeal held (Scrutton, L.J. dissenting, upon the ground that the *Otranto* was to blame for not keeping her course), that the *Otranto* ought not to be held to blame for failing to take off her way. The relevant authorities established no general rule that a vessel in taking action justified by the note to art. 21, must first take off her way. The *Otranto* was therefore bound to take such action as in the circumstances might appear best calculated to avoid the collision, and the master of the *Otranto* was not negligent in taking the action which he took, notwithstanding that if the *Otranto* had taken off her way the collision might in the circumstances have been avoided.

The owners of the *Kitano Maru* appealed.

The Regulations for Preventing Collisions at Sea 1910, so far as material, are as follows:

Art. 19. When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

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

Note.—When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision: (see Arts. 27 and 29).

Dunlop, K.C. and *R. F. Hayward* for the appellants.

A. T. Miller, K.C. and *H. C. S. Dumas* for the respondents.

The House took time for consideration.

Lord Buckmaster.—On the 11th Aug. 1928, in the North Sea, off the mouth of the Humber, the *Otranto*, a twin screw steamship of 2032 tons gross register and 658ft. in length, bound

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

from Immingham in the Humber to Copenhagen on a cruise to Norway with 586 passengers was proceeding at a speed of about sixteen knots on a course of North 59° E. true. The *Kitano Maru*, a twin screw steamship of 7952 tons gross register and 474ft. in length, was bound from Middlesbrough to Antwerp partly laden with cargo. She was proceeding at a speed of about thirteen knots on a course of S. 38° E. true. The wind was light, the sea smooth and the tides were slack.

The courses of the vessels were crossing at about a right-angle, the *Kitano Maru* bearing about three-and-a-half points on the port bow of the *Otranto* and the *Otranto* bearing about four-and-a-half points on the starboard bow of the *Kitano Maru*. It was the duty of the *Kitano Maru*, being the vessel which had the other on her starboard side, to keep out of the way of the *Otranto* and avoid crossing ahead of her. The time of day was just after 8 p.m. The light was good, permitting of seeing approaching vessels without difficulty but making the estimate of distance a little uncertain. There resulted a collision between the two vessels in which both vessels were injured. Litigation was initiated at the instance of the owners of the *Kitano Maru* against the owners of the *Otranto* in which litigation the claim was met by a counter-claim. The case was heard before Hill, J. with the assistance of Trinity Masters who found both vessels to blame and made no apportionment of damage. Appeal was taken to the Court of Appeal who, sitting with assessors, by a majority, Scrutton, L.J. dissenting, found the *Kitano Maru* alone to blame. Appeal has now been taken to your Lordships' House and what is asked is to restore the judgment of Hill, J.

It has not been contended that the *Kitano Maru* was not to blame. Hill, J., before whom the case depended, found that the crew on board the *Kitano Maru* put forward an absolutely false account of the events prior to the collision. He said in plain words that the witnesses were liars. On the other hand, he believed the story given by the officers on board the *Otranto*. That estimate was agreed to by all the learned judges of the Court of Appeal. The facts of the case may, therefore, be taken according to the testimony on board the *Otranto*. The *Kitano Maru* was first observed from the deck of the *Otranto* a little before 8.30, at which time she was about six to seven miles distant, by Shurrock, the supernumerary second officer, who had come on duty at 8 p.m. At 8.29 he took a bearing of the *Kitano Maru*. This he took from the standard compass. He then returned to the bridge but went up again at 8.35 p.m. and took another bearing, and found it was the same as before. The *Kitano Maru* was still a good way off. He continued to watch her and finding that she was not altering her bearing he sent for the captain, who came at once at 8.40 p.m. At that time he estimated the distance between the two ships at about two-and-a-half miles. He went and took another bearing and found it practically the same. The story may now be taken up according to the testimony of the captain. On arriving on the bridge he was told by the second officer of what he had observed as to the bearing. He estimated the vessel at this time at about two-and-a-half miles off. He watched her closely and could see her quite well, but she held on her course without altering either course or speed. That continued five minutes, another report as to the bearing being unaltered was given by the second officer from the compass. By this time she was apparently up to a quarter to half a mile distant. Then, to give the captain's own words, " I considered that I was in a very dangerous position. She had shown no sign of altering her course or speed and I assumed that she was trying to cross my bow and I thought it was time for me to take immediate action." Accordingly, at 8.45 p.m. he ordered the helm hard a-starboard and sounded two short blasts. Up to this time there had been no alteration on the part of the *Kitano Maru* of either course or speed. Half a minute after the helm of the *Otranto* had been put hard to starboard and when the vessel had begun to pay off, the second officer suddenly shouted, " She is altering her course to starboard. She is porting," and then, again using the words of the captain, " I immediately gave an order ' hard-a-port,' but the ships were so close together then that I could see that a collision was inevitable, but, I think, before the helm was even amidships I put her helm back to hard starboard and from the time I starboarded my ship was swinging hard to port under a starboard helm. At 8.48 p.m. the collision occurred. One minute before the collision the engines of the *Otranto* were put hard astern."

The regulations applicable to this set of circumstances are these :

19. When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

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

Note.—When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision : (see Arts. 27 and 29).

27. In obeying and construing these rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

I agree with Greer, L.J. that these rules must aid each and that the note to rule 21 which relates to special conditions does not destroy the effect of rule 27 which is of general application.

In obedience to rule 21, therefore, the *Kitano Maru* was the ship bound to give way, and the *Otranto* to keep her course and speed. The negligence of the *Kitano Maru* was gross and palpable. She made no attempt whatever to give way until two minutes of the spot

where disaster was inevitable. She did not, in fact, stir from her course until thirty seconds after the *Otranto* had begun to swing to port, and she then turned to starboard under a port helm. It was impossible to excuse such manoeuvres, and, apparently recognising this fact, the story told on behalf of her owners was found to be a mass of deliberate and concocted lies.

With this comment she can pass from consideration, for the real issue in this case, on which there has been great divergence of judicial and nautical opinion, is whether the *Otranto* was negligent in what she did?

The negligence alleged against her can be summed up under four heads: (1) That she had no right to alter her course or her speed at the moment she did; (2) That if any step taken by her could be justified, it would have been that of reversing her engines; (3) That if she altered her helm, she should have altered it to port and steered her course to starboard; (4) That even if the engines had not been stopped before, they should have been stopped at once when she realised that the *Kitano Maru* was moving to starboard.

The only one of these points that is of general application is that relating to the moment when the *Otranto* altered her course, and upon this Hill, J. and Scrutton, L.J. are at variance. Much has been said about this rule in many cases. It is beyond all doubt of the utmost consequence that it should be obeyed. The ship that is bound to keep her course is not entitled to alter it at a moment when there is ample time for the ship that is bound to give way to discharge her duty, for that ship is entitled to rely upon obedience to the rule by the ship that has to keep her course. But, acknowledging to the full the vital consequence of strict obedience, there still remains the fact that these rules were made for the guidance of mariners and not of mathematicians, and that it is not right, by an elaborate process of calculation after the event, to decide that the ship that was bound to keep her course acted a little before the moment that in fact she need have done. When two ships are travelling at sixteen and thirteen knots an hour, the moment when safety has passed and peril has arrived cannot be determined to a hair's breadth. The rule was designed to secure that the standing-on vessel shall maintain her course until the last safe moment. What that safe moment is must depend primarily upon the judgment of a competent sailor, forming his opinion with knowledge of the necessity of obedience to the rule and in face of all the existing facts. Subsequent examination may show that his judgment could not properly have been formed, in which case the rule has been broken without excuse, but the ultimate decision is not to be settled merely by exact calculations made after the event, but by considering these facts as they presented themselves to a skilled man at the time. This is in close accordance with the view expressed by Lord Herschell in *The Tasmania*, where he says (6 Asp. Mar. Law Cas., at p. 518; 63 L. T. Rep., at p. 2; 15 App. Cas., at p. 226): "As soon then as it was, or ought to a master of reasonable skill and pruduence to have been, obvious that to keep his course would invoke immediate danger, it was no longer the duty of the master of the *Tasmania* to adhere to the 22nd (now the 21st) rule. He was not only justified in departing from it, but bound to do so, and to also use his best judgment to avoid the danger which threatened." And again with Vaughan Williams, L.J., in *The Olympic and H.M.S. Hawke* (12 Asp. Mar. Law Cas. 580; 1913, P. 214, at p. 245), where he says: "I am inclined to think that in a case where good seamanship would assume that collision cannot be avoided by the action of the giving-way vessel alone, the case falls with the exception"—namely, the exception to the rule to keep course and speed—"even though in fact the giving-way vessel could by her own action have averted collision." This is confirmed in other words by Lord Parker in the same case: (at p. 279). In *The Orduna* (14 Asp. Mar. Law Cas., at p. 576; 122 L. T. Rep., at p. 513; (1919) P., at p. 390), Bankes, L.J. comments on this but does not express disagreement, nor can I find there was any disapproval in the judgment of this house in *The SS. Orduna* v. *Shipping Controller* (1921, A. C. 250). A sentence from the opinion of Lord Sumner shows at once how that case differs from the present. At p. 260 he says: "The evidence of the officer of the watch, that at the moment when he took this helm action he judged the position to be a safe one, leaves him without excuse."

Here I have already referred to the evidence of the captain upon the point in chief and to it may be added his answers. In cross-examination, he is there asked: Q. "Was it then (namely, at 8.44) that you gave the order to starboard?" A. "Just after that." Q. "At that time do you say that it was a very dangerous position?" A. "Yes." And there is no evidence nor, in my opinion, any calculation that would justify us in saying he was wrong. In *The Albano* (10 Asp. Mar. Law Cas., at p. 207; 96 L. T. Rep., at p. 339; (1907) A. C. 193, at p. 207) Sir Gorell Barnes, in giving the judgment of the Privy Council, says this: "It must always be a matter of some difficulty for the master of a vessel which has to keep her course and speed with regard to another vessel which has to keep out of her way, to determine when the time has arrived for him to take action, for if he act too soon he may disconcert any action which the other vessel may be about to take to avoid his vessel, and might be blamed for so doing, and yet the time may come at which he must take action. Therefore he must keep his course and speed up to some point, and then act, but the precise point must necessarily be difficult to determine, and some little latitude has to be allowed to the master in determining this."

In these circumstances, I am not prepared to hold that the captain of the *Otranto* broke

any rule when he decided to act. The lives of 560 passsengers were in his care, and with such responsibility calculations cannot be expected to be as minute and accurate as when distances, speed, and times are afterwards plotted out in a law court on a sheet of paper. All the six experienced men who have advised the courts on this point are in agreement with this conclusion.

But although the captain was entitled to act, I am unable to find that his action was in accordance with the requirements of good seamanship. First, and before all things, he ought to have stopped and reversed his engines. Upon this point the nautical assessors by whom we have been advised are in agreement. This, by itself, might have saved an accident. But, in addition to this, whatever action he took ought to have been under a port helm, which would have tended to draw his vessel into line with the *Kitano Maru* and not opposed to it. I realise that his feeling was not to expose his unprotected flank to the beak of the Japanese ship, but in doing what he did he courted disaster, while the other manœuvre would have taken him into safety. I think, too, that, thirty seconds after he began to move, even if his engines had not been reversed before, they should have been reversed even then, though I doubt if, when once the initial mistake had been committed and the boat was swinging under a starboard helm, the collision could have been avoided, and had he changed to port helm, which he momentarily tried to do, he might have received the blow amidships.

I have examined, but I have not been able to find much assistance from, the authorities. It seems to me impossible to lay down a general rule that in all cases of crossing ships a starboard helm for the stand-on ship must necessarily be a negligent act. It probably often is so, and it is remarkable that in no case quoted has a port helm been held negligent in similar circumstances and in only one case the case of *The Rayford* (10 Ll. L. Rep. 743) has starboarding been excused. Scrutton, L.J., who was one of the members of the Court of Appeal, says that in that case the view taken was that the starboarding was so slight as not to affect the collision. In the present case, coupled with maintaining speed, it was, as our assessors advise, a negligent manœuvre for which the *Otranto* must suffer the consequences, and from these consequences I cannot hold her absolved by the subsequent action of the *Kitano Maru*. Upon the question of altering the share of responsibility each has to take, this is primarily a matter for the judge at the trial, and unless there is some error in law or fact in his judgment it ought not to be disturbed.

I am therefore of opinion that the judgment of Hill, J. was right in all respects and should be restored.

Lord Dunedin.—I concur. I confess I do so with the greatest regret, because I think the captain of the *Otranto* was put in a terribly difficult position by the utterly unjustifiable conduct of the *Kitano Maru*, but in view of the advice we got from our assessors, and also the views expressed already by my noble and learned friend on the Woolsack, I am unable to resist the conclusion that the captain of the *Otranto* was wrong in keeping full speed.

Lord Blanesburgh.—I also concur.

Lord Warrington.—I concur.

Lord Thankerton.—I concur.

Appeal allowed.

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

Solicitors for the respondents, *Parker*, *Garrett*, and *Co.*

Judicial Committee of the Privy Council.

Oct. 27, 28, 30, 31 ; *Nov.* 3, 4, 6, 7, 1930 ; *and Jan.* 26, 1931.

(Present : Lords Merrivale, Atkin, and Russell, sitting with nautical assessors.)

United States Shipping Board v. The Ship St. Albans. (*a*)

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES

Collision — Evidence — Photographs taken from passing ship—Calculations made therefrom—Locality of collision.

In a collision action between two vessels in Sydney Harbour the evidence given at a court of inquiry included three photographs which had been taken by a passenger from an outward bound ship showing the vessels just before the collision, in collision, and afterwards. Each photograph had as a background a long stretch of the frontage of the harbour, showing outstanding objects in the background on either hand. Subsequently leave was given to embody the results of the photographs in a diagram, which was produced by three land surveyors, and the Full Court found the diagram to be a true presentment of the material facts as to the locality of the collision and based their judgment thereon.

Held, that the Court of Appeal, in Hindson v. Ashby (74 *L. T. Rep.* 327 ; (1896) 2 *Ch.* 1) *having demonstrated the necessity for careful delimitation of the uses for which photographs could be accepted as means of proof of matters of fact, the skill or science called for in the preparation of the diagram which had been accepted as evidence, was not that of a land surveyor, neither was there before the Court of Appeal the evidence of any witness skilled and experienced in such a task.*

Held, therefore, that standing alone the new evidence did not warrant departure from the

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

judgment of the court of first instance, which, without new evidence, was admitted to be unimpeachable.

Judgment of the Supreme Court of New South Wales, in Admiralty, reversed.

APPEAL from the Full Court of the Supreme Court of New South Wales dated the 17th Dec. 1928, reversing the judgment of Street, C.J. sitting in Admiralty Jurisdiction. The case arose out of a collision between the appellants' motor-ship *Crown City* and the respondents' steamship *St. Albans*, which occurred in Sydney Harbour in the neighbourhood of Bradley's Head, about 12.48 p.m. on the 22nd Oct. 1927. The *Crown City* was outward bound from Sydney to Melbourne and the *St. Albans* was inward bound from Japan to Sydney. The collision took place in daylight. The weather was clear, the wind fresh from south-south-east, and squally, and the tide was flood of very little, if any, force. Both vessels received damage. There was no counter-claim by the owners of the *St. Albans* for the damage which she received. The claim in the action related to the damage received by the *Crown City*. Under the provisions of the law locally applicable, a Commonwealth Court of Inquiry was held presently after the collision whereat both parties were present. Following on the enquiry, the appellants brought the present action, alleging the respondents by their servants to have been to blame for the collision, and it was agreed that the action should be tried on the evidence given at the inquiry. Three photographs were produced at the inquiry as having been taken by a passenger on an outward bound ship, showing the vessels just before the collision, in collision, and afterwards. Each photograph had as a background a long stretch of the frontages of the harbour showing outstanding objects in the background on either hand.

The Chief Justice stated that he was unable to form a trustworthy judgment on the contents of the photographs. He was therefore bound to deal with the case on the evidence of the eye witnesses and accordingly found the *St. Albans* to blame.

On appeal to the Full Court leave was given to adduce the evidence of surveyors to prove what conclusions ought to be drawn from the photographs. The evidence thus admitted was embodied in a diagram which purported to lay down the focal points at which the three photographs respectively were taken, and by reference to the backgrounds to extend to points thereon radial lines within which, it was said, the vessels lay at the material times.

The Full Court (Ferguson, Campbell, and Davidson, JJ.) found the diagram produced to be a true presentment of the material facts as to the positions of the two vessels at the material times. Acting upon this view they reversed the decision of the trial judge and found the *Crown City* alone to blame. The *Crown City* appealed.

Dunlop, K.C. and *Stenham* for the appellants.

Raeburn, K.C. and *Willmer* for the respondents.

The considered opinion of their Lordships was delivered by

Lord MERRIVALE.—The appellants, the United States Shipping Board, are owners of the *Crown City*, a steel screw motor-ship of 5428 tons gross register, and 426 ft. in length, which on the 22nd Oct. 1927, found herself in collision with the defendants' steel single screw steamship *St. Albans*, a vessel of 4119 tons gross register and 367 ft. in length, in Sydney Harbour near to Bradley Head, where is found the turning point and place of passing of the traffic into and out of the harbour. The *Crown City* was outward bound for Melbourne from Wooloomooloo Bay within the harbour. The *St. Albans* was inward bound from Japan.

In its actual incidents the collision, which took place in broad daylight, was of an ordinary kind involving simple questions to be determined upon the usual conflict of evidence as to the exact place of the casualty and the course and management of the ships. The proceedings in the litigation have been of an unusual kind. Under the provisions of the law locally applicable a Commonwealth court of inquiry was held, presently after the collision, whereat both parties now in litigation were represented by counsel. Following on the enquiry the now appellants brought their action in the Supreme Court of New South Wales (in Admiralty) alleging the respondents by their servants to have been to blame for the collision. After preliminary acts had been filed the parties agreed that the action should be tried on the evidence given at the inquiry. Respondents, however, called at the hearing before the Chief Justice of New South Wales a surveyor to explain certain photographs, hereafter mentioned at length, which had been produced by one of the witnesses at the inquiry. Then the troubles of the parties as to procedure commenced.

Before the Court of Appeal the respondents obtained leave to call further evidence, and in fact called three land surveyors who gave evidence which they stated to be proof of facts demonstrated by or demonstrable upon the photographs. On the strength of this additional testimony, the finding of the trial judge in favour of the appellants was reversed. What is mainly in question here is the admissibility of this evidence, and if it be received, its proper effect in the determination of the question of liability for the collision.

The nature of the additional proof received in the Court of Appeal and its value as evidence raise questions of law and practice of some general importance.

To make the main facts of the collision intelligible the courses of the two ships need to be appreciated.

The usual course of an outward bound vessel, upon rounding Garden Island, which lies eastward of Wooloomooloo Bay, is to get upon a heading of 95 degrees—that is E. 5 degrees S.

—and on that course to proceed across the harbour until Bradley Head Lighthouse is about abeam, and then under a starboard helm to steam out on a northward and eastward course towards the Sound (by West Channel or East Channel).

On the occasion in question the course of the *Crown City* outward bound from Wooloomooloo Bay and that of the *St. Albans* inward by way of West Channel to Wooloomooloo Bay brought them at about the same time to the immediate vicinity of the Head. At the moment of the collision the *Crown City* had not reached her turning point, and on the other hand the *St. Albans* coming from the West Channel had advanced southward, had had the lighthouse abeam, and had engaged herself in the necessary helm action for making her turn.

The *Crown City* had speed of about eight knots till just before the collision. The speed of the *St. Albans* for reasons not immediately necessary to be stated, was no more than about four knots. The exact course and position of the *Crown City* and the place of collision were in dispute.

The evidence at the public inquiry of witnesses from the *Crown City* and others called on behalf of the now appellants was that the *Crown City* set on her outward course off Garden Island well on the south side of the channel and continued upon a course of 95 degrees and remained on that course until her engines were put full speed astern to avoid collision with the *St. Albans*. That course it was said gave her a heading on which she would have passed with a moderate clearance under the stern of a French vessel, the *Commissaire Ramal*, which was at the time moored at a point about S.S.E. from Bradley Head Light at a distance from the Light of some 1500 ft.

The *Crown City* was in charge of a Sydney Harbour pilot who said he took the usual outward course until collision was imminent. The evidence from the ship corroborated this. It was also substantiated by testimony from the captain of the *Commissaire Ramal* and the pilot who was in charge of her, and by two public officers, the signalman at Garden Island and the signal master who was on duty on a signal tower eastward of the harbour. Each of the two last-mentioned witnesses described his observation of the collision and stated a line of sight from his own standpoint upon which it occurred.

The net effect of the *Crown City's* evidence was to define the place of collision as being upon a line southward of Bradley Head at a distance from the Light which could not well be less than 1500 ft.

The officer who was in charge of the *St. Albans* stated that she passed the Head at about 300 ft., that when they got abreast of the Light the helm was put hard aport and that the vessel was about 300 ft. off from Bradley Head at the collision. He said also that the *Commissaire Ramal* was lying not more than 500 ft. from the Head. The *St. Albans'* captain said that she was abeam of Bradley Head when she took her engine and helm action to avoid collision and was then 500 ft. from the Light with about 300 ft. of navigable water. Her second officer's evidence was that she passed Bradley Head at 300 ft. from the Light and thereupon took helm action. The officer in charge and the captain also deposed to having observed the *Crown City* on her eastward course at successive points practically in line with the Head—the more distant some 2500 ft. off and the nearer about 600 ft. They fixed the place of collision southward of the nearer of these points and purported to establish this by evidence of bearings taken—as was said—while the *St. Albans* was still at the place of collision.

The point so indicated appears to be something less than 1000 ft. in a south-westerly direction from the Light.

The three photographs which have been mentioned were produced at the public inquiry by the master of the outward bound steamship *Orungal*, as having been taken by a passenger on his ship when she was proceeding on her course by the West Channel after she had turned under starboard helm off Bradley Head. They show the vessels just before the collision, in collision, and afterwards, when the *Crown City's* stem was some three-fourths of her length eastward from the stem of the *St. Albans*. Each has as background a long stretch of the frontages of the harbour extending along its southern and south-western shores. By questions directed to the nautical witnesses who saw the collision and by evidence of a surveyor it was sought to be shown on behalf of the *St. Albans* that the place of collision could not have been substantially farther from Bradley Head than the point deposed to by the master and the other officers of the *St. Albans*. The surveyor by examination of the background of the photographs identified outstanding objects in the background on either hand, and by a process the reverse of that by which nautical bearings are taken, used the alignments of the identified buildings in order to draw transit lines and to ascertain the focal point at which such lines intersect, which point it was said must mark the position of the lens of the photographic camera when the view presented in the photograph was obtained. The surveyor plotted on a chart the position of the *Crown City* so determined and stated it to be a position in which the bow of the ship was about 950 ft. from the Bradley Head Light.

Importance was attached at the hearing in the Admiralty Court and in the arguments before their Lordships to evidence given by numerous witnesses at the public inquiry with regard to the course of the *St. Albans* in the five minutes immediately preceding the collision. Off Bradley Head incoming vessels bound for Wooloomooloo Bay must make a turn of five points to come over from the southerly course down the West Channel to their westward course towards the reach between Garden Island and Fort Denison.

The *St. Albans*' preliminary act states that her course when the *Crown City* was first seen was S.W. by S. ½ S. What was said generally by the *Crown City's* witnesses was that "she did not make the turn." Captain McCaw of the *Crown City* said she was on a course of about S.S.W. and to all appearances did not alter her course. The *Crown City's* pilot said the *St. Albans*' course when sighted was S.W. by S. ¾ S. and at the collision "was not higher than S.W. ½ S. and may be further south than that." The master of the *Commissaire Ramal* "did not think she made any change in her course."

The witnesses for the respondents gave evidence which on the whole was consistent with their preliminary act, where the respondents having stated their vessel's course when the *Crown City* was sighted said that the action taken by the *St. Albans* to avoid the collision was that "the engines of the *St. Albans* were put full speed astern, three short blasts blown, and the helm was put hard aport, and the starboard anchor dropped about two minutes before the collision." The master said "We got abreast of the Light and the helm was put hard aport. The ship began to swing but very slightly on account of her going so slow. Then we decided to go full speed astern and let go the starboard anchor." "The whistle was sounded three blasts and her engines put hard astern."

The *St. Albans*' chief officer spoke to the same effect. Her third officer said the ship hauled out when approaching Bradley Head, then the helm was put hard aport and her head swung S.S.W. to S.W. He "thought she canted a little to starboard." The vessel's speed was said not to have exceeded four knots, and the general impression given by the evidence of those in charge of her was that at that speed she did not come round for her intended westerly course as she was expected to do. The *St. Albans*' helmsman was not called at the inquiry and her engine room entries were not put in evidence.

The learned Chief Justice of New South Wales, before whom the appellants' action was heard in the Admiralty jurisdiction, placed under the inevitable disadvantage of deciding a collision case on a shorthand note of the statements of witnesses he had not seen, with such assistance, if any, as could be derived from the charts, sketches and photographs which were put in, came to the conclusion that the story of the plaintiffs' witnesses was the more trustworthy and was inherently more probable than that of those from the *St. Albans*. "I find it quite impossible," the learned judge said "to accept the story these latter tell." Assuming their place of collision even to be approximately correct, the learned judge could not see why if the *St. Albans* was under control and was being efficiently navigated, there should have been any collision. But he found as a fact, on the evidence of the *Crown City's* officers and the independent witnesses, that the collision took place something like 1000 ft. to the south of Bradley Head.

The photographs taken on board the steamship *Orungal* were considered by the Chief Justice in the light of conflicting evidence given by witnesses as to the inferences to be drawn from them, and he found himself unable to form a trustworthy judgment upon their contents and bound to deal with the case on the evidence of the eye-witnesses.

The learned Chief Justice held further that if the *Crown City* had been as near as 1000 ft. to the Head there should still have been room enough for the *St. Albans* to pass her in safety upon her proper side.

"I think, therefore," the learned Chief Justice concluded, "that for some unexplained reason the *St. Albans* kept too far to the southward before porting her helm to proceed up the harbour, and that she is to blame."

Arguments, which had been raised on the footing that the *Crown City* failed to keep to her starboard hand in a narrow channel, and again on the footing that the ships were crossing ships and that the duty of the *St. Albans* in that position was to keep out of the way of the *Crown City* and that of the latter vessel to keep her course and speed, were duly considered.

Very naturally, as it seems to their Lordships, the learned Chief Justice found himself in difficulties as to defining the limits of the narrow channel, to which in this case art. 25 of the Regulations for preventing Collisions at Sea would be applied, and declared himself unable to find that the *Crown City* was in fault under this head. He also held in favour of the *Crown City* that the *St. Albans* was under a duty by virtue of art. 19 of the regulations to keep clear of the *Crown City*, as that vessel had been on the *St. Albans*' starboard hand, and under art. 21 that the duty of the *Crown City* in the circumstances was to keep her course and speed.

On the appeal of the now respondents to the Full Court, application was made by them for leave to adduce new evidence, that, namely, of surveyors, to prove what conclusions ought to be drawn from the photographs which had been put in evidence. The application was strenuously opposed, but upon the opinion of the majority of the learned judges was allowed, and the evidence was in due course received. In view of the agreement of the parties as to the evidence to be received at the hearing of the action, this reception of evidence was made a ground of appeal to His Majesty in Council by the appellants. An interesting question of the operation of the relevant statute was thereby raised. As to this, however, no more need now be said, since the appellants did not eventually press the objection before their Lordships.

The evidence of the surveyors who were called by the respondents to apply in the case facts which they declared to be established by scientific use of the photographs in question was subjected before the Full Court to close cross-examination, but the appellants did not call surveyors or other scientific experts.

They insisted that the propositions of fact asserted against them could not be sustained on the material before the court.

The evidence admitted in manner stated before the Court of Appeal was for all practical purposes embodied in a diagram which purported to lay down the focal points at which the three photographs respectively were taken, and by reference to the backgrounds to extend to points thereon radial lines within which, as it was said, the vessels lay at the material times. Given the distance from the shore of each focal point and the angle of convergence thereon of the radial lines the situation of each ship could, it was contended, be geometrically determined with practical certainty. Proceeding on this footing the surveyors testified that the place of collision was virtually that alleged on the part of the *St. Albans*, and not more than 950 ft. from the shore.

The three learned judges in the Court of Appeal found the diagram produced as before mentioned to be a true presentment of the material facts as to the positions of the *Crown City* and the *St. Albans* at the material times. These the court held to be the facts demonstrated by the photographs. Acting upon this view the learned judges rejected the evidence of the eye-witnesses on which the learned Chief Justice had arrived at his decision and gave judgment for the now respondents. "I have no hesitation," the Acting Chief Justice said, "in discarding at once any oral evidence from either side so far as it is inconsistent with the facts disclosed by the photographs."

Campbell, J. said: "I see no reason for refusing to accept the evidence of the witnesses . . . called for the defendants on the hearing of the appeal . . . I accept their evidence and I look at the photographs in the light of it." Davidson, J. agreed.

The learned judges were also agreed in considering that upon the evidence given at the public inquiry the findings of the trial judge in favour of the *Crown City* were unimpeachable, if not inevitable. "I should have been unable," Campbell, J. said, "to come to any other conclusion."

The judgments in the Court of Appeal do not deal specifically with the question whether, assuming the place of collision deposed to by the surveyors, the *St. Albans* ought to be held to blame for the collision. The learned Chief Justice was of opinion that she ought.

The reasoning on which the professional witnesses in the Court of Appeal based their conclusions proceeds in this manner: On the photographs in question certain pairs of buildings and objects are seen to be more or less directly in line upon the same perpendicular plane: these same buildings and objects must lie horizontally in a more or less direct line from the lens in which the photographic picture was received; the point of intersection of converging lines extended horizontally through the respective pairs of buildings and objects will show what was the point at which the camera was used. The measurements taken by the surveyors were not challenged, nor was their good faith. What was in dispute was whether the premises assumed or obtained could warrant their conclusions of fact.

Underlying the matter last mentioned is the inquiry whether there was before the Court of Appeal evidence of fact upon which the findings of the court of first instance could be, or ought to be, displaced.

The evidence in question, its admissibility and its juristic effect, were subjects of close and prolonged examination in the arguments addressed to their Lordships on the hearing of the present appeal. Counsel reasoned the matter on general principles and it is useful under the circumstances to see what are the rules which on general principles are applicable to the case.

The use in evidence of photographic pictures and the limits within which they are judicially receivable by way of proof of matters of fact has often come under consideration before English courts. For instance, in a case of *Reg.* v. *United Kingdom Electric Telegraph Company Limited* (3 F. & F. 73), in 1862, Martin, B., after argument, received as evidence photographic views showing the configuration and general nature of the surface of a highway, where the matter in question was nuisance by an alleged obstruction, and in a more modern case, in the Court of Appeal, in *Hindson* v. *Ashby* (74 L. T. Rep. 327, at p. 336; (1896) 2 Ch. 1, at pp. 25–27), A. L. Smith, L.J., and other Lords Justices, demonstrated the necessity for careful delimitation of the uses for which, upon mere production of them, photographs can be accepted as means of proof of matters of fact. Clearly a photographic picture cannot be relied upon as proof in itself of the dimensions of the depicted object or objects, and cannot be made properly available to establish the relative proportions of such objects except by evidence of personal knowledge or scientific experience to demonstrate accurately the facts sought to be established.

The question of the evidential value of the testimony of the three expert witnesses for the defendants depends in like manner upon ascertained limitations which define the power of judges to accept opinions of witnesses as proof of matters of fact.

The extent to which the opinions or conclusions of skilled persons are receivable by way of proof in point of fact has not been seriously in doubt from the time when, in 1782, in *Folkes* v. *Chadd* (3 Dougl. 157), Lord Mansfield stated the grounds on which the evidence of Smeaton, the famous constructive engineer, was to be admitted upon a disputed question of obstruction to a harbour: "the opinion of scientific men upon proven facts may be given by men of science within their own science." Another Chief Justice, Lord Russell of Killowen, explained the rule in a modern case of *Reg.* v. *Silverlock* (72 L. T. Rep. 298; (1894) 2 Q. B. 766). The witness must have made a special study of the subject or acquired a special experience therein. "The question is," Lord

Russell said (72 L. T. Rep., at p. 301; (1894) 2 Q. B., at p. 771), "Is he *peritus*: is he skilled; has he adequate knowledge?"

Some of the scientific topics involved in the contest here were discussed by counsel in course of prolonged argument as to proofs afforded by the photographs, on the footing that judicial notice is taken of matters which are of common knowledge. Among these were subjects such as these; the difference of scale in the picture obtainable by a single lens of objects in the direct line of view and objects in the margins of the field; the effect in photography of the extent of the focal angle; the results due to development on a plane surface of pictures obtained in photographic perspective; the means of neutralising the effect of the curve of the field of the lens. Counsel purported to discuss the topics in question in the light of personal experience, as matters of common knowledge.

What are the limits within which matters such as those here mentioned are within judicial cognisance is not necessary now to be determined. Evidence of the sources of common knowledge, if not of its extent, may perhaps be obtained by reference to a cyclopædia and the lists of textbooks there to be found. Detailed information supplied from such sources requires usually to be established by experts.

That the extent to which and the processes by which an accurate topographic plan can be produced from a pictorial delineation of a scene are matters of common knowledge could hardly be said, though such questions have long occupied the attention of men of science. A well-known member of the Bar, who is also a distinguished student of applied mathematical science, has traced in a recent work (Generalised Linear Perspective with Special Reference to Photographic Land Surveying, by J. W. Gordon, K.C., London, 1922) the development of knowledge in relation to the subject since the time when an eighteenth century mathematician dealt with it in a treatise on generalised perspective. Two prerequisites for the conversion of a photographed picture of a landscape into a map or plan—after ascertainment of the viewpoint of the photographer—are said to be proof that the lens used had been accurately corrected to yield what is known as a flat field and knowledge of the angle to the horizontal plane at which the camera was held.

Reference is made here to the scientific problems which have just been indicated not by way of preface to any judicial conclusion as to the true value of the photographs in question as the basis for geometric surveys of the scenes they present, but to emphasise two manifest propositions, one that the skill or science called for by the task mentioned is not that of the land surveyor and the other that there was not before the Court of Appeal the evidence of any witness skilled and experienced in the discharge of such a task.

What follows in their Lordships' view upon the examination which has now been made of the new evidence received in the Court of Appeal is that standing alone it does not warrant departure from the judgment of the court of first instance, which, without new evidence, was admitted to be unimpeachable.

The judgment of the learned Chief Justice, moreover, as has already been mentioned, proceeded upon two grounds: firstly, acceptance of the *Crown City's* place of collision, and, secondly, consideration of the questions of nautical skill which arise if the *St. Albans'* place of collision be assumed.

Their Lordships had the advantage at the hearing of the assistance of nautical assessors to whom they submitted a series of questions bearing immediately on the case made for the *St. Albans.*

As to the point of time, and the place at which on her course, as stated on her behalf, the *St. Albans* could properly take helm action, engine action, or both, the view stated by the assessors was that the *St. Albans* ought not to approach the Light and Head nearer than 500 ft. and that she would be in a position to port her helm for rounding the head when the lighthouse was on a bearing of 276 degrees and at the distance of about 580 ft. shown in the line of her course marked on one of the plans put in evidence, but that this is a position nearer the shoal water than should be taken except to avoid collision.

As to the narrowest breadth of waterway in which the *St. Albans*, in good order and properly navigated, could certainly be able to make her turning movement so as to round Bradley Head in safety and proceed on her new course westward the assessors stated it at 250 ft., but added that with the *Crown City* in view and Bradley Head to be rounded, to round within this distance of the *Crown City* would involve considerable risk to both vessels.

Having regard to the accepted position of the *Crown City* in relation to the *Orungal* and the point northward of Bradley Head at which the *St. Albans* declaredly passed the *Orungal*, the assessors were asked whether the *St. Albans* would be hindered or embarrassed in shaping to pass on and keep clear of the *Crown City* if the *Orungal's* distance from the Light when abeam of the Light was 1100 ft. or 1200 ft. They replied that under these conditions the *St. Albans* should not have been hindered or embarrassed.

The assessors were asked further: assuming the place of collision alleged by the *St. Albans*, and the *Crown City* on the course of 95 degrees which brought her to that point, could the *St. Albans* by reasonable care have avoided collision? They replied that from a seaman's point of view the *St. Albans* on that assumption had a somewhat difficult problem, considering that her speed was only about 4 knots and her turning power therefore very slow. They amplified their answer thus: She had two alternatives (*a*) to go full speed ahead in hopes she could turn sufficiently fast to clear the *Crown City*; and give one short blast; (*b*) to go full speed astern and let go anchor; this

she did; but not soon enough. She veered her cable to 30 fathoms. Had she checked it at 15 or 20 fathoms it might have brought her up just in time to avoid collision. Reasonable care was taken, but just too late.

The last of these answers throws light on a striking part of the evidence in the case, that, namely, which suggests that the *St. Albans* both failed to make her turn and failed to bring up, as promptly as those in charge of her expected. The real cause of the collision seems to be probably found in this failure.

As far as the relative situations of the vessels at material points of time are concerned their Lordships, accepting as they do the advice of the nautical assessors, are satisfied that the collision was due not to the *St. Albans* being kept by the *Crown City* so close to the shore that she had not room to make her turning movement in safety, clear of the *Crown City*, but to her failure from causes incidental to her own navigation both to make the turn and keep clear of the *Crown City*.

The questions which were raised between the parties, as to the effect of the various Regulations for Preventing Collisions at Sea, which control navigation of vessels passing in a narrow channel and decide as between approaching vessels which is the "give way" ship, depend upon conclusions of fact as to the extent and bounds of the narrow channel to which the relevant regulation is to be applied and as to the relative movements of the *Crown City* and the *St. Albans*, before the collision, which, in view of the conclusions already stated, would not usefully be examined in the present case.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, and the judgment of the Chief Justice restored, and that the respondents should pay the appellants' costs here and below.

Appeal allowed.

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

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

Nov. 10, 11, 13, 14, 1930, *and Jan.* 13, 1931.

(Present: Lords MERRIVALE, ATKIN, RUSSELL, MACMILLAN, and Sir LAUNCELOT SANDERSON.)

STEAMSHIP EURANA *v.* BURRARD INLET TUNNEL AND BRIDGE COMPANY. (*a*)

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Canada—Railway bridge over navigable channel—Obstruction to navigation—Damage caused to ship—Statutory authority—Interference amounting to public nuisance—Railway Act (*R. S. Can.*, 1927, *c.* 170), *ss.* 3, 245, 248.

The respondent company, which was incorporated by a Dominion statute (9 *&* 10 *Edw.* 7, *c.* 74), *built a railway bridge over the Second Narrows in the harbour of Vancouver, B.C. By sect.* 16 *of that Act the Railway Act, c.* 68, *Statutes of Canada* 1919, *was made applicable to the company. The general plan for the bridge was approved by the Governor in Council in* 1913. *In July* 1923 *the company obtained a construction order from the Railway Board, but the plans of the bridge approved by such order differed from the general plan approved in* 1913. *Further alterations were required by the Railway Board, and the work was finally completed in Aug.* 1925. *By sect.* 8 *of the Act it was provided that the bridge was "not to interfere with navigation."*

In an action for damages arising from a collision between the appellants' steamship E. and the respondents' bridge, in which the appellants counter-claimed for damages to their ship on the ground that the bridge was an unlawful obstruction to navigation.

Held (1) *on the facts, that the bridge in its present form substantially interfered with navigation;* (2) *that even if the provisions of the Railway Act had been strictly observed in every particular, the power to construct and maintain the bridge was limited by the express condition that it was not to interfere with navigation; and* (3) *that the defendants had suffered damage by reason of a substantial interference with navigation amounting to a public nuisance for which there was no statutory authority. The counterclaim must accordingly be remitted for damages to be assessed.*

Decision of the Exchequer Court of Canada (1930) *Ex. C. R.* 38, *reversed.*

APPEAL from the judgment of Maclean, J. President of the Exchequer Court of Canada, dated the 8th Dec. 1929, affirming the judgment of Martin, L.J.A. for the Admiralty District of British Columbia. The appellants' steamship *Eurana* collided with the respondents' bridge across the Second Narrows of Vancouver Harbour while endeavouring to navigate through the bascule span in the bridge. The plaintiffs, the present respondents, claimed damages against the defendants, the present appellants, in respect of injury to their bridge, and the appellants counterclaimed for damages to their ship arising out of the bridge being an obstruction to navigation. The respondent company was created by Act of Parliament of Canada (9 & 10 Edw. 7, c. 74) with powers to build and operate a railway, including the bridge in question; and the Act incorporated the Railway Act. By sect. 8 the bridge was "not to interfere with navigation." Sect. 245 contained a general prohibition against impeding free navigation of any river, water, or canal over which the railway was carried. By sect. 248 before commencing the work the company had to submit to the Minister of Public Works for approval by the Governor in Council a general plan of the works to be constructed, and after approval apply to the board for an

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

order authorising the construction of the works. By sect. 3 the Act was to be construed as incorporate with the special Act, but where the provisions of the Act and of any special Act passed by the Parliament of Canada related to the same subject-matter the provisions of the special Act were, in so far as was necessary to give effect to such special Act to override the provisions of the Railway Act. Both courts found the vessel not to blame for the damage to the bridge, and there was no appeal from that decision. On the counterclaim that the damage was due to the bridge being an unlawful obstruction to navigation the trial judge found that the bridge substantially increased the natural difficulties of navigation, but he found, on the other hand, that the bridge was authorised by statute to be there in its existing form, and that the shipowners had no cause of action. The President of the Exchequer Court agreed with the trial judge as to statutory authority for the erection of the bridge. The case is reported (1930) Ex. C. R. 38. The shipowners appealed.

Martin Griffin, K.C. and *G. St. C. Pilcher* for the appellants.

Dugald Donaghy, K.C., *Theobald Mathew* and *Edmondson* for the respondents.

The considered opinion of their Lordships was delivered by

Lord ATKIN.—This is an appeal from a judgment of the President of the Exchequer Court of Canada dismissing an appeal from the Trial Judge in Admiralty for the Admiralty district of British Columbia. The action was brought by the Burrard Inlet Tunnel and Bridge Company, the present respondents, hereafter called the bridge company, against the owners of the steamship *Eurana* for damages sustained by the bridge company through the ship coming into collision with their bridge over the Second Narrows in the harbour of Vancouver. The shipowners counterclaimed against the bridge company in respect of the damage to their ship caused by the collision, alleging that the bridge was a wrongful obstruction to the navigation of the harbour. Both claim and counterclaim were dismissed by the trial judge, and on appeal by the shipowners the judgment dismissing their counterclaim was affirmed by the president of the Exchequer Court.

The harbour of Vancouver runs for some miles inland easterly from the sea. At two points known as the First and the Second Narrows the waterway is contracted. The bridge in question is built over the Second Narrows. It carries both a railway track and a road track and appears to afford a valuable connection between N. and S. Vancouver and the railways on either side of the harbour. It consists of five spans built on piers, some of which are in the waterway. The height is 22ft. above high water level, but one of the spans, 150ft. in width, is raised by a bascule and thus affords means for the passage of vessels. The navigable channel taken from the five-fathom lines at low water is at the site of the bridge 500ft. The adjacent land slopes more steeply to the water level on the south side than on the north. The ordinary course of navigation before there was a bridge was towards the southerly side of the waterway; the bascule span is the southernmost span of those covering the original navigable waterway. The tide runs both ways with considerable velocity, ranging from four to seven knots at flood on different tides. Before the bridge was built the Narrows were navigable at all stages of the tides by smaller vessels; larger vessels avoided the full strength of the larger tides, but otherwise were not restricted. The effect of the construction of the bridge is that, owing to the proximity of the open span to the southern shore, the space available for outgoing vessels to line up for the span is inconveniently restricted, and that all vessels are exposed to cross-currents sometimes acting only beneath the surface, which set them either away from the opening or across the bridge. The result is that it is found undesirable to navigate through the bridge except at slack water, which lasts about half an hour. Navigable hours, therefore, are confined to about two hours in the twenty-four. The difficulty of the navigation is illustrated by the collision in question. The *Eurana*, a steamship of 5,689 tons gross, 400ft. in length, 56ft. beam, was proceeding outward under charge of a pilot in daylight at 6 p.m. in March 1927. The tide was low water slack. She had straightened to pass the span, but when about 600ft. away and under slight starboard helm, her speed being about four knots, she took a sheer to starboard, and though engines were reversed and both anchors dropped, she collided with the central span of the bridge and suffered considerable damage to her top hamper. The trial judge found her not to blame, a decision affirmed by the president, from which there has been no appeal to this board. The ship counterclaims against the bridge company on the ground that the damage was due to the bridge being an unlawful obstruction to navigation. The trial judge found that the bridge substantially increased the natural difficulties of navigation in three respects: in contracting the space in which it is necessary for ships to line up outwards, and to manœuvre after passing inwards; in adding to the uncertain conditions of tidal currents in the vicinity of the bridge, and in increasing the force of the current through the open span. The learned judge, however, found that the bridge was authorised by statute to be there in its existing form and that the shipowners had no cause of action. The learned president agreed with the trial judge as to statutory authority, and did not find it necessary to express an opinion as to the effect of the bridge on navigation, except for a statement that at the time and place in question conditions prevailed that undoubtedly made navigation through the bascule span extremely

difficult. There was evidence that since the bridge was opened in Nov. 1925, and before the trial in Nov. and Dec. 1928, several other vessels had either collided or narrowly avoided collision with the bridge.

Having regard to the facts stated above and in particular to the important circumstance not mentioned by the trial judge that owing to the construction of the bridge navigation is now confined to the periods of slack water amounting in all to only about two hours of the twenty-four, their Lordships have no doubt that it was proved that the bridge in its present form substantially interferes with navigation. Unless, therefore, the bridge company can establish statutory authority for erecting such a bridge, they have caused a public nuisance by obstructing the navigable highway; and the shipowners who have suffered special damage in the damage caused to their ship by the nuisance will have a cause of action against them for damages.

It is necessary, therefore, to consider the statutes and the executive orders thereunder upon which the plaintiffs rely. The bridge company was incorporated by a dominion statute (9 & 10 Edw. 7, c. 74), an Act to incorporate the Burrard Inlet Tunnel and Bridge Company. By sect. 8: "The company may lay out, construct, operate, maintain and use a tunnel under the First Narrows of Burrard Inlet and a bridge over the Second Narrows of Burrard Inlet for foot passengers, carriages, street, railway and railway purposes with the necessary approaches from some convenient points on the south shore in or near the city of Vancouver to points on the opposite shore of Burrard Inlet so as not to interfere with navigation." The section proceeds to give powers to construct and operate lines of railway to connect with the lines of certain scheduled companies. By sect. 16 "The Railway Act shall apply to the company and its undertaking." It is to be observed that the authority given by the special Act is to construct and maintain a bridge "so as not to interfere with navigation." Relying on the special Act alone, the bridge company obtain no protection for a bridge which does interfere with navigation. But the plaintiffs found themselves on the provisions of the incorporated Railway Act. Under that Act they say they have to submit their plans to the Governor in Council and to the Railway Board, who are specially charged to consider matters of navigation, and without whose authority they may not construct the bridge. The Governor in Council and the Railway Board are, it is said, the bodies designated to decide whether the bridge interferes with navigation or not, and, if they are satisfied, no further question arises. Their Lordships cannot accept this contention. The Railway Act, a general Act, contains a fasciculus of clauses under a heading "Respecting Navigable Waters," which contains provisions for the protection of rights of navigation. Sect. 245 contains a general prohibition against causing obstruction in or impeding free navigation of any river, water, stream or canal over which the railway is carried. By sect. 47, whenever the railway is proposed to be carried over any navigable water by means of a bridge, the board may direct with what spans or headway or opening spans the bridge shall be constructed, "as to the board may seem expedient for the proper protection of navigation." By sect. 248, when the company desires to construct a bridge over navigable waters, the company, before commencing the work, shall submit to the Minister of Public Works for approval by the Governor in Council a general plan of the site and of the works to be constructed, and after approval apply to the board for an order authorising the construction of the work, transmitting the approved plans and also detail plans. No deviation from the site or plans approved by the Governor in Council is to be made without the consent of the Governor in Council. The board may alter the detail plans, and make an order for the construction of the work (sub-sect. (4)), and upon such order being granted the company shall be authorised to construct such work in accordance therewith; on completion the board may grant an order authorising the use or operation of the work. The Bridge Company from time to time made various applications for approval of their plans and for authority to construct and use the work, and obtained various orders upon which they rely. The shipping company contest the validity of these orders, alleging that the statutory requirements were not observed.

That the strict provisions of the statute were departed from is beyond question. In 1913 the company submitted to the Governor in Council a plan for a swing bridge. This was approved, but nothing further was done. In April 1923, the company submitted to the Governor in Council the plan of a bascule bridge and obtained approval. They then submitted this plan for approval, with detail drawings, to the Railway Board. They obtained a construction order from the Railway Board in July 1923, but the plans of the bridge approved by such order differed from the general plan approved by the Governor in Council. The latter provided for two spans and four piers; the new plans for three spans and five piers; the length of the bridge was altered, and the position of some of the piers was substantially changed. In 1924, when a considerable part of the work was done, fears were entertained as to the effect on navigation. A board of consulting engineers was set up, and in accordance with their recommendations plans were prepared showing alterations by raising the bridge 5ft., constructing two additional spans, making alteration in the structure of the piers, and dismantling and reconstructing part of the trestle superstructure.

These plans were submitted direct to the Railway Board and a construction order obtained in Mar. 1925. The bridge was constructed in accordance with these plans, and it was not till Aug. 1925, when the work was practically complete, that the new plans were

submitted for the approval of the Governor in Council. They were on this occasion not submitted by the Bridge Company on the recommendation of the Minister of Public Works under the Railway Act, but were submitted by the Vancouver Harbour Commissioners on the recommendation of the Minister of Marine and Fisheries under the Vancouver Harbour Commissioners Act for the purpose of obtaining permission to assist the Bridge Company financially to meet the expenses of altering the bridge. In Oct. 1925 the Railway Board made an order authorising the use of the bridge. The learned President was of opinion that though there might have been laxity in observing the precise directions of the statute, yet the precise order in which the Governor in Council and the Railway Board approved the plans was not of importance and the procedural defaults were waived in the final sanction of the plans of the bridge as completed. He came to the conclusion that the statutory conditions were complied with within the spirit and intent of the Railway Act. In the view their Lordships take of the case it is not necessary to express a final opinion upon this part of the case. They content themselves with saying that there is excellent authority for requiring statutory conditions to be strictly fulfilled if interference with public rights is to be justified. They must not be taken to assent to the view expressed on this part of the case in the courts below.

But even if it be assumed that the provisions of the Railway Act were strictly observed in every particular, will the Bridge Company be protected if in fact the bridge, when constructed, does interfere with navigation? In their Lordships' opinion there can be only one answer. The special Act which constitutes the Bridge Company and confers upon them the power to construct and maintain the bridge limits the power by the express condition that the bridge is not to interfere with navigation. This stipulation in favour of public rights controls the whole activities of the company. It is absolute and it cannot be supposed that the incorporation of provisions of a general Act implied the intention of the Legislature that nevertheless the bridge might interfere with navigation if the Railway Board so permitted. Their Lordships would have no difficulty in arriving at this conclusion apart from the express provisions of the Railway Act itself regulating the consequences of its incorporation with the special Act. But when those provisions are examined the conclusion is confirmed. By sect. 3 except as in this Act otherwise provided: "(*a*) This Act shall be construed as incorporate with the special Act. (*b*) Where the provisions of this Act and of any special Act passed by the Parliament of Canada relate to the same subject-matter the provisions of the special Act shall in so far as is necessary to give effect to such special Act be taken to override the provisions of this Act."

The provisions of the special Act with which this case is concerned deal with the same subject-matter as the general Act, namely, the protection of public rights of navigation. Even if, therefore, the protection of navigation in the Railway Act is qualified by the discretion of the Railway Board, as to which their Lordships express no opinion, that qualified protection would be overridden by the absolute protection which in their Lordships' opinion was given by the special Act. It is quite a different matter when the powers of the general Act to protect the public are invoked so as to interfere with the plans of the undertaking under the special Act having no special reference to public protection. There, as has been decided by the board in *Canadian Pacific Railway Company* v. *Corporation of Toronto and others* (104 L. T. Rep. 724; (1911) A. C. 461), the subject-matter is not the same.

Their Lordships, therefore, are of opinion that the defendants have suffered damage by reason of the construction and maintenance by the Bridge Company of a substantial interference with navigation amounting to a public nuisance, for which the defendants have no statutory authority. They are of opinion that the appeal should be allowed, and that so much of the order of Maclean, J. as dismissed the defendants' appeal with costs be set aside, and that so much of the judgment of Martin, J., dated the 22nd April 1929, as dismissed the counter-claim with costs and directed that the costs of the counter-claim be set off against the costs of the action, be set aside, and that in lieu thereof judgment be entered for the defendants on the counter-claim for damages to be assessed, and that the counter-claim should be remitted to the judge of the British Columbia Admiralty District. They will humbly advise His Majesty accordingly. The plaintiffs must pay the costs of the counter-claim and of the defendants' appeal to the Exchequer Court and of this appeal.

Appeal allowed.

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

Solicitors for the respondents, *Berrymans*.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Monday, Jan. 26, 1931.

(Before ROWLATT, J.)

WETHERALL AND CO. LIMITED *v.* THE LONDON ASSURANCE. (*a*)

Insurance (Marine)—General average—Time charter—Voyage charter—Damage to vessel in avoiding collision—Repairs carried out after termination of voyage—Claim by shipowners to be indemnified for loss of time hire—York-Antwerp Rules, rr. C., X. (d), *XI., XVIII.—Marine Insurance Act* 1906 (6 *Edw.* 7, *c.* 41), *s.* 66.

(*a*) Reported by R. A. YULE, Esq., Barrister-at-Law.

The plaintiffs were the owners of the steamship B., which was insured with the defendants. On prosecuting a voyage she took the ground in avoiding a collision. After being refloated she accomplished her voyage, and then went into dock for repairs. She had suffered a general average damage and also particular average damage, and both sets of repairs were carried out simultaneously. The plaintiffs claimed indemnity under the policy for loss of freight while the vessel was under repair, basing their claim on the York-Antwerp Rules which were incorporated in the policy.

Held, that the defendants were not liable. The direct authority was The Leitrim (9 *Asp. Mar. Law Cas.* 317; 87 *L. T. Rep.* 240; (1902) *P.* 256), *and though the Marine Insurance Act was passed after that decision there was nothing inconsistent in sect.* 66 *of that Act with that case. Nor did rule C. of the York-Antwerp Rules* 1924, *which negatived only a claim for delay during a voyage, impliedly admit delay after the voyage.*

Action tried before Rowlatt, J. upon an agreed statement of facts.

The plaintiffs were the owners of the steamship *Blacktoft*, and as such, fully interested in a policy of marine assurance, dated the 19th Feb. 1929, by which the defendants, the London Assurance, insured the plaintiffs for part of the value of the steamer from the 20th Feb. 1929 to the 20th Feb. 1930, against the ordinary perils in respect thereof. The policy incorporated clause 9 of the Institute Time Clauses, Hulls, which provides, *inter alia*, that where the contract of affreightment so provides the general average adjustment shall be in accordance with the York-Antwerp Rules 1890 or 1924. In May 1929, the steamer loaded a cargo of coals at Goole for carriage to Rouen under the following contracts: (*a*) A time charter dated the 13th Nov. 1928, made between the plaintiffs as owners and Fenwick (W. F.) and Co. Limited, as charterers: (*b*) a voyage charter dated the 23rd May 1929 made between Fenwick (W. F.) and Co. Limited as owners, and the Humber Coal Company Limited, as charterers; (*c*) a bill of lading dated the 28th May 1929 duly signed by the master of the steamer and in which the Humber Coal Company Limited appeared as shippers. Each of these documents provided that general average should be settled in accordance with the York-Antwerp Rules 1924. The steamer left Goole at ten a.m. on the 29th May 1929, but a quarter of an hour later, in swerving to avoid a collision with another vessel, she took the ground on Goole Ness. She was not refloated until 12.45 p.m. on the 30th May 1929. The steamer suffered particular average damage which, together with certain other such damage on the 11th June 1929, amounted to 446*l.* 5*s.*, and general average damage which amounted to 432*l.* 5*s.* After being refloated, the steamer proceeded to Rouen, where she discharged her cargo on or about the 4th June 1929, and on her return carried another cargo from London to Goole. She then went into the Alexandra Dock, Hull, where she remained under repair from the 11th June to the 20th June 1929, the total period being nine days nine-and-a-half hours. The particular average repairs and the general average repairs were carried out concurrently and completed simultaneously. If the two sets of repairs had been carried out separately each would have occupied substantially the same time as was occupied in doing both together, namely, nine days nine-and-a-half hours. The plaintiffs estimated their loss by reason of the detention at 145*l.* 18*s.* 7*d.* made up of loss of time-hire or, alternatively, demurrage or loss of profit, less certain expense saved. An average statement dated the 13th Nov. 1929, apportioned the above loss attributing 71*l.* 16*s.* to general average damage, and 74*l.* 2*s.* 7*d.* to particular average damage. Including certain commission and interest charges, the total amount allowed in general average was 74*l.* 14*s.* 8*d.* If this amount were correctly allowed then if the plaintiffs were entitled to be indemnified by the defendants under the policy, their proportion would be 4*l.* 7*s.* 6*d.* as for a general average sacrifice, or 3*l.* 19*s.* as for a general average expenditure. The plaintiffs claimed one or other of these proportions. The defendants pleaded that the delay or detention of the steamer was outside the scope of a general average loss.

Miller, K.C. and *W. L. McNair* for the plaintiffs.

Le Quesne, K.C. and Sir *Robert Aske* for the defendants.

Rowlatt, J.—In this case the question is whether the plaintiff shipowners can recover against the underwriters in respect of delay to the ship, while repairs necessitated by a general average act were being executed after the voyage had been completed. The facts are embodied in an agreed written statement upon which the case was argued. I need not here set them out again.

The first point in logical order—for if it succeeds it excludes all other points—taken for the defendants was that the ship was bound to suffer this delay for the purpose of repairs due to a particular average loss incurred before the general average, and that, as the general average repairs were done in the same period, there was no delay attributable to the general average act. In my view it is not clear that the facts were as suggested, and the statement of facts upon which my decision was invited was not drawn to bring out this point. It seems to me that some of the particular average damage involved in the casualty of stranding may have occurred after some, at least, of the general average damage happened. If so, the general average loss was not incurred by a vessel already doomed to this delay (if I may use that expression) in respect of a particular average loss, and the point fails.

Another point which was mooted was whether the York–Antwerp rules were under

clause 9 of the Institute Time Clauses to be interpreted according to the French or English practice. I intimated my opinion that the English practice is the relevant one. The contention that it is the French is open to the plaintiffs in another court.

The question that remains may be stated thus: Mr. Miller, for the plaintiffs, contended that under the Marine Insurance Act, s. 66, and the York–Antwerp Rules, as understood in this country, loss by delay for the purpose of executing such repairs as these was in principle recoverable subject to an exception laid down in *The Leitrim* (9 Asp. Mar. Law Cas. 317; 87 L. T. Rep. 240; (1902) P. 256) as regards delay during the voyage when other interests were suffering delay also.

Mr. Le Quesne, on the other hand, contended that all delay was outside the scope of a general average loss altogether. He supported his argument by a critical examination of r. C. of the York–Antwerp Rules and by reference to rules XI., XVIII., and X. (*d*). He also argued that such cases as *The Field Steamship Company Limited* v. *Burr* (8 Asp. Mar. Law Cas. 348, 529; 80 L. T. Rep. 445; (1899) 1 Q. B. 579) and *Shelbourne* v. *The Law Investment Corporation* (8 Asp. Mar. Law Cas. 445; 79 L. T. Rep. 278; (1898) 2 Q. B. 626) show that delay is not for the present purpose a direct consequence of the general average act.

In *Field* v. *Burr* (*sup.*) it was held that the cost of discharging a cargo which had become putrid in consequence of a collision was not recoverable by the shipowner under a policy on hull and machinery. In *Shelbourne* v. *The Law Investment Corporation* (*sup.*) a barge owner failed to recover from his underwriters in respect of delay in doing repairs necessitated by a collision. The policy in the present case, said Mr. Le Quesne, is on hull and machinery, and consequently here, too, loss consequential on the actual damage, but outside the cost of repair, cannot be recovered. In the view I take it is not necessary, and therefore not advisable, to discuss the relevance of such cases to claims for a general average loss, a conception derived primarily from the contract of affreightment. In my view the defendants here are entitled to succeed in this court upon the direct authority of the judgment of Gorell Barnes, J. in *The Leitrim* (*sup.*). The material passage (9 Asp. Mar. Law Cas., at p. 321; 87 L. T. Rep., at p. 243; (1902) P., pp. 268, 269) is as follows: " But it does not at all follow that the mere loss of the profitable employment of the vessel as distinguished from actual expenses should in such a case be allowed. In the first place, so far as I can ascertain, a loss of this character has never been claimed in general average. It is not introduced in the York–Antwerp Rules, nor can I find any trace of it being allowed by the laws of any foreign country, though many of them contain provisions as to the allowance in the general average of the wages and maintenance of the crew. It may be said, why on principle should not the loss of time be compensated for where that loss is due to the necessity for repairing damage, itself the subject of general average? I think the answer is that although possibly there may be cases in which the loss of time is not common to all concerned, at any rate in cases like the present the loss of time is common to all the parties interested, and all suffer damage by the delay, so that the damage by the loss of time may be considered proportionate to the interests and may be left out of consideration."

It seems to me that, when the learned judge speaks of a " loss of this character " as being hitherto unknown and not introduced by the York–Antwerp Rules, he was speaking of all delay, and when, in pointing out that all interests are involved in the delay and that it is impracticable to work out all the claims, he allows that possibly there may be cases where the delay does not affect them all. He does not mean that in these cases there would be exceptionally be a different rule, but is indicating that the possibility of such cases does not affect the practical principle.

I have not forgotten that the Marine Insurance Act was passed after the decision in *The Leitrim* (*sup.*), but I cannot read the language of sect. 66 as inconsistent with it. Nor do I forget that rule C. of the York–Antwerp Rules 1924 negatives only a claim for delay during the voyage. But I cannot accept the view that this rule by the omission expressly to exclude impliedly admits delay after the voyage. From one point of view, as Mr. Le Quesne said, one would think it was excluded *a fortiori*, or to put it in another way, a claim in that respect may not have been contemplated as calling for mention.

In the result, there must be judgment for the defendants with costs.

Judgment for defendants.

Solicitors for the plaintiffs, *Botterell* and *Roche*, for *Botterell, Roche*, and *Temperley*, Newcastle - upon - Tyne,

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

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Monday, Jan. 12, 1931.

(Before Lord MERRIVALE, P.)

THE ESKBRIDGE. (*a*)

Action in rem—*Claim for freight—Owner of the ship domiciled in England—Judicature* (*Consolidation*) *Act* 1925 (15 *&* 16 *Geo.* 5, c. 49), *s.* 22—*Administration of Justice Act* 1928 (18 *&* 19 *Geo.* 5, *c.* 26), *s.* 6.

The Admiralty Court has no jurisdiction to entertain an action in rem *for freight by the owner of a ship domiciled in England.*

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

MOTION to set aside the writ and subsequent proceedings.

By a writ *in rem* the plaintiffs, North of England Steamship Company Limited, owners of the steamship *Eskbridge*, claimed against the defendants, the owners of 480 quarters of wheat ex the steamship *Eskbridge*, 338*l.* 13*s.* 3*d.*, being insurance charges and freight due in respect of the carriage of the said cargo, arising out of an agreement relating to the use or hire of the *Eskbridge*, and the expenses of storage, realisation, and costs. The writ was stated to have been issued by Messrs. Botterell and Roche, agents for Messrs. Botterell, Roche, and Temperley, of West Hartlepool, solicitors for the plaintiffs, who reside at West Hartlepool.

The *Eskbridge* was chartered by Arcos Limited, as agents for Exportlieb, of Leningrad, to carry a cargo of grain to Hull, where she arrived on the 21st Nov. 1930. On that date the bills of lading had not reached the consignees, and the cargo was accordingly discharged into a warehouse at Hull in the names of the shipowners. The plaintiffs' agents at Hull then agreed to release the cargo to the consignees upon receiving from them an indemnity against any loss or damage resulting from release without production of the bills of lading, and payment of freight. The receivers accordingly gave the necessary indemnity, and paid the sum of 3200*l.* in respect of the freight. The shipowners then repudiated the action of their agents in agreeing to release the cargo upon a letter of indemnity and payment of 3200*l.*, and claimed freight and insurance charges amounting to 3538*l.* 13*s.* 3*d.* On the 2nd Dec. 1930 the shipowners issued the writ *in rem* in the present action for the balance of freight and insurance charges due, amounting to 338*l.* 13*s.* 3*d.* The defendants refused to accept service of the writ, and the plaintiffs thereupon proceeded to serve the writ on the wheat lying in the warehouse without separating from the whole 448 quarters, the quantity upon which the freight represented the sum in dispute. On the 9th Dec. the bills of lading were received and presented to the plaintiffs together with the full amount of the freight and insurance charges due, and the plaintiffs released the whole cargo to the receivers. The defendants then entered an appearance under protest, and moved to set aside the writ and subsequent proceedings.

By sect. 22, sub-sect. (1) (*a*) (xii.), of the Supreme Court of Judicature (Consolidation) Act 1925 (15 & 16 Geo. 5, c. 29) the High Court has Admiralty jurisdiction to hear and determine "any claim (1) arising out of an agreement relating to the use or hire of a ship; or (2) relating to the carriage of goods in a ship . . . unless it is shown to the court that at the time of the institution of the proceedings any owner or part owner of the ship is domiciled in England." By sect. 4, as amended by sect. 6 of the Administration of Justice Act 1928 (18 & 19 Geo. 5, c. 26), it is provided that "Without prejudice to the provisions of this Act relating to the distribution of business in the High Court, all jurisdiction vested in the High Court under this Act shall belong to all the Divisions alike."

Cyril Miller for the defendants.—There is no jurisdiction to entertain an action *in rem* where the owner of the ship is domiciled in England. Here it appears from the writ that the owner is domiciled at West Hartlepool; and there is, therefore, no jurisdiction to entertain the action.

Sir *R. Aske* for the plaintiffs.—The proviso to sect. 22, sub-sect. (1) (*a*) (xii.), does not apply where the owner of the ship is plaintiff. The proviso ought to be construed to apply only where it is sought to proceed against a vessel the owner of which is domiciled in England. The earlier statutes show that the intention of the Legislature was always to prevent a vessel from being made liable in an action *in rem* where the owner was capable of being proceeded against *in personam.* If the section is to be construed in the manner contended for by the defendants the result will be to place British shipowners at a substantial disadvantage with foreign owners, since the latter will have the benefit of being able to proceed *in rem.* It cannot be supposed that the Legislature intended such a differentiation which in practice would be very unfair. Sect. 6 of the Administration of Justice Act 1928 has now made it plain that all judges of the High Court enjoy, and may exercise, identical jurisdiction. To this extent the decision of the Court of Appeal in *The Sheaf Brook* (17 Asp. Mar. Law Cas. 157; 134 L. T. Rep. 534; (1926) P. 61) is now obsolete.

Lord MERRIVALE, P.—The discussion which has been raised on this motion relates to a point of considerable practical importance. The position was this. The shipowners, having their residence within this jurisdiction, being a company registered in England, brought to Hull from a Russian port a cargo of grain in bulk. The cargo was consigned to another English company. When the cargo arrived at Hull it was found that no bills of lading were available and the owners of the cargo were not personally present to take delivery. So the cargo owners were in default and neither by themselves nor by their assignees were they in a position to take delivery. All the difficulties in the case have arisen out of that default of the cargo owners. There were negotiations and the assignees of the cargo, the English assignees, who had not at the time the bills of lading, proposed that the goods should be delivered on payment of a sum which did not amount to the whole freight, and on the giving of a letter of indemnity to the shipowners. The shipowners' agents were minded to do business by way of agreement, but not to do business upon precisely the terms proposed, and the negotiations broke down. If it were material I should have been disposed to hold that no shipowner could be bound by such a contract as that which was alleged against the agents of the shipowners in respect of this cargo.

The matter being in that situation, on the 2nd Dec. 1930 the shipowners issued a writ for freight amounting to 338*l.*, which they attributed to a certain parcel of cargo as 480 quarters of wheat lying in a Hull warehouse. They were in this difficulty, that they had notice of the existence of alleged owners of cargo, but they had no bills of lading presented, and they had no owner of the cargo within the jurisdiction who at that time was offering them the whole freight in exchange for delivery. They were also perhaps in some uncertainty as to the question who was in truth at the moment the person entitled to claim delivery of the bulk cargo. No doubt after some consideration of the relevant statute they came to the conclusion that they could effect service of their writ by identifying a parcel of the cargo, 480 quarters, and issuing the writ as a writ in an action *in rem* against that parcel of the cargo, making that parcel the *res.* There was no specific parcel of 480 quarters, but they met that difficulty by conversation with a representative of the railway company, who said that if it would facilitate business they would take care that the tail end—the residue—of a parcel of the grain in a particular granary should not be released until the shipowners were settled with. So there was a kind of notional proceeding by which the writ was taken to be served upon that *res.* A few days afterwards the bills of lading arrived and the holders of the bills of lading, having by that time a complete title to the grain, claimed it, paid the freight, and received the cargo.

The action commenced by the writ on the 2nd Dec. was in the air. The business part of the transaction had been cleared up, but the writ was outstanding, and the question now remaining is, who shall pay the costs to which the shipowners have been put by reason of the delay in taking delivery of the cargo, owing to the bills of lading not being forthcoming. The argument addressed to me has been directed to ascertaining whether the defendants named in the writ, the owners of that parcel of cargo, who have now appeared and are identified as the owners, are liable for the costs of this action, or whether the costs must fall upon the shipowners, because—as suggested by the defendants—there was no jurisdiction which warranted the issue of a writ *in rem* in the Admiralty Division at the time when the writ was issued and there was no High Court jurisdiction to deal with this claim.

That has been stoutly contested, and I feel the force of the argument addressed to me by Sir Robert Aske as to the advantage there would be, apparently, in a practice where, as a matter of business, if a shipowner who is brought into an English port does not find an owner of the cargo at the dockside ready at the proper time to receive it, he should be entitled to proceed and clear up the transaction by dealing with the wheat and exacting from its owner, by the sale of the wheat if necessary, the amount due for freight.

That, however, is not the matter which is in question here. This is not a branch of the Legislature but a Division of the High Court of Justice, and the question is whether there is jurisdiction to clear up the matter in the manner proposed by the plaintiffs. It is conceded that before 1920 there was in the High Court no power by which such steps as were taken here could rightfully be taken in the exercise of the jurisdiction of the court. It is quite immaterial that in the county courts, under particular statutes, there is a limited power to deal with small matters in some such way ; but what is conceded is that down to 1920 there was not in the High Court this power purported to be exercised here. Therefore, the real question in the case is whether the Administration of Justice Act 1920 and the Supreme Court of Judicature (Consolidation) Act 1925—in which the additional powers of the Act of 1920 are incorporated—give to the shipowners in this case the right or power to take proceedings which in fact they have taken.

The material provision of the Act of 1925 is sect. 22, sub-sect. (1) (*a*) (xii.). That provides that the High Court shall in Admiralty matters have jurisdiction in respect of any claim arising out of an agreement relating to the carriage of goods in a ship " unless it is shown to the court that at the time of the institution of the proceedings any owner or part owner of the ship was domiciled in England." It is admitted that the owners of this ship, being an English company, were domiciled in England, and this section provides that the jurisdiction of the High Court shall be jurisdiction in respect of claims relating to the carriage of goods in a ship, unless the shipowners—these present plaintiffs—are at the material time domiciled in England. When the matter is put in that way it seems to me clear that the limited jurisdiction given by the statute of 1920, incorporated in the Consolidation Act of 1925, does not extend to the present case.

Sir Robert Aske very persuasively presented the case of the plaintiffs. He pointed out its great hardship. First of all, he said that they ought to be at least as well off as plaintiffs not domiciled in this country. Why, he asked, should English shipowners be at a disadvantage compared with alien shipowners ? It is really not the function of this court to answer that question, but if it were I could invent a good many reasons why it might be thought that foreign owners of a ship brought here under a contract, who had not advantages possessed by persons domiciled within the jurisdiction, should be given facilities for clearing up business which were not necessary in the case of a shipowner domiciled here. I am not persuaded by the *argumentum ab inconvenienti.*

Then it is said that one must construe these powers under the Act of 1920, incorporated in the Act of 1925, with due regard to the provisions of the Admiralty Court Act 1861. What that Act provided by sect. 6 was that an owner or consignee or assignee of goods carried into any port in England or Wales in any ship might

proceed under the Admiralty jurisdiction in respect of damage done to the goods, or any part thereof, by negligence or breach of the contract of carriage, 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. It is damage done by the ship. It relates to a totally different matter. It gives the owner of goods a right to proceed *in rem* where he is not able to proceed *in personam*. It does not seem to me that the provision in the Act of 1861 has any real bearing on this case.

Then it is said that there has been a decision in *The Sheaf Brook* (17 Asp. Mar. Law Cas. 157; 134 L. T. Rep. 534; (1926) P. 61) where, if one gives the widest possible interpretation to some of the wording of the judgments in the Court of Appeal, one might spell out of them a meaning of the section in question which that section would not otherwise have.

Judgments, as well as statutes, must be construed with regard to the subject-matter and business under consideration, and when I construe the judgments in *The Sheaf Brook* (*sup.*) with regard to the position in which this case stands I do not find that it really helps me. At any rate it does not help the plaintiffs to sustain the argument which has been presented on their behalf.

I think this writ is outside the jurisdiction of the court, and there can be no further proceedings upon it except that the plaintiffs—though I sympathise with them—must bear the costs to which they have put the defendants.

Solicitors: *Pritchard* and *Sons*, agents for *A. M. Jackson* and *Co.*, Hull; *Botterell* and *Roche*, agents for *Botterell*, *Roche*, and *Temperley*, West Hartlepool.

Supreme Court of Judicature.

COURT OF APPEAL.

Jan. 30, *Feb.* 2, 3, 4 *and* 16, 1931.

(Before Scrutton, Greer and Slesser, L.JJ.)

Foscolo Mango and another v. Stag Line Limited. (a)

Charter-party — Bill of lading — Liberty to call at any ports in any order for "bunkering or other purposes" — "Trial trip"— Whether deviation—"Any reasonable deviation"—Rule that deviation excludes right to rely upon exceptions—Whether still exists, after Act of 1924*—Loss of c.i.f. cargo at sea, before property has passed—Measure of damages—Carriage of Goods by Sea Act* 1924 *(*14 *&* 15 *Geo.* 5, *c.* 22*) Schedule, Rules Relating to Bills of Lading, Art. IV., rr.* 2 *and* 4.

Plaintiffs V. sold a cargo of coal to plaintiffs F. on c.i.f. terms for delivery from Swansea to Constantinople. By the bill of lading, the coal was to be carried from Swansea to Constantinople by steamship Ixia *with liberty . . . to call at any ports in any order for bunkering or other purposes or to make trial trips after notice . . ." By the bill of lading all the provisions of the Carriage of Goods by Sea Act* 1924 *were to apply to the contract. By Art. IV., r.* 2, *in the schedule to that Act: "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from* [inter alia] *perils of the sea." And by rule* 4 *of the same article: "Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom."*

The ship was fitted with Wyndham's superheater, and Wyndham's engineer and the superintendent engineer of the defendants, the shipowners, joined the ship at Swansea to test the superheater, when on the voyage. In the ordinary course the test would have been completed by the time the ship reached Lundy, and the two engineers could then have left the ship with the pilot. In fact, some of the firemen were drunk when the ship left Swansea, and so no proper head of steam could be obtained such as was required for the test. The captain therefore arranged to carry on the engineers to conclude the test, and to put them ashore at St. Ives. The ship made a course rather more E. than it would have made but for this arrangement, and when off St. Ives, a course more E. into St. Ives Bay, where the ship lay for one-and-a-half hours about a mile from the shore, before the two engineers were taken off by boat. The ship then, instead of regaining the normal course, coasted, and a little way from St. Ives the captain left the second officer in charge of the vessel with instructions to keep her a mile-and-a-half off the shore (no compass bearing). Shortly afterwards the steamship Ixia *ran onto the Vyneck Rock, and eventually became a total loss. No notice had been given to the cargo-owners of the test, and the property in the cargo had not passed to the purchasers at the time of the loss.*

Held, (1) *that the course taken by the ship was not within the liberty "to call at any port or ports in any order for bunkering or other purposes." Detailed consideration by the court as to the construction of the words "bunkering or other purposes."*

Held, also (2), *that this was a "trial trip" without notice, was not part of the contract voyage, and was therefore a deviation, both in delay, and in route and risk.*

Held, also (3), *that the course taken by the ship was not a "reasonable deviation" within the meaning of Art. IV., r.* 4.

As to what is a "reasonable deviation" under Art. IV., r. 4.

Per Scrutton, L.J.: The interests to be considered must be those of the parties to the contract

(a) Reported by C. G. Moran, Esq., Barrister-at-Law.

adventure, which may involve consideration of the position of the underwriters. Rule 4 was not intended to extend the permissible limits of deviation (apart from deviation to save property), as stated in The Teutonia (1872, 1 *Asp. Mar. Law Cas.* 214 ; 26 *L. T. Rep., at p.* 52 ; *L. Rep.* 4 *P. C., at p.* 179).

Per Greer, L.J. : The words of rule 4 are not confined to cases of permitted deviation recognised at common law : (see The Teutonia, sup.). *The words mean a deviation whether in the interests of the ship or the cargo-owner or both, to which no reasonably minded cargo-owner would raise any objection.*

Per Slesser, L.J. : I adopt the view expressed by Wright, J. in Foreman and Ellams Limited *v.* Federal Steam Navigation Company (17 *Asp. Mar. Law Cas., at p.* 449 ; 138 *L. T. Rep., at p.* 584 ; (1928) 2 *K. B., at p.* 431) : " *Its reasonableness must depend upon what would be contemplated reasonably by both parties having regard to the exigencies of the route, known or assumed to be known to both parties.*"

Held, also (4), *that the rule of law that a deviating ship lost the benefit of the exceptions in the contract of carriage had not been abrogated by Carriage of Goods by Sea Act* 1924.

Held, also (5), *that the measure of damages was not* 6000*l., the contract price, but* 8000*l., the market price of the cargo at the date when it should have arrived at Constantinople : (see* Finlay and Co. *v.* Kwik Hoo Tong Handel Maatschappij, 17 *Asp. Mar. Law Cas.* 566 ; 140 L. T. Rep. 389 ; (1929) 1 *K. B.* 400).

Accordingly, as there had been deviation from the agreed contract voyage which was not a " reasonable deviation " under Art. IV., r. 4, the shipowners were not protected by the exception of " perils of the sea," and the appeal was dismissed.

APPEAL from a judgment of Mackinnon, J. in favour of the plaintiffs for 8000*l.*

Messrs. Vivian, who were added as plaintiffs after issue of the writ, sold a cargo of coals to Messrs. Foscolo Mango and Co., the original plaintiffs, who were dealers in coal at Constantinople, on c.i.f. terms under a contract for shipment by the steamship *Ixia*, and Messrs. Vivian undertook to insure the cargo at a valuation of the c.i.f. price, plus ten per cent. profit.

The terms of the contract of carriage were contained in the bill of lading dated the 29th June 1929, which incorporated all the terms, conditions, and exceptions contained in a charter-party dated the 14th June 1929, and also provided that " all the terms provisions and conditions of the Carriage of Goods by Sea Act 1924 and the Schedule thereto are to apply to the contract contained in this bill of lading. . . . If or to the extent that any term of this bill of lading is repugnant to or inconsistent with anything in such Act or Schedule it shall be void." The bill of lading provided that the coal should be shipped at Swansea in the *Ixia*, and contained the exception of " perils of the sea." The agreed route was expressed to be from Swansea to Constantinople " with liberty to sail without pilots, to call at any ports in any order for bunkering or other purposes, or to make trial trips after notice or adjust compasses, all as part of the contract voyage." Art. III., r. 1, of the Rules, relating to Bills of Lading in the Schedule to the Carriage of Goods by Sea Act 1924, provides that the carrier shall be bound before and at the beginning of the voyage to exercise due diligence to make the ship seaworthy. Art. IV. provides, in par. 1, that the carrier shall not be liable " for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy." Art. III., by rule 2, provides that : " Subject to the provisions of Art. IV. the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried," and Art. IV., by rule 2, provides that : " Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from " *inter alia* " perils . . . of the sea." By rule 4 of Art. IV. : " Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom."

On the preceding voyage of the steamship *Ixia* there had been fitted on that vessel Wyndham's superheater, a device designed to preserve waste heat or steam for re-use, so as ultimately to diminish the bill for fuel. Complaints had been made about the working of this apparatus, and the defendants, the Stag Line Limited, shipowners, arranged that a representative of Messrs. Wyndham should investigate the complaints and make a test of the superheater on the steamship *Ixia* when she was starting on this voyage from Swansea. Accordingly, Messrs. Wyndham's engineer and the defendant's superintendent engineer joined the ship at Swansea. The intention was to make the test immediately on the ship leaving Swansea, when the two engineers could have left the ship with the pilot at or before reaching Lundy Island. In fact some of the firemen were drunk when the ship left Swansea, so that no proper head of steam was then obtained to carry out the test. The two engineers were unable to leave the ship with the pilot, and the captain arranged to carry on the engineers to conclude the test, and to put them ashore at St. Ives. The ship made a course rather more East than it would have made but for this arrangement, and when off the entrance to the port of St. Ives, a course was made so as to put into St. Ives Bay. The ship lay to about a mile from the shore, whistling for a boat which, on arrival, took off the two engineers. The ship, after laying to for one hour-and-a-half, proceeded round the coast towards Pendeen, and a little way out from St. Ives,

the captain left the second mate in charge of the vessel with instructions to keep a mile-and-a-half off the coast, without instructions to sail on any particular compass course. The steamship *Ixia* shortly afterwards ran on to the Vyneck Rock, was badly damaged, and eventually became a total loss. No notice had been given to the cargo-owners of the test.

The ship was lost on her first day out from Swansea, and the invoice, policy, bills of lading, and bills of exchange had not been sent by the plaintiffs, Messrs. Vivian, the sellers of the cargo, to the plaintiffs, Messrs. Foscolo, Mango, and Co., the purchasers, at the time of the loss, and they did not subsequently send them. Messrs. Vivian collected the money payable under the insurance policy as agents for Messrs. Foscolo, Mango, and Co., and eventually transmitted to them the difference between the insured value and the contract price. The market value of such coal as that lost had increased in Constantinople at the date when the cargo should have been delivered there. The plaintiffs claimed the market value of the coal at that date as damages for breach of the contract of carriage of the coal, which admittedly was not carried to and delivered at the agreed destination. The defendants pleaded by their defence that they were not liable on the contract, as the loss was due to perils of the sea. The plaintiffs replied that the defendants were not entitled to rely upon this exception as the shipowners had deviated from the agreed course.

Mackinnon, J. found that the usual and customary route for the voyage from Swansea to Constantinople was to pass a few miles south of Lundy, and then set a straight course to a point about five miles off Pendeen, near Cape Cornwall, and at that point to alter the course slightly to the East, to a line passing off Finisterre. He held that this was the route upon which by the contract the coal was to be carried. No doubt there was liberty "to call at any ports in any order for bunkering or other purposes." In his view that was a limited permission. The turning aside of the vessel into St. Ives Bay was for a purpose in which the cargo-owner had no interest, as he would have had for bunkering purposes. There was, therefore, a deviation from the agreed route.

It had been contended that the effect of the rules in the schedule to the Carriage of Goods by Sea Act 1924 was to annul the implication of the contract of carriage that a deviation from the agreed voyage destroyed the right of the shipowner to rely on the exceptions. It had also been contended that rule 4 of Art. IV. of the schedule was not permissive and additional, but controlling and restrictive, merely intimating those sorts of liberties as regards route in any bill of lading which alone should be regarded as permissible. He was unable to agree with either of those contentions. As to the construction of rule 4 of Art. IV., in his opinion the deviation to St. Ives Bay was not "a reasonable deviation" within the meaning of that rule.

As to damages, although after the loss of the cargo, Messrs. Vivian could not transfer any property in the coals to Messrs. Foscolo, Mango, and Co., because the coals had ceased to exist, they were bound under the c.i.f. contract to transfer to them the choses in action represented by the documents, one of which was the right of action against the ship under the bill of lading for damages for breach of the bill of lading in not carrying the coals to Constantinople. Though the cause of action had accrued when the bill of lading was still held by Messrs. Vivian it was for damages of which the measure was the market value when the coals should have been delivered at Constantinople, the value that by handing over the documents in pursuance of their c.i.f. contract they transferred to Messrs. Foscolo, Mango, and Co.

Accordingly, as there had been a deviation from the agreed route, which was not "a reasonable deviation" within the meaning of rule 4, Art. IV. of the schedule to the Carriage of Goods by Sea Act 1924, the right of the shipowners to rely upon the exception for "perils of the sea" was destroyed. There would be judgment for the plaintiffs for 8000*l*. damages on the basis of the market value of the cargo at Constantinople.

The defendants, the shipowners, appealed.

C. R. Dunlop, K.C. and Sir *Robert Aske* for the defendants, the shipowners, appealing. —The steamship *Ixia* did not deviate from the contract voyage from Swansea to Constantinople. She had liberty to call "at any ports in any order for bunkering or other purposes." St. Ives, as appeared from the evidence, was a port, and the ship was entitled to call there for any business purpose, even if the purpose was not connected with that particular voyage, and even if the purpose was not one in which the cargo-owners had some interest: (*Leduc* v. *Ward*, 1888, 6 Asp. Mar. Law Cas. 290; 58 L. T. Rep. 908; 20 Q. B. Div. 475, and *Glynn* v. *Margetson and Co.*, 7 Asp. Mar. Law Cas. 366; 69 L. T. Rep. 1; (1893) A. C. 351). Lord Esher said in the former case (6 Asp. Mar. Law Cas., at p. 292; 58 L. T. Rep., at p. 910; 20 Q. B. Div., at p. 482): "It was argued that that clause gives liberty to call at any port in the world. Here, again, it is a question of the construction of a mercantile expression used in a mercantile document, and I think that as such the term can have but one meaning, namely, that the ports, liberty to call at which is intended to be given, must be ports which are substantially ports which will be passed on the named voyage. Of course, such a term must entitle the vessel to go somewhat out of the ordinary track by sea of the named voyage, for going into the port of call in itself would involve that. To 'call' at a port is a well-known sea term; it means to call for the purposes of business, generally

to take in or unload cargo or to receive orders; it must mean that the vessel may stop at the port of call for a time, or else the liberty to call would be idle. I believe the term has always been interpreted to mean that the ship may call at such ports as would naturally and usually be ports of call on the voyage named." In the latter case, Lord Herschell, L.C. said (7 Asp. Mar. Law Cas., at p. 367; 69 L. T. Rep., at p. 2; (1893) A. C. at p. 355): "There is no difficulty in construing this clause to apply to a liberty in the performance of the stipulated voyage to call at a particular port or ports in the course of the voyage. That port, or those ports, would differ according to what the stipulated voyage was, inasmuch as at the time when this document was framed the parties who framed it did not know what the particular voyage would be, and intended it to be equally used whatever that voyage is. The ports, a visit to which would be justified under this contract, would, no doubt, differ according to the particular voyage stipulated for between the shipper and the shipowner; but it must, in my view, be a liberty consistent with the main object of the contract—a liberty only to proceed to and stay at the ports which are in the course of the voyage. In saying that, I am, of course, speaking in a business sense. It may be said that no port is directly in the course of the voyage . . . inasmuch as, in merely entering a port or approaching it nearly, you deviate from the direct course between the port of shipment and the ultimate port of destination. That is perfectly true; but in a business sense it would be perfectly well understood to say that there were certain ports on the way between Malaga and Liverpool, and those are the ports at which, I think, the right to touch and stay is given." Both these passages were cited by Phillimore, L.J. in *Morrison (James) and Co.* v. *Shaw, Savill, and Albion Company Limited* (13 Asp. Mar. Law Cas. 504, at p. 507; 115 L. T. Rep. 508, at p. 511; (1916) 2 K. B. 783, at p. 798). [Scrutton, L.J.—Under this liberty, might the master put into a port for the purpose of arranging a charter for the next voyage?] It is difficult to answer that. I submit the ship may call for any business purpose, *e.g.*, to land a pilot in fog or bad weather, to land a stowaway, or a sick seaman. In no one of these cases has the cargo owner any interest. The insertion of the word "bunkering" in no way limits the purposes for which the ship may call. The word "bunkering" is only used as an illustration. The *ejusdem generis* rule is inapplicable when there is only one species; in such a case there can be no *genus.* MacKinnon, J., in construing this liberty clause, relied on *Attorney-General* v. *Seccombe* (105 L. T. Rep. 18; (1911) 2 K. B. 688). That case involved the construction of a taxing Act and is of no real assistance here.

Secondly, if this call of the vessel was not within the words of the liberty clause, and so there was deviation, it was "a reasonable deviation" under rule 4 of Art. IV. of the Rules Relating to Bills of Lading in the Schedule to the Carriage of Goods by Sea Act 1924. A "reasonable deviation" must mean any departure of the ship from the usual course of the agreed voyage, which is in fact reasonable in the circumstances. These general words were used, as it was impossible to particularise all the cases that would be reasonable. [Greer, L.J.—May not it be put in this way: Suppose the cargo-owner was on the ship, what would he say as to the deviation being reasonable? If he refused, would it not be unreasonable?] All the circumstances of the case must be considered. It is submitted that the deviation in this case was reasonable. [Slesser, L.J.—Do you say that the rules in the Schedule to the Act of 1924 have changed the law? (See Scrutton on Charterparties, 12th edit., at p. 299, and *The Teutonia* (1872) 1 Asp. Mar. Law Cas. 214; 26 L. T. Rep. 48; L. Rep. 4 P. C. 171).] Yes, that is clear. Deviation is now permitted to save property, and further, any reasonable deviation is not to be deemed to be an infringement of the contract of carriage. Here, if there had been no test of the superheater, there might have been a waste of fuel that was unnecessary. MacKinnon, J. said that he found great difficulty in giving any meaning to the words "any reasonable deviation." [Greer, L.J.—In a case tried by judge and jury which would find whether a deviation was reasonable?] The jury. See *Phelps, James, and Co.* v. *Hill* (7 Asp. Mar. Law Cas. 42; 64 L. T. Rep. 610; (1891) 1 Q. B. 605), where the question was left to the jury whether the master had acted reasonably. There is nothing in rule 4 to suggest that a deviation to be reasonable must be in the interests of both ship and cargo. [*Scaramanga and Co.* v. *Stamp* (1880, 4 Asp. Mar. Law Cas. 295; 42 L. T. Rep. 840; 5 C. P. Div. 295) and *Morrison (James) and Co. Limited* v. *Shaw, Savill, and Albion Company Limited* (13 Asp. Mar. Law Cas. 504; 115 L. T. Rep. 508; (1916) 2 K. B. 783) was also referred to.] If the appellants are wrong on the first two points, it is submitted alternatively that the effects of the rules in the Schedule to the Carriage of Goods by Sea Act 1924 is to annul the implication formerly present in the contract of carriage that a deviation from the agreed voyage destroys the right of the shipowner to rely upon the exceptions. There is nothing in the Act of 1924 which suggests that if there be deviation, all the statutory exceptions are eliminated. If there is unreasonable deviation, no doubt there is a breach of contract, and the shipowners are liable in damages, but the exceptions remain, and the shipowner can take advantage of them. The property in these coals had not passed to the buyer at the time of the loss, and the only party who can recover damages is the seller, and the damages suffered is the contract price of the coals—6000*l*.

Sir *Robert Aske* followed.—Scrutton, L.J., in the course of the argument, has raised the question whether this part of the voyage was a trial trip within the meaning of the liberty clause. This point was not taken before MacKinnon, J. It was not a trial trip. The mere fact that two engineers came aboard cannot make it a trial trip. [SCRUTTON, L.J.—It appears from the evidence that the engineers would have required the helm to be put hard over and all three auxiliary engines to be started suddenly and similar operations for the purposes of the test to the super-heater.] A trial trip, like a trial ball at cricket, is a passage that takes place before the regular voyage. In the course of five or seven hours' voyage all that was or would be done for the purposes of the test, might well occur if there had been no test. The fact that the helm was put hard over does not turn this part of the contract voyage into a trial trip. Alternatively, if it was a trial trip, it finished long before the ship turned aside to go into the Bay of St. Ives. On the first point argued, if there is any limitation on the words " or other purposes " in the liberty " to call at any ports in any order for bunkering or other purposes," that limitation is not due to the presence of the word " bunkering." If there had been a catalogue of such terms, that would be another matter. But here there were no two species out of which to construct a *genus*, and the rule of *ejusdem generis* does not apply. [SLESSER, L.J.—Is there authority that you cannot construct a *genus* from a single category ?] I submit that is to be found in *Tillmanns and Co.* v. *Steamship Knutsford Limited* (99 L. T. Rep. 399 ; (1908) 2 K. B. 385 ; see judgment of Farwell, L.J., 11 Asp. Mar. Law Cas. 105, at p. 112 ; 99 L. T. Rep., at p. 406 ; (1908) 2 K. B., at p. 402). [He cited also the following cases : *Baerselman* v. *Bailey* (8 Asp. Mar. Law Cas. 4 ; 72 L. T. Rep. 677 ; (1895) 2 Q. B. 301), *Steamship Knutsford Limited* v. *Tillmanns and Co.* (11 Asp. Mar. Law Cas. 105 ; 99 L. T. Rep. 399 ; (1908) A. C. 406), *Thorman* v. *Dowgate Steamship Company* (11 Asp. Mar. Law Cas. 481 ; 102 L. T. Rep. 242 ; (1910) 1 K. B. 410), *Aktieselskabet Frank* v. *Namaqua Copper Company Limited* (15 Asp. Mar. Law Cas. 20 ; 123 L. T. Rep. 523), and *Cheshire and Co.* v. *Vaughan Brothers and Co.* (17 Asp. Mar. Law Cas. 449 ; 123 L. T. Rep. 487 ; (1920) 3 K. B. 240).] As to rule 4 of Art. IV. of the rules in the Schedule, deviation in saving life or property at sea is permitted, and neither of these deviations is of any concern to the charterer. And the reasonable deviation permitted need not be in the interest of the charterer. " Reasonable " must mean reasonable from the point of view of the shipowner having regard to all the facts—distance, time, and risk. [He cited *Phelps, James, and Co.* v. *Hill* (7 Asp. Mar. Law Cas. 42 ; 64 L. T. Rep. 610 ; (1891) 1 Q. B. 605) and *Foreman and Ellams Limited* v. *Federal Steam Navigation Company* (17 Asp. Mar. Law Cas. 449 ; 138 L. T. Rep. 582 ; (1928) 2 K. B. 424).]

A. T. Miller, K.C. and *R. F. Hayward* for the cargo owners.—[SCRUTTON, L.J.—We need not trouble you on the point as to measure of damages.] As to the liberty clause, the words " or other purposes " are limited by the preceding word " bunkering." The *genus* consists of the two species " bunkering " and " other purposes." See judgment of Hamilton, J. in *Attorney-General* v. *Seccombe* (105 L. T. Rep. 18, at p. 23 ; (1911) 2 K. B., at pp. 702-3). [GREER, L.J.—Is that the only case where there is only one category ?] Yes. The argument for the appellants seeks to obtain from the liberty clause a wider right to deviate than that afforded by Art IV., r. 4. If there were such a wider right of deviation it would be null and void. See Art. III., r. 8. Regard must be had first and last to the contract voyage. It cannot be part of the contract voyage to call at ports in any order. The case of *Margetson* v. *Glynn and Co.* (7 Asp. Mar. Law Cas. 148 ; 66 L. T. Rep. 144 ; (1892) 1 Q. B. 337) shows that the words in this liberty clause must be subject to some limitation. [SCRUTTON, L.J.—You may compare Lord Mansfield's observations in *Moore* v. *Magrath* (1774, 1 Cowp. 9, at p. 12).] The liberty cannot mean that the vessel may call at a port for any business purpose. The purpose must be one of the same kind as that of bunkering, a purpose in which the cargo-owner has an interest. If this was a trial trip, it was admittedly made without notice. Notice would give the cargo-owner the opportunity of considering his insurances. [GREER, L.J.—There would seem to be nothing to prevent the master trying his engines, whilst on the way to Constantinople ; but if he went away from his route, that would be another matter.] I submit he has no right to run his vessel on tests unless he has given notice to the cargo-owner. I submit that from the evidence it appears that some of the tests were continued after the vessel has turned aside from the contract route near Lundy. As to rule 4 of Art. IV., the phrase " reasonable deviation " had a meaning before the Act of 1924 was passed—see *Phelps, James, and Co.* v. *Hill* (*sup.*) and *The Teutonia* (*sup.*). It is no reason for the abrogation of that meaning and construction of the phrase that rule 4 permits deviation to save property. [GREER, L.J.—If your contention is correct that rule 4 has not altered the law, except as to the right to deviate to save property, it is very odd drafting. It would have been easy to limit deviation to such as is " reasonably necessary to avoid imminent peril." It may well be, in this case, that it was a reasonable deviation to put in to St. Ives Bay to land these two engineers, and an unreasonable deviation then not to return at once to the course of the contract voyage, and instead to continue coasting round a dangerous coast.] There are four views that have been taken as to what is reasonable deviation : (*a*) That the law has not been altered from that stated in *The Teutonia* (*sup.*) except that there is a right to deviate to save property—that is

the view I put forward. (*b*) The view taken by MacKinnon, J. in this case that the deviation to be reasonable must be in the interests of both ship and cargo. (*c*) The view taken by Wright, J. in the case of *Foreman and Ellams Limited* v. *Federal Steam Navigation Company Limited* (*sup.*), where he said : " Its reasonableness must depend upon what would be contemplated reasonably by both parties having regard to the exigencies of the route, known or assumed to be known to both parties," and (*d*) the view that has been advanced before this court by the appellants.

R. F. Hayward followed. [*Hick* v. *Raymond* (7 Asp. Mar. Law Cas. 233 ; 68 L. T. Rep. 174 ; (1893) A. C. 22) and *London and North Western Railway Company* v. *Neilson* (127 L. T. Rep. 469 ; (1922) 2 A. C. 263) were also cited.]

Dunlop, in reply, on the construction of the liberty clause referred to *Packwood* v. *Union Castle Mail Steamship Company Limited* (1903, 20 Times L. Rep. 59) and *Baerselman* v. *Bailey* (*sup.*), and, as showing the distinction between bad navigation and deviation, *Rio Tinto Company* v. *Seed Shipping Company* (1926, 17 Asp. Mar. Law Cas. 21 ; 134 L. T. Rep. 764).

Cur. adv. vult.

SCRUTTON, L.J.—This is an appeal by a shipowning company from a judgment of Mackinnon, J. holding them liable for a loss of a cargo of coal while their ship was on a voyage from Swansea to Constantinople because the loss occurred while the ship was without justification deviating from the contract voyage. To appreciate the position it is necessary to state the facts in some detail.

The *Ixia* was an old ship fitted with a device called a superheater. The object of this fitting is to collect the waste steam and heat which would otherwise go up the funnel and to use it again to reheat the steam and so to save fuel. The steam to be collected may come from the main propelling engines or from the auxiliary engines, such as the dynamo, steam steering gear or donkey engine. The efficiency of the device depends on the correct adjustment of valves to the needs of the actual work being done. If they are too loose too much steam may escape ; if too tight, too much steam may be retained and exercise detrimental back pressure on the engines. On the voyage preceding the one in question the captain had reported that the superheater was not working well and that there was danger from it to the steering gear and dynamo engines. Accordingly the shipowners had the matter looked into by the makers of the superheater and at Swansea a new valve or valves were fitted. I gather that the correct size of valve is not a theoretical matter but is rather empirical, depending like the shape of the propeller on actual experience on the particular ship at work with her usual cargo, speed and sea conditions. Accordingly it was arranged that when the ship started from Swansea with a full cargo of coal two engineers, one from the makers of the superheater and one the superintendent engineer of the shipping line, should accompany her for a short distance to make a test or trial (both words are used) of the efficiency of the setting of the valves under ordinary working conditions and to correct any defects by readjustment of the valves. It was expected that this test or trial would take some five hours or so and that the engineers would be dropped with the pilot off Lundy. Unfortunately, when the time for starting came the firemen came on board in such a condition as to sobriety that they could not do their work effectively. Nevertheless the ship started, but the firemen could not or would not raise a full head of steam, and such a full head was essential for the trial. When Lundy was reached no satisfactory trial had been obtained. Under ordinary circumstances the ship off Lundy would have been set on a course S.W. ¾ W. magnetic till she reached five miles off Pendeen, when her course would have been set for Finisterre to pass along the middle of the channel between the rock-strewn coast of Cornwall to the East and the Seven Stones and Scilly Rocks to the West, a channel about eleven miles wide. In view of the desirability of completing the trial, the captain decided not to follow the ordinary course but to lay a course nearer to the coast of Cornwall, which would take him to the entrance to St. Ives Bay, where he would turn into the bay and get a boat to come out to take the engineers off. This he did, having to wait about one-and-a-half hours in St. Ives Bay. He then had to get back to his original course and might have done so quite safely by going straight out till he got on the course that would take him five miles off Pendeen. Instead of that, he proceeded to coast round the Cornish cliffs at a supposed distance of one-and-a-half miles till he got off the Longships, where he would lay his course again. The captain, owing to the events of the morning, had been a long time on duty, and he went below during this coasting, leaving the second officer in charge. The weather is described as " cloudy and showery," " overcast, with slight rain," and somehow the second mate managed to run the vessel on to the Vyneck Rock, where she sustained such injury that she was totally lost. The second mate said it was the master's fault for leaving him to carry out the dangerous navigation on such a rocky coast. The master said it was entirely the second mate's fault for not doing what he was told to do, keeping a certain distance from the shore. The evidence of the sub-commander of pilots for the St. Ives district, which the judge accepted, was : " (A.) The proper course is to pass within four or five miles of Pendeen, the safe course down the channel. (Mr. Miller) Then haul down to the southward to make Finisterre ? (A.) And then steer down for Finisterre. (Q.) Would you consider it safe or proper to bring a ship in within a mile-and-a-half ? (A.) Not a safe course. (Q.) And if a vessel, instead of running on that course, stands in for the coast and anchors or stops off St. Ives, is she running any greater risk ? (A.)

Certainly she would be running a greater risk than if she stood on her proper course from Lundy down five miles off Pendeen. (Q.) Such risk as is attached to coasting on a rocky coast ? (A.) Certainly. It is a very dangerous coast from St. Ives round," and that coasting course was certainly not the ordinary or safe course from Swansea to Finisterre.

On this evidence the plaintiffs argued that the shipowners had improperly deviated, that the loss occurred on and because of the deviation, that the excepted perils, such as perils of the sea, therefore did not protect the shipowners. The shipowners in answer relied on the terms of the bill of lading and the Rules of the Schedule to the Carriage of Goods by Sea Act, 1924 incorporated thereunder. They argued first that their voyage was within the voyage allowed by the contract, and that what they did was therefore not a deviation at all. They had liberty under the bill of lading "to call at any ports in any order for bunkering or other purposes . . . as part of the contract voyage." The cargo-owners replied that these wide words must on the authorities be restricted by the nature of the main adventure to ports having some relation to the joint adventure of carrying cargo from Swansea to Constantinople ; that the words "other purposes" must receive a similar limitation. It could not be that the ship might call for "any purpose," *e.g.*, if the captain wanted to see his wife ; and the mere presence of the word "bunkering" supported this view, as it was not wanted, if calling for "any purpose" was allowed. They also argued that what had happened was a "trial trip" and it was made "without notice" and, therefore, was not part of the contract voyage. There is a well-known principle of construction expressed by Lord Halsbury, L.C. in the case of *Thames and Mersey Marine Insurance Company* v. *Hamilton* (1887, 6 Asp. Mar. Law Cas., at p. 202 ; 57 L. T. Rep. 695, at p. 696, 12 A. C. 484, at p. 490) : "Words, however general, may be limited with respect to the subject matter in relation to which they are used." This is expressed by Lord Herschell, L.C. in *Glynn* v. *Margetson and Co.* (7 Asp. Mar. Law Cas., at p. 367 ; (1893) 69 L. T. Rep. 1, at p. 2 ; A. C. 351, at p. 355) thus : "Where general words are used in a printed form which are obviously intended to apply, so far as they are applicable, to the circumstances of a particular contract, which particular contract is to be embodied in or introduced into that printed form, I think you are justified in looking at the main object and intent of the contract and in limiting the general words used, having in view that object and intent." In that case a clause "bound for Liverpool, with liberty to proceed to and stay at any port or ports in any station in the Mediterranean, Levant, Black Sea, or Adriatic, or on the coasts of Africa, Spain, Portugal, France, Great Britain and Ireland, for the purpose of delivering coals, cargo, or passengers, or for any other purpose whatsoever" was construed as giving a liberty consistent with the main object of the contract, a liberty only to proceed to and stay at the ports which were in the course of the voyage in a business sense.

The same limitation would apply to the wide words "other purposes" ; they must be purposes of the contract adventure. The preceding word "bunkering" assists that view. As Lord Mansfield says in *Moore* v. *Magrath* (1774, 1 Cowp., at p. 12) : "It is very common to put in a sweeping clause ; and the use and object of it in general is, to guard against any accidental omission ; but in such cases it is meant to refer to estates or things of the same nature and description with those that have been already mentioned." I do not propose to discuss the numerous cases that have explained and confused the so-called rule of *ejusdem generis ;* but the presence of the word "bunkering" shows that there is a limitation on the general words following. If they were unlimited its mention would be unnecessary. To land a maker's engineer and a ship's engineer who has been detained on the ship while making a trial trip not authorised by the contract of affreightment because of the drunkenness of the firemen and to land them at a port on a dangerous coast and not in the course of the voyage does not seem to me to be for a purpose or on a voyage permitted by the contract.

As to the clause, "with liberty to make trial trips with notice," some trials require to be made with a full cargo as, for instance, to test fulfilment of a contract as to the speed of the vessel fully loaded. They might involve departure from the contract voyage, as in runs backwards and forwards over the measured mile. They might involve use of the engines for other purposes than those of the contract voyage. The trial of the superheater valves, the representative of the maker says, is sometimes done by starting from, for example, Barry and making a run to the Nash Light and back. He also says that the trial takes from five to seven hours and that ordinary working conditions with a full head of steam are necessary. The engineers then go round the machinery and see that everything is working all right and that the relief valve is functioning under sea conditions, such as putting the helm hard over and seeing that she is opening out to any relief. From the captain's letter of the 16th April 1929, and the engineer's report of the 16th May 1929 as to the previous voyage, it appears that owing to the relief valves not working well the back pressure was preventing the steering gear from working properly. It is obvious that manœuvres would have to be performed with the steering gear and auxiliary engines which would not necessarily be performed at that time on an ordinary voyage. The bill of lading gives power to perform trial trips on the contract voyage if notice is given. The notice is presumably to allow cargo-owners to see that their insurance is in order. No notice was given in this case, the ship's representative says because he did not anticipate

any trouble and thought the firemen would be all right and the trial over by Lundy. It is evident he did not look at his bill of lading. In my opinion this trial trip was not part of the contract voyage and was therefore a deviation, both in delay and in route and risk.

If what was done was not part of the contract voyage, the next question is: Was what happened a justifiable deviation? Art. IV, r. 4, of the Schedule to the Act of 1924 is as follows: "Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom." This certainly alters the previous law in one respect. Previously, deviation to save life was allowed, but not deviation to save property, unless, as has not been unusual lately, there was a clause in the bill of lading allowing it. A deviation to save property and earn salvage in which the cargo-owner would not share, might cause greatly increased risk and delay with no benefit to the cargo-owner. The rule, however, now allows a deviation to save property. The rule proceeds to allow "any reasonable deviation." It gives no indication whose interests are to be considered. For instance, where the master finds a stowaway on board, it may be "reasonable" if only the interest of the ship is concerned to get rid of him by a deviation to some port even if some distance away. The delay may be detrimental to the cargo-owner. I think the interests to be considered must be those of the parties to the contract adventure, which may include a consideration of the position of their underwriters. Mackinnon, J. has confessed himself quite unable to understand what "reasonable" here means. I think it is a pity that word was used without more indication of whose interests were to be considered. But I am disposed to adopt the meaning given to the word by the House of Lords in *Hick* v. *Raymond* (1892, 7 Asp. Mar. Law Cas. 233; 68 L. T. Rep. 175; (1893) A. C. 22). The question there was whether a reasonable time for loading was to be the reasonable time in ordinary circumstances or in the circumstances then existing. Lord Herschell phrases it thus (7 Asp. Mar. Law Cas., at p. 234; 68 L. T. Rep., at p. 176; (1893) A. C., at p. 29): "The only sound principle is that the 'reasonable time' should depend on the circumstances which actually exist. If the cargo has been taken with all reasonable despatch under those circumstances, I think the obligation of the consignee has been fulfilled. When I say the circumstances which actually exist, I, of course, imply that those circumstances, in so far as they involve delay, have not been caused or contributed to by the consignee." Applying this to the present case, the present deviation was necessitated by the steamer starting with drunken firemen and a short supply of steam which might, if a storm had sprung up, have landed the owner into difficulties as to unseaworthiness. I do not think rule 4 was intended to extend the permissible limits of deviation as stated in the *Teutonia* (1872, 1 Asp. Mar. Law Cas. 214; 26 L. T. Rep. 48, at p. 52; L. R. 4, P. C., at p. 179): "It seems obvious that, if a master receives credible information that, if he continues in the direct course of his voyage, his ship will be exposed to some imminent peril, as, for instance, that there are pirates in his course, or icebergs, or other dangers of navigation, he must be justified in pausing and deviating from the direct course, and taking any step which a prudent man would take for the purpose of avoiding the danger," and I cannot believe that the passage in the Law Reports on page 180 was intended always to exclude the necessity of considering the interests of both parties to the adventure or of preventing the consideration of the fact that the deviation was entered upon because of the default of one party to the adventure. I agree with the view of the judge below that this was not a reasonable deviation.

One further point was argued as to the effect of the deviation, if proved. There is sometimes difficulty in distinguishing deviation from negligence in navigation, as illustrated by the case of *Rio Tinto Company* v. *Seed Shipping Company* (1926, 17 Asp. Mar. Law Cas. 21; 134 L. T. Rep. 764). But in that case the master intended to pursue the contract voyage, though by negligence he set an entirely wrong course. In the present case the master intended not to pursue the ordinary course of the voyage. Before the Carriage of Goods by Sea Act 1924, the effect of unjustified deviation was clear; the ship was deprived of the protection of exceptions for they only applied to a ship on the contract voyage. It was argued that the Act of 1924 had altered the law and (if I understood the argument, I am not sure that I did) that the exceptions applied even to an unjustified deviation. I cannot accept this argument in the absence of any clear words effecting such a serious alteration of the law. When the Legislature intended by the Act of 1924 to abolish the absolute warranty of seaworthiness, they said so in clear terms in sect. 2. I should expect equally clear words to abolish the well-recognised rule as to the consequences of deviation. If I understood the argument I cannot accede to it.

One further point on damages was raised. The cargo of coal was sold by vendors to purchasers on c.i.f. terms, but the property had not passed at the time of the loss. The contract price was roughly 6000*l.*; the cargo was insured for 7000*l.*, and the arrived market value at Constantinople was 8000*l.* The defendants argued that as the property had not passed the vendors could not recover more than the price they would get if the cargo arrived. The judge disregarded the contract and gave them the market price on arrival. In my opinion it is clearly established that this is the correct measure of damage. Unless

the contract was in the contemplation of both parties its terms cannot be used either to reduce damages, because the vendors would not have got the market value if the cargo had arrived but only the contract price; or to increase damages because that is what the vendor has really lost: (see *Rodocanachi* v. *Milburn* (1886) 6 Asp. Mar. Law Cas. 100; 56 L. T. Rep. 594; 18 Q. B. D. 67, *Williams Brothers* v. *Agius* (1914) 110 L. T. Rep. 865; A. C. 510, and *Finlay and Co.* v. *Kwik Hoo Tong* (1928) 17 Asp. Mar. Law Cas. 566; 140 L. T. Rep. 389; (1929) 1 K. B. 400). Both vendors and purchasers are appearing as plaintiffs by the same solicitors, and it is not necessary to make any distinction between them in the judgment. The appeal must be dismissed with costs.

Greer, L.J.—This is an appeal by the defendants from a judgment of Mackinnon, J. whereby he adjudged the defendants to pay to the plaintiffs 8000*l.* damages, and costs, for breach of contract, or for breach of duty, as carriers in respect of a cargo of coal which they undertook to carry from Swansea to Constantinople on the terms contained in a bill of lading dated the 29th June 1929. The acts complained of by the plaintiffs were alleged to be either breaches of contract or breaches of duty, and any decision with regard to the liability of the defendants must depend not merely on the express terms of the contract, but also on the terms which the bill of lading is obliged to incorporate by reason of the Carriage of Goods by Sea Act 1924.

The following are the relevant facts proved in evidence. By the bill of lading the goods are stated to be shipped at Swansea on the steamship *Ixia* bound for Constantinople "with liberty to sail without pilots, to call at any ports in any order for bunkering or other purposes, or to make trial trips after notice, or adjust compasses all as part of the contract voyage." As required by the Carriage of Goods by Sea Act 1924, the bill of lading stated that all the terms, provisions and conditions of that Act and the schedule thereto were to apply to the contract contained in the bill of lading, and the owners and the charterers were to be entitled to the benefit of all privileges, rights and immunities contained in such Act and the schedule thereto as if the same were therein specifically set out. If, or to the extent, that any term in the bill of lading was repugnant to or inconsistent with such Act or schedule it was to be void. Before she started on the voyage to be considered in the present case, the owners had installed on board the steamship a superheater. This is an apparatus for the purpose of utilising what otherwise would be waste heat for the purposes of the steam steering gear and other engines or apparatus ancillary to the main engines. The superheater was not required to enable the vessel duly to perform the voyage contracted for. It is a device which enables her to economise in the use of coal. It was a matter of no consequence to the cargo-owners whether the steamer had a superheater or not, or whether if it had a superheater the same was in working order. The superheater on the *Ixia* had not been working satisfactorily, and before the ship started on the voyage to Constantinople alterations had been made to the superheater, with a view to rendering it efficient. On the 30th June 1930 the *Ixia* started on her voyage from Swansea, where the alterations to the superheater had been effected. She took on board the defendants' superintendent engineer, and a representative of the firm responsible for the superheater, with the object of ascertaining by test whether the superheater was satisfactory or not. This test could be adequately made only if the engines developed a full head of steam. When the vessel started the firemen were drunk, and until they sobered down it was impossible to get a full head of steam. As far as somewhere near Lundy the vessel proceeded on the usual sea route on a voyage from Swansea to Constantinople. It had been intended that the two experts should be put on the pilot boat when the pilot left the steamer in the neighbourhood of Lundy Island, but as the test had not then been completed it was necessary to make some other provision for preventing the experts being carried too far on the journey. Thereupon the captain altered the course of the vessel so as to bring her somewhere near St. Ives Bay. The test continued on this altered course, and when the vessel arrived opposite St. Ives Bay she changed her course to go farther in the bay, signalled for a boat, and dropped her two passengers. The captain then, instead of directly returning to the usual route as he might have done, possibly to save some time, directed the second officer to follow the coast line, keeping a mile and a half from the coast. If he had strictly obeyed this injunction there would have been no accident, but he failed to do so, with the result that the vessel struck a rock and became a total wreck, and the plaintiffs' cargo was lost. In these circumstances the plaintiffs contended that at the time of the loss the vessel was engaged in an unauthorised deviation, and was, therefore, disentitled to the immunity from liability for damage occasioned by perils of the sea, which she would otherwise have been entitled to under Art. IV., r. 2, of the Schedule to the Carriage of Goods by Sea Act 1924.

The learned judge found for the plaintiffs, and awarded them 8000*l.* damages, which he estimated to be the market value that the goods would have had if they had been duly carried to Constantinople.

The appellants contended that the goods were lost while the ship was by reason of the liberty contained in the bill of lading pursuing her contract voyage; and secondly, that in any event the deviation was a reasonable one within the meaning of rule 4 of Art. IV. of the schedule to the Act. On the other hand, it was contended for the respondents (1) that the deviation was not a deviation to call at a port

for bunkering or other purposes within the meaning of the bill of lading; (2) that if it was, it was a liberty to deviate in excess of the deviation permitted by Art. IV., r. 4, and was therefore unlawful; (3) that the loss happened as a consequence of the vessel having made a trial trip without giving notice, and as there is a special provision for making trial trips after notice, such a trip could not be within the meaning of the words "other purposes" in the bill of lading; and lastly, that on the evidence in the case the judge was right in holding that at the time of the loss the vessel was not engaged in a reasonable deviation. Mackinnon, J. held that when the vessel was lost she was not calling at a port for any purpose included in the words "for bunkering or other purposes," that she was, therefore, deviating from the agreed contract voyage, and that such deviation was not a reasonable deviation within Art. IV., r. 4, of the Schedule to the Carriage of Goods by Sea Act 1924.

The first question to be determined is whether or not the learned judge was right in holding that the vessel was at the time of her loss deviating from the contract voyage. The contract voyage in the present case is described as a voyage to Constantinople, with liberty to do certain things in the course of the voyage which would not ordinarily be included in the contractual duty to proceed to Constantinople. In my view the liberties mentioned in the bill of lading are part of the description of the contract voyage, and any action of the ship within the prescribed liberties could not be described as deviation, but would be described accurately as acts in performance of the contract voyage. The point to be determined is whether the words "liberty to call at any port in any order for bunkering or other purposes" included what the ship did in the present case. It was contended for the respondents that the words "other purposes" should by their context be limited to purposes similar to bunkering, which were for the furtherance of the joint adventure of shippers and shipowners. On the other hand, the appellants contended that the *ejusdem generis* rule has no application to general words in a contract which follow one specific instance, but that the rule is confined to cases where general words follow a number of specific instances which can be said to belong to a class or genus. In support of this view they relied especially on the decision of the Court of Appeal in *Baerselman* v. *Bailey* (8 Asp. Mar. Law Cas. 4; 72 L. T. Rep. 677; (1895) 2 Q. B. 301). In that case the court was concerned with the meaning of the following words in the bill of lading, "any act negligence default or error in judgment of the pilot, master, mariners, or other servants of the shipowner in navigating the ship, or otherwise." It was there held that the general words did not indicate something resembling negligence in navigation, but related to negligence in navigating the ship, and in matters other than navigating it. In that case it seems clear from the words of the bill of lading that the exception was intended to cover not merely the acts of the pilot, master and mariners, the only persons concerned in navigation, but also the acts of other servants of the company. It does not seem to me to be a decision to the effect that in no case can the *ejusdem generis* doctrine, or some similar canon of interpretation, be applied to the interpretation of general words preceded by only one specific instance. In the case of *Packwood* v. *Union Castle Steamship Company* (1903, 20 Times L. Rep. 59) Walton, J. held that the words of an exception of damage arising from any act, neglect, or default of the master, officers, crew, or any servant of the shipowner in providing, despatching, and navigating a vessel or otherwise, were wide enough to cover the negligence of some servant of the company who was not engaged in either providing, despatching or navigating the vessel. Walton, J. seems to have thought that the case was within the authority of *Baerselman* v. *Bailey* (*sup.*). This seems to be right, as the clause was necessarily intended to protect the shipowners from the acts of servants other than master, officers, and crew, who were the only persons except the owner who were engaged providing, despatching, and navigating the vessel. It does not seem to me that these cases afford any authority for the view that the doctrine of *ejusdem generis* cannot be applied to words such as those which are used in the bill of lading under consideration. I think, as I said in the case of *Aktieselskabet Frank* v. *Namaqua Copper Company Limited* (1920, 15 Asp. Mar. Law Cas. 20; 123 L. T. Rep. 523) that in applying the *ejusdem generis* rule it is not necessary to ascertain with exactitude what is the scientific definition of the genus to which the general words are supposed to be confined. I think it is sufficient if one can reasonably say that the event that has happened was of a like kind to someone or more of the specific events which precede the general words. In *Attorney-General* v. *Seccombe* (105 L. T. Rep. 18; (1911) 2 K. B. 688) the court had to construe the words of a Taxing Act that property subject to tax should include "property taken under any gift, whenever made, of which property *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise." Hamilton, J. held that the words "or otherwise" must be read as meaning some arrangement *ejusdem generis* with contract, that is to say an enforceable arrangement. In my judgment the reasoning that led him to this conclusion is applicable to the point under consideration in this case. I think the words "bunkering or other purposes" indicate a genus of which "bunkering" is a species—that is to say, purposes reasonably required in the interest of both parties for the furtherance of the carrying voyage. In every case the words of the contract are to be read with their context. The context of general words may be a number

of specific instances or one only, and in either case the general words are to be interpreted by the light of their context. To call at a port for bunkering purposes is to call for a purpose in furtherance of the joint adventure of the ship and cargo. It was admitted in argument that some limitation must be put on the words "other purposes," and that they are not wide enough to include any purpose whatsoever. It was contended that they should be limited only to purposes which were business purposes of the ship, whether they were of any interest to the cargo-owner or not. In my judgment, construing these words in the light of the general objects of the contract recorded in the bill of lading and of the contiguity of the word "bunkering," their true meaning is that the purposes must be purposes relevant to the furtherance of the joint adventure, and that they are not wide enough to include the visit of this ship to St. Ives Bay, a visit which was not in any way essential to the carriage of the respondents' goods from Swansea to Constantinople.

I therefore think that the learned judge was right in holding that when the vessel was lost she was not on her contract voyage, and the ship is liable for the loss of the cargo unless she is protected by Art. IV., r. 4, of the Schedule to the Carriage of Goods by Sea Act 1924. That article is as follows: "Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom." Apart from the provisions of the Act, the ship was entitled to deviate from the agreed voyage for the purpose of saving life, or when such deviation was reasonably necessary to avoid imminent peril. The cases of *The Teutonia* (1872) 1 Asp. Mar. Law Cas. 214; 26 L. T. Rep. 48; L. Rep. 4 P. C. 171) and *Phelps, James and Co.* v. *Hill* (7 Asp. Mar. Law Cas. 42; 64 L. T. Rep. 610; (1891) 1 Q. B. 605), afford instances of the latter permitted deviation recognised at common law. Those cases probably depend upon an implied term in the contract. I do not think the words of rule 4, Art. IV., of the Act are confined to cases of this kind. I think rule 4 is to be read as enlarging the area in which a deviation will not be deemed to be a breach of the contract. I think the word "reasonable" is used in its ordinary sense in relation to what would otherwise be a deviation occurring in the course of the voyage. We must picture to ourselves the cargo-owner and the shipowner being present when the occasion for the deviation arises and ask ourselves: "Could the cargo owner object to the course taken by the vessel without being unreasonable?" It is to be remembered that the statute was passed to give effect to a convention between representatives of shipowners and traders. One can understand shipowners objecting to the hardship they suffered, by having the advantages of their contract entirely taken away, by a slight deviation from the contract route of such a character that no reasonable cargo-owner would object to it. I do not think that the words "reasonable deviation" ought to be treated as confined to what is reasonably necessary or required or directed to the interests of both parties. I think the words mean a deviation, whether in the interests of the ship or of the cargo-owner or of both, to which no reasonably minded cargo-owner would raise any objection. In my judgment if the ship had contented herself with going into St. Ives Bay and there putting the two engineers ashore, and had then proceeded directly to get back on to the usual route for vessels going from Swansea to Constantinople, the deviation would have been a reasonable deviation within the meaning of the rule. This is not what the ship did. By the master's orders, after landing the engineers, the ship proceeded along a dangerous coast instead of getting back to the safe waters where she would have been if she had not deviated at all. In my judgment, from the time that the mate took charge under the master's orders and began to navigate the vessel along the coast, the deviation became an unreasonable one. The ship ought to have been taken, according to the evidence, to a position where she would pass within four or five miles of Pendeen, where she would have been on a safe course down channel instead of being taken within a mile-and-a-half off the coast which was not a safe course, but which was a course along a very dangerous coast.

It was further contended on behalf of the appellants that the well-established rule of law that a deviating ship loses the benefit of the exceptions in the contract no longer applies since the Act of 1924. I agree with the learned judge that there is nothing in this point. The provisions of the Act import into the agreement compulsorily certain exceptions, but there is nothing in the Act to show that these exceptions can be relied upon while the vessel is not pursuing the contract voyage, but is pursuing a voyage, or part of it, which is not covered by the contract at all. Many other points were discussed in the course of the argument before us, but if I am right in the view I have expressed this is sufficient to determine the appeal, and in my judgment it is not necessary to express any opinion on other matters which I do not think arise for decision at present.

As regards the measure of damages, I am of opinion that the learned judge was right. As the property had not passed from Messrs. Vivian and Co. at the time of the loss they were the proper plaintiffs. The fact that they had sold the goods at a price which was less than the market price that the goods would have had on arrival at Constantinople cannot, according to the authorities, be used in order to diminish the damages, just as it could not be used to inflate the damages if it happened to be a larger sum than such market price. So far as this court is concerned we are bound to accept this view of the law by the decision

in *James Finlay and Co.* v. *N. V. Kwik Hoo Tong* (17 Asp. Mar. Law Cas. 566; 140 L. T. Rep. 389; (1929) 1 K. B. 400). Scrutton, L.J. states the result of the decided cases in the following words: "Before the decision in *Hall* v. *Pim (Junior) and Co.* (139 L. T. Rep. 50), we had been brought up to understand that, as a general rule, sub-contracts entered into by a buyer cannot be used to increase or minimise his damages, as the sub-contracts are incidental matters with which the seller had nothing to do. I find that laid down in *Rodocanachi* v. *Milburn* (*sup.*), which was affirmed in *Williams Brothers* v. *Agius* (*sup.*), and in an unreported case in which Greer, L.J. was counsel, the House repeated the language used in *Williams Brothers* v. *Agius* (*sup.*) and affirmed *Rodocanachi* v. *Milburn* (*sup.*). This court in *Slater* v. *Hoyle and Smith* (122 L. T. Rep. 611; (1920) 2 K. B. 11), applied the same principle, that unless the seller contemplates the possibility of a sub-contract under which a claim may be made on the buyer, the sub-contract must be disregarded for the purpose either of increasing or diminishing the damages."

I agree that this appeal should be dismissed with costs.

Slesser, L.J.—I agree that this appeal fails.

In this action, the plaintiffs claimed damages from the defendants for breach of contract or breach of duty as carriers to carry certain goods under bills of lading to an agreed destination on an agreed voyage. It is conceded by the defence that the goods were lost during the agreed voyage, but such loss, being due to the perils of the sea or the wreck of the ship, it is said that under the exception in the contract the defendants are not liable in damage. There is no doubt that the goods were so lost owing to the perils of the sea or the wreck of the ship, but the plaintiffs reply that the defendants cannot here rely on the exception or perils of the sea or wreck of the ship because, in the circumstances, they had lost the right to rely upon the exception which would otherwise protect them, in that they have broken the contract by not doing the thing contracted for in the way contracted for, and, consequently, cannot rely on conditions which were only intended to protect them if they carried out the contract in the way they had contracted to do it: (see per Scrutton, L.J. in *Gibaud* v. *Great Eastern Railway Company* 125 L. T. Rep. 76, at p. 81; (1921) 2 K. B. 426, at p. 435). The plaintiffs seek to come within this principle for two reasons: first, they say that on the facts of this case the language of the bills of lading excludes the right of the defendants to rely on the exception of perils of the sea or wreck of the ship, and secondly, they rely upon the Carriage of Goods by Sea Act 1924 and the schedule thereto.

The material facts of the case are as follows: There was shipped upon the *Ixia* at Swansea for Constantinople under a number of bills of lading containing similar terms certain steam coal. On a previous voyage, without the knowledge of the plaintiffs, the defendants had used an apparatus called a superheater, the object of which was to utilise waste steam so as to make an economy in running. It is not necessary to consider the working of this device except to say that, owing to its failure to work properly on this previous voyage, when the *Ixia* started on the contract voyage to Constantinople which is here in question, she had on board a representative of the makers of the superheater and also the superintendent engineer of the defendants, both of whom joined the ship at Swansea. The intention had been that the tests should thereafter immediately be made and that these two experts should leave the ship with the pilot at or before they reached Lundy Island; but owing to a failure of the firemen, who were drunk, to get up a proper head of steam which was necessary for the test of the superheater, the two gentlemen had to remain on the ship after the pilot had left. They then arranged with the captain that the ship should go to the small port of St. Ives in Cornwall which was admittedly a deviation from the normal voyage to Constantinople, taking the vessel more to the eastward and by a route more dangerous, as the evidence shows, than otherwise would have been the case. The *Ixia* lay to in St. Ives Bay; a boat came alongside, and the engineers got into it and went to the shore. The ship then proceeded on its way. After a short time the captain went below and left the second mate in charge with instructions to keep a mile-and-a-half off the coast and follow down in that way—not to sail by a compass course. In the event, the second mate ran the vessel on to a rock called the Vyneck Rock, where she became a total loss. The goods of the plaintiffs were also lost, and it is in respect of that loss that they claim damages.

With this brief statement of facts I proceed to consider the arguments which have been addressed to us by way of appeal from the judgment of Mackinnon, J. who has decided that the plaintiffs recover 8000*l.* damages and that both under the terms of the bill of lading itself and under the 1924 statute the defendants fail in their endeavour to rely upon the exception in the contract which might otherwise protect them. The case for the defendants on the bill of lading that they were within their contract depends upon the liberty therein given them "to call at any ports in any order for bunkering or other purposes." They say, first of all, as indeed they must, that St. Ives is a port within the meaning of the liberty, and in so far as there is no limitation of the word "port" in the bill of lading I think they are right in this contention. It was shown in the evidence and in the documents disclosed that St. Ives is a port. The real difficulty in the defendants' way lies in the consequent words "for bunkering or other purposes." It is argued for the defendants that the words "other

purposes " here are wide enough to include any business purpose connected with the voyage. Mr. Dunlop had to concede during the argument that for the captain to call for the purpose of visiting his wife would not be an " other purpose " within the meaning of those words. On the other hand, it was argued by Sir Robert Aske that it is not possible here to apply the doctrine of *ejusdem generis* inasmuch as the word " bunkering " appears as an isolated species of purpose and that there is no genus to which the words " other purposes " can be assimilated. The authority which is cited against him on this head of the argument, which was relied upon by the learned judge in the court below, is the case of the *Attorney-General* v. *Seccombe* (105 L. T. Rep. 18 ; (1911) 2 K. B. 688). That was a case under the Customs and Inland Revenue Acts as applied by the Finance Act 1894, wherein occurred the words that certain property should be affected by taxation if retained to the entire exclusion of the donor or of any benefit to him under contract or otherwise. Here, also, it was argued that the words " or otherwise " should not be read as *ejusdem generis* with contract, in that the word " contract " was itself but a species and there was, therefore, no genus. Hamilton, J., now Lord Sumner, said (105 L. T. Rep., at p. 23 ; (1911) 2 K. B., at p. 703 : " The words 'by contract or otherwise' indicate a genus of which contract is one species and all other species are intended to be swept in. I do not see the difficulty of saying that there is a genus of which contract is a species." On a strict application of the *ejusdem generis* rule it may be argued with some force that to construct a genus out of one species and undefined general words (which together with the species has gone to form the genus) in order to define the denotation of those general words is but a *petitio principii*, but, however, that may be, on the wider consideration of the intention and context, there is ample authority for Lord Sumner's view. In *Monck* v. *Hilton* (1877, 36 L. T. Rep 66 ; 2 Ex. Div. 268) the appellant was convicted for using a device " by palmistry or otherwise " to deceive. He pretended to have the supernatural faculty of obtaining from invisible agents messages or powers. Baron Cleasby said : " It was further contended that the words 'or otherwise' following the particular word 'palmistry' must be read as having reference to arts or pretentions of the same description as palmistry, according to a general rule of construction limiting the effect of general words following a particular description. As to the general rule, no authority was necessary " (36 L. T. Rep., at p. 68 ; 2 Ex. Div., at p. 275). In *Williams* v. *Golding* (1865, 13 L. T. Rep. 291 ; L. Rep. 1, C. P. 69) the *ejusdem generis* rule was applied to the single term " district surveyor " or other person, and it was held that a right to one month's notice of action for anything done under the Metropolitan Building Act 1855 was limited to persons *ejusdem generis* with a district surveyor. Under the heading " generic words following more specific " in Maxwell's Interpretation of Statutes, 7th edit., p. 284, appears the following : " It is, however, the use of a general word following one or more less general terms *ejusdem generis* which affords the most frequent illustration of the rule." I mention this in deference to Sir Robert Aske's argument that the doctrine cannot logically be applied where there is only one species, but once this view is rejected it becomes a question of the intention of the parties as expressed in their written agreement whether they did mean to limit the words " or other purposes " and, if so, what limitation they intended to place upon them. In *Margetson* v. *Glynn and Co.* (1892, 7 Asp. Mar. Law Cas. at p. 150 ; 66 L. T. Rep. at p. 144 ; 1 Q. B. 337, at p. 344, Fry, L.J. in construing a liberty under a bill of lading to proceed to and stay at any port or ports in any rotation . . . for the purposes of delivering coals, cargo or passengers or for any other purposes whatsoever, holding with the rest of the court that the general words of the bill of lading must be limited with reference to the specific voyage, and that they allowed the ship to proceed only to ports which were fairly and substantially in the ordinary course of the voyage, said : " Our decision depends, as it appears to me, upon an ancient and well-established principle of construction of which *Leduc* v. *Ward* (1888, 6 Asp. Mar. Law Cas. 290 ; 58 L. T. Rep. 908 ; 20 Q. B. Div. 475) is one of the most recent illustrations. I think that principle of construction is not confined to this class of documents, but is applicable to all documents. This principle is applicable wherever specific words are used to express the main object and intent of the instrument, and in some other parts general words are used which in their utmost generality would be inconsistent with and destructive of the main object of the contract. When the court, in dealing with a contract or document of any kind finds that difficulty, it always, so far as I know, follows this principle, that the general words must be limited so that they shall be consistent with, and shall not defeat the main object of the contracting parties." The words of the species of liberty in this present case are far narrower than in *Margetson* v. *Glynn and Co.*, being confined to " bunkering." I think that the word " other " in this context means purposes other than but analogous to bunkering. This does not include all other possible purposes, but points to a dichotomy between " bunkering " and " purposes in the nature of bunkering," which latter words, nevertheless, are to be read as in one genus with the former. An essential element of such a synthesis of bunkering and other purposes would be the taking on board of materials necessary for the prosecution of the voyage. In my judgment, to call at a port to take on board other materials than coal—provisions, medical supplies and the like—may properly be said to be purposes in the

nature of, though other than, bunkering. It is very possible that on a liberal construction of the words "calling at ports" for repairs might possibly fall within the definition, but I am clear that the genus "bunkering or other purposes" should not be extended to include any and every business purpose so long as it is connected with the voyage. So to hold would be to construe the words as a general liberty to call, say to discharge or to take in cargo, in which case the word "bunkering" would be otiose, and so offend the doctrine that upon the true construction of bills of lading words must be read reasonably and with a view to all the circumstances: (*Knutsford Steamship* v. *Tillmans* (11 Asp. Mar. Law Cas. 105; 99. L. T. Rep. 399; (1908) A. C. 406). In *Baerselman* v. *Bailey* (8 Asp. Mar. Law Cas. 4; 72 L. T. Rep. 677; (1895) 2 Q. B. 301) the wider language of the liberty was held to justify a wider connotation, but that case does not, in my view, at all help the defendants in this one.

Applying these considerations to the present case, I have come to the conclusion that the setting down of these two men for their convenience or for the convenience of the shipowners was not a calling for the purpose of bunkering or any other similar purpose. It was not necessary for the prosecution of the voyage for, as far as the cargo-owner was concerned, there was no reason why these two engineers should not be carried on to Constantinople, if, indeed it were necessary to have them on board at all. If we have regard to the intention of the parties, it is impossible to think that the words "liberty to call at any port for bunkering or other purposes" can properly be extended to cover all conveniences of the shipowners or of a third party. Moreover, on the facts disclosed in this case the deviation occurred for a trial trip. Trial trips with notice to the cargo-owner are expressly permitted during the performance of the contract, but here, in my view, the deviation to land these men was a consequence and part of a trial trip without notice which is by implication excluded from the contract, and so in its turn, when undertaken, excludes the benefits of the exceptions to the shipowners.

The second defence, that raised under the statute, is one of great difficulty and of great importance. Before the passing of the Carriage of Goods by Sea Act 1924 certain deviations were undoubtedly permissible—such deviations "being an exception to the general rule that in the absence of express stipulation to the contrary the owner of a vessel, whether a general ship or chartered for a special voyage, impliedly undertakes to proceed in that ship without unnecessary deviation in the usual and customary manner": (Scrutton on Charterparties, 12th edit., art. 99). According to the authorities, of which *Scaramanga* v. *Stamp* (1880, 4 Asp. Mar. Law Cas. 295; 42 L. T. Rep. 840; L. Rep. 5 C. P. Div. 295) is a leading example, a deviation for the purpose of saving life was justified, but not a deviation for the mere purpose of saving property. If a master receive credible information that if he continue in the correct course of his voyage his ship or cargo would be exposed to some imminent peril he would be justified in reasonable deviation to avoid the peril. He may take any step that a prudent man would take for the purpose of avoiding the danger: (*The Teutonia* (1872, 26 L. T. Rep. 48; L. Rep. 4, P. C. 172). This, being the law before the passing of the 1924 Act, it is not suggested that in the present case the deviation into St. Ives Bay could have been justified as a deviation, apart from any specific liberty, before the statute, for there was here no question of saving life nor of avoiding peril. But the defendants here contend that the Schedule to the 1924 Act, rules relating to bills of lading, Art. IV., r. 4, has given them a statutory right to deviation on the facts of the present case. The provisions of Art. IV., rule 4, are as follows: "Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom." These provisions create two new classes of deviation, namely, first, any deviation in saving or attempting to save property at sea, and, secondly, any reasonable deviation. It is under the latter permission that the defendants here seek to come, and the problem thus arises: What is the meaning of the words "reasonable deviation" in this article? It is argued by Mr. Dunlop, as I understand him, that it can be extended to cover any deviation during a contract voyage which a prudent owner or master of a vessel might think fit, which is a question of fact. At the other extreme, it is said that the section has really made no difference to the existing law beyond adding the right to deviate to save property. As between these two conditions, both of which I reject, there are the views expressed by Wright, J. in the case of *Foremans and Ellams* v. *Federal Steam Navigation Company* (1928, 17 Asp. Mar. Law Cas. 449; 138 L. T. Rep. at p. 584; 2 K. B., at p. 431). There the learned judge says: "The expression 'reasonable deviation' may give rise to considerable difficulties. I think it is clear that a deviation would not be reasonable merely because it was convenient to the shipowner. Its reasonableness must depend upon what would be contemplated reasonably by both parties, having regard to the exigencies of the route, known, or assumed to be known to both parties." And he goes on to give as an example of his meaning: "I think in this case that shippers on a cargo liner of this type must be deemed to have known the circumstances of mercantile geography such as the position as to the amount of water available . . . and the probable draught of a vessel of this type, and it is on that ground that I do not think the deviation here, the only deviation which I think

is before me, can be regarded as unreasonable." This view would appear to indicate that the criterion of reasonableness must depend upon what would be contemplated reasonably by both parties or assumed to be known to both parties. In the present case, Mackinnon, J. takes a slightly different view. He has searched the dictionary for definitions of the word "reasonable." He says that he has not the faintest idea what is to be regarded as reasonable deviation, but he is satisfied that the putting into St. Ives was not a reasonable deviation. He appears to treat the matter as one of fact, but also states that it was no concern of the cargo-owners and not part of any joint interest of the cargo-owners and the shipowners. It will be observed that both these learned judges associate the cargo-owner and the shipowner together in considering what test is to be applied, Wright, J. looking to what was known or assumed to be known to both parties in order to test the reasonableness of the deviation; Mackinnon, J. apparently deciding the matter as one of fact, or taking his standard from the point of view of the interest of the parties. I do not know that there is any very vital difference between these points of view; but for myself I adopt the view presented *obiter* by Wright, J. for the following reasons. The rules which are by the statute to be applied to bills of lading are in effect implied terms thereof imported into the individual contract. Sect. 2 of the Act, for example, provides: "There shall not be implied in any contract for the carriage of goods by sea to which the Rules apply" certain undertakings. Such a statutory provision is sometimes put positively as in the Coal Mines (Minimum Wage) Act 1912, which, by sect. 1, sub-sect. (1), provides that: "It shall be an implied term of every contract" that certain conditions shall obtain. With regard to the specific provisions of Art. IV. as to deviation for the saving of life or property, no question of the knowledge of the cargo-owner can arise, for these are rights of deviation specifically bestowed upon the shipowner in certain defined events, as in the common law case of avoiding perils, but as regards the phrase "reasonable deviation," had a similar specific provision appeared in the bill of lading itself before the passing of the Act, I think that the bilateral nature of the contract, the mutual interest in the voyage and in the security of the ship and goods, would induce the court to say that the test of reasonableness of the deviation would have had to be regarded from the point of view of reasonableness in regard to conditions in or about the voyage known or contemplated by both parties. In deviation the parties contracting have voluntarily substituted another voyage for that which has been agreed: (per Roche, J. in *Rio Tinto Company* v. *Seed Shipping Company* (1926, 17 Asp. Mar. Law Cas. 21; 134 L. T. Rep. 764; 42 Times L. Rep. 316), citing Lord Mansfield in *Lavabre* v. *Wilson* (1779, 1 Douglas, 284)). "So soon as the parties have agreed upon the voyage and have written that in, the definition of the voyage must, as a matter of business, cut down the general words as to what is fairly applicable to the voyage which has been agreed upon and defined": (per Bowen, L.J. in *Margetson* v. *Glynn and Co.*, 7 Asp. Mar. Law Cas., at p. 150; 66 L. T. Rep. 144; (1892) 1 Q. B., at p. 343). If these observations be true in construing a bill of lading containing the phrase "deviation," I cannot see why a similar standard should not obtain when the words are imported into the contract by operation of statute.

Applying this test, it is evident in the present case that neither the existence nor the deficiencies of the superheater nor the necessity, if it existed, for its trial, nor the landing of the engineers were known or could fairly be assumed to be known to the cargo-owners. This is not a case like that of *Foremans and Ellams* v. *Federal Steam Navigation Company* (*sup.*), where the circumstances of mercantile geography and the probable draught of a vessel of a certain type might be held to be in the knowledge or contemplation of the parties to make a deviation in certain waters reasonable. I have, therefore, adopting Wright, J.'s criterion, come to the conclusion that the defendants fail to establish any protection under the Carriage of Goods by Sea Act 1924.

If, however, as Mackinnon, J. seems to indicate, the question of reasonableness of deviation is one wholly of fact, then, as in the case of *Nelson and Sons* v. *Nelson Line* (*Liverpool*) (10 Asp. Mar. Law Cas. 544; 96 L. T. Rep. 402; (1907) 1 K. B. 769), the question of reasonableness may be one which might be left to a jury without further direction, and, although this is not my view, for, as I have indicated, I think that the test laid down by Wright, J. is a correct one, yet, if it be so, the learned judge has found against the appellants that this was not, in his opinion, on any construction, a reasonable deviation, and, for this reason also, there being evidence on which the learned judge could so find, I am of opinion that this appeal should fail.

Appeal dismissed.

Solicitors for the appellants, *Holman, Fenwick*, and *Willan*.

Solicitors for the respondents, *Charles Lightbound, Jones*, and *Lightbound*, for *Ingledew* and *Co.*, Newcastle-upon-Tyne.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Feb. 25, 26, 27, *and March* 17, 1931.

(Before ROCHE, J.)

GREEN STAR SHIPPING COMPANY LIMITED *v.* LONDON ASSURANCE AND OTHERS. (*a*)

General average expenditure — Fire while loading — Subsequent collision — Total loss of ship — Voyage abandoned — Policy on hull and machinery — Policy on cargo's proportion of general average and right to indemnity from club for cargo's proportion of general average not otherwise recoverable— Apportionment between the various risks— York-Antwerp Rules 1890—*Marine Insurance Act* 1906 (6 *Edw.* 7, *c.* 41), *s.* 66, *sub-s.* 4.

The plaintiffs were the owners of the steamship A. *While loading a general cargo at New York a fire broke out and general average expenditure was incurred. The share of the cargo-owners amounted to* 18,000 *dollars and this was paid to the plaintiffs. After repairs and reloading the* A. *proceeded on her voyage, but was struck and sunk by another steamer. The cargo was discharged and the* A. *raised and taken into Chester, near Philadelphia, where the voyage was abandoned. Further general average disbursements were made. By the law and practice of Philadelphia cargo-owners were not liable to pay more than the salved value of the cargo. This they paid. The first defendants, the London Assurance, were the insurers in part of the hull and machinery against perils of the sea and fire. The second defendants, the British Traders Insurance Company Limited, were the insurers of part of the cargo's proportion of general average disbursements, and the fourth defendant, A. H. Henderson, was an underwriter of a similar policy at Lloyds for the other part. The third defendants, the United Kingdom Mutual Assurance Association Limited, were a club of which the plaintiffs were members, and as such entitled to be indemnified against liabilities for cargo's proportion of general average not otherwise recoverable. The plaintiffs claimed under the policies. The London Assurance denied liability. The third defendants admitted liability if and when any balance was ascertained. The other insurers disputed the amount claimed and the method of computation. The bills of lading provided that general average should be adjusted under the York-Antwerp Rules* 1890, *and under the policies the same rules were to apply.*

Held, that the 18,000 *dollars recovered in New York must be taken into account when computing the liability of the disbursements underwriters. In the case of the hull underwriters the values to be considered were those at the termination of the adventure and the loss incurred by reason of the diminution or extinction of the value of the cargo was a loss which fell upon the assured, the shipowner, and came within sect.* 66, *sub-sect.* (4), *of the Marine Insurance Act* 1906.

ACTION tried before Roche, J. without a jury.

The following is taken from the statement of facts :

1. The question is whether and to what extent the plaintiffs are entitled to recover certain general average and other losses and expenditures from their insurers.

2. The plaintiffs were the owners of the steamship *Andree*. On the 14th April 1922 the vessel commenced loading a general cargo at New York for Barcelona and African ports. On the 20th April a fire broke out in her holds and did serious damage to vessel and cargo. The latter had to be discharged and various general average expenses were incurred by the plaintiffs. The vessel was repaired and, having reloaded part of the damaged cargo and taken in fresh cargo, left New York on the 21st May for her said intended voyage. Part of the damaged cargo was left at New York and either sold or returned to the shippers.

3. On the 22nd May 1922, the *Andree* was struck and sunk by the steamship *H. F. Alexander*. The cargo was again discharged and the *Andree* was raised and taken into Chester, near Philadelphia, where the voyage was abandoned. Further general average expenses were incurred by the plaintiffs by reason of the collision.

4. The bills of lading provided for general average to be adjusted according to the York-Antwerp Rules 1890.

5. An average adjustment was prepared (dated the 30th Dec. 1924) by Messrs. Willcox, Peck, and Hughes, of New York, wherein the amount of general average expenditure adjusted upon the cargo was 73,941.31 dollars. By the law and practice of Philadelphia owners of cargo are not liable to pay in general average more than its value ultimately salved. This value was paid by the owners of the cargo, and the cargo was then released to them, and they refused to pay any further sum. The adjustment was made in accordance with the law and practice of the port where the adventure terminated, namely, Philadelphia, and the plaintiffs contend that by virtue of the law and practice above mentioned, the cargo-owners were not liable to pay more than they have paid as above mentioned.

6. By a policy of marine insurance, dated the 7th July 1921, and effected on behalf of the plaintiffs who were fully interested, the defendants, the London Assurance, insured the hull and the machinery of the *Andree* in the sum of 5595*l.* (part of 100,000*l.*) for twelve months from the 24th June 1921 against perils of the seas and fire. The policy contained the Institute Time Clauses, one of which provides that general average is to be adjusted according to York-Antwerp Rules and subject thereto according to the law and practice obtaining at the place where the adventure ends.

(*a*) Reported by R. A. YULE, Esq., Barrister-at-Law.

7. By a final average adjustment dated the 7th Dec. 1926 of Messrs. Manley, Hopkins, and Co., it is shown (after taking into account certain matters not dealt with in Messrs. Willcox's adjustment including payment on account and sums recovered from the owners of the *H. F. Alexander*) that there is due from hull underwriters the sum of 5776*l.* 9*s.* 4*d.*, of which the share of the defendants, the London Assurance, is 323*l.* 3*s.* 11*d.*

8. By a further policy of marine insurance dated the 3rd Feb. 1925, but in fact arranged after the fire in April and before the collision in May 1922, and effected on behalf of the plaintiffs, the defendants, the British Traders Insurance Company Limited, insured the *Andree's* cargo's proportion of general average disbursements for the second voyage in the sum of 7500 dollars, being part of an aggregate insurance of 30,000 dollars against the usual perils, and it was declared that the said insurance was on (*inter alia*) average disbursements applicable to cargo only; to pay the proportion attaching to any amount by which the property might be reduced in value owing to any subsequent accident, &c. And by another policy of marine insurance dated the 30th Jan. 1925 the said disbursements were insured at Lloyd's on the same terms for the sum of 22,500 dollars, being the balance of the sum of 30,000 dollars. The last-mentioned policy was underwritten by the defendant Henderson in the amount of 400 dollars.

9. By reason of the collision on the 21st May 1922 (being a subsequent accident within the meaning of the two policies last mentioned) the cargo was seriously damaged and reduced in value, and there were incurred general average expenditure and special charges on the cargo amounting to 55,912.32 dollars, of which the plaintiffs incurred expenditure and charges amounting to 34,447.98 dollars, namely, 34,241.76 dollars general average expenditure and 202.22 dollars special charges on the cargo. Upon the basis adopted in an average adjustment or statement of claim prepared by Messrs. Willcox and Co., dated the 2nd Oct. 1925 (if on the construction of the two said policies and in the circumstances hereinbefore agreed that basis is held to be correct) the plaintiffs are entitled to recover from the defendants, the British Traders Insurance Company Limited and from the defendant Henderson the sums of 1376*l.* 4*s.* 8*d.* and 67*l.* 3*s.* 2*d.* respectively. Upon the basis adopted in the points of defence of the two said defendants (if on the construction of the two said policies and in the circumstances hereinbefore agreed that basis is held to be correct) the plaintiffs are entitled to recover from the two said defendants the respective amounts brought into court by them and no more. The plaintiffs have received the net proceeds of the cargo amounting to 18,048.91 dollars, referred to in par. 8 of the points of defence of the disbursement underwriters.

10. The plaintiffs are members of the indemnity club of the defendants, the United Kingdom Mutual Steamship Assurance Association Limited, and were duly entered therein in respect of the *Andree.* By rule 2 (*c*) of the said club the plaintiffs are entitled to be indemnified against liabilities for cargo's proportion of general average and if and so far as it is not recoverable from the insurers mentioned in pars. 7 and 9 hereof is "not otherwise recoverable" within the meaning of the said rule.

11. The rate of exchange on the 2nd Oct. 1925 was 4.84 dollars to the £. At this rate the sterling equivalents of

29,643.12 dollars is 6397*l.* 6*s.* 10*d.*
26,643.90 dollars is 5504*l.* 18*s.* 9*d.*
6,660.97 dollars is 1376*l.* 4*s.* 8*d.*
19,982.93 dollars is 4128*l.* 14*s.* 1*d.*
325.05 dollars is 67*l.* 3*s.* 2*d.*

The plaintiffs claimed from the London Assurance 323*l.* 3*s.* 11*d.*; from the British Traders Insurance Company Limited, 1376*l.* 4*s.* 8*d.*; from H. H. Henderson 67*l.* 3*s.* 2*d.* The London Assurance denied liability altogether. The British Traders Insurance Company and H. H. Henderson limited their liability to 55*l.* 0*s.* 3*d.* and 2*l.* 18*s.* 8*d.* respectively, which sums were paid into court.

Miller, K.C. and *R. I. Simey*, for the plaintiffs.

Raeburn, K.C. and Sir *Robert Aske*, for the London Assurance.

G. R. Mitchison, for the British Traders Insurance Company Limited, and Mr. A. H. Henderson.

James Dickinson, K.C. and *Cyril T. Miller*, for the United Kingdom Mutual Steamship Assurance Association Limited.

Cur. adv. vult.

March 17, 1931.—ROCHE, J. read the following considered judgment:

This case raises questions of novelty and great difficulty in marine insurance law. Those questions were very fully argued by counsel for the various parties, to whom I am much indebted for their assistance, and at the conclusion of the hearing I reserved my judgment.

The hearing proceeded upon the basis of an agreed statement of facts supplemented by the material contained in several average statements. It was agreed by counsel that I should deal in the first instance with principles only, leaving all questions of amount for subsequent settlement or determination. Accordingly, where figures appear in this judgment they are to be regarded as symbols only employed to identify the items in dispute and not as binding upon either the parties or the court.

The facts may be summarised as follows: The plaintiffs at the material time were the owners of the steamship *Andree.* The defendants, the London Assurance, were underwriters on hull and machinery under a time policy containing the Institute Time Clauses, and I refer to them hereafter as the hull underwriters. The defendants, the British Traders

Insurance Company Limited, and the defendant Henderson (one of the underwriters of a Lloyds' Policy) were underwriters of a special risk relating to general average losses, and for convenience I refer to them hereafter as the special risk underwriters. The defendants, the United Kingdom Mutual Steamship Assurance Association Limited, of which the plaintiffs were members, undertook subject to its rules to indemnify members against divers liabilities, including cargo's proportion of general average not otherwise recoverable. I refer to this association hereafter as the club. In the year 1922 two casualties befell the *Andree* on one voyage—the first in April at New York by reason of a fire during loading, and the second in May by collision occurring on her voyage. As a result of the collision the *Andree* was sunk, but was salved with some of her cargo and taken to or near Philadelphia, where the voyage was abandoned. In connection with each of these casualties general average expenditure was incurred by the plaintiffs. The contract of affreightment provided for the adjustment of general average according to York-Antwerp Rules. The policy issued by the hull underwriters by clause 9 of the Institute Time Clauses provided as follows: "General average to be adjusted . . . if the contract of affreightment so provides according to York-Antwerp Rules, but in all matters not specifically referred to in York-Antwerp Rules 1 to 17 inclusive, the adjustment shall be in accordance with the law and practice obtaining at the place where the adventure ends, and as if the contract of affreightment contained no special terms upon the subject." The material York-Antwerp Rule is rule 17 of the Rules of 1890, which provides that the contribution to a general average shall be made upon the actual value of the property at the end of the adventure, and also that deductions shall be made from the value of the property of all charges incurred in respect thereof subsequent to the general average act, except such charges as are allowed in general average. By the law and practice obtaining at Philadelphia where the adventure ended owners of property are not liable to pay more than its salved value.

As between the parties to the contract of affreightment on the facts and under the stipulations of the contract, the position seems to me to be clear especially after the authoritative exposition of the law as regards York-Antwerp Rules in the case of *Chellew* v. *Royal Commission on the Sugar Supply* (15 Asp. Mar. Law Cas. 393; 126 L. T. Rep. 103; (1922) 1 K. B. 12). The position and rights and liabilities of these parties I find to be as follows. The general average expenditure of the plaintiffs in connection with the first casualty (New York fire) was about 63,000 dollars. (This figure and consequently sums to be recovered in this action based thereon may be subject to some reduction if actual payments are found to be less than certain estimated liabilities.) Part of the cargo was discharged at New York and was not re-loaded. The net value of such cargo which was saved by reason of the General Average Act was about 18,000 dollars. This 18,000 dollars worth of cargo was the only property in the adventure which was available for the purpose of contribution in the first general average because the expenditure occasioned by the second general average, the collision, fell to be deducted from the values of ship and cargo (York-Antwerp Rule 17) for the purposes of the adjustment of the first general average. After this deduction was made the values of the rest of the cargo and of the ship were nil. Contribution from the owners of the cargo saved at New York was due up to its full value and the plaintiffs have received in respect thereof a sum of rather over 18,000 dollars. Apart from this they have not received and are not entitled to any further contribution from owners of cargo. Accordingly they are out of pocket some 45,000 dollars of general average expenditure in respect of the fire.

In respect of the second general average act the figures stand approximately as follows. The general average expenditure of the plaintiffs was about 18,000 dollars. The salved value of the ship at the termination of the adventure was about 116,000 dollars and the salved value of the cargo was rather over 26,000 dollars. The owners of this cargo are liable to make contribution up to its full value, and the plaintiffs have received this contribution amounting to 26,249 dollars. Apart from this they have received and are not entitled to any further contribution from owners of cargo. Accordingly, they are out of pocket some 155,000 dollars of general average expenditure in respect of the collision. As to 116,000 dollars of this sum there could in the circumstances have arisen no right to contribution since that amount of the expenditure would clearly have remained to be borne by the ship, representing 100 per cent. of its salved value. The incidence of the balance of about 39,000 dollars alone has to be regarded when the policies come to be considered.

I now turn to the much more difficult question of the position as between the plaintiffs and their underwriters and the club. As I have stated above, the amounts to be considered for this purpose are sums of about 45,000 dollars in respect of the fire, and about 39,000 dollars in respect of the collision—84,000 dollars in all. But the controversy is narrowed and the amount in dispute is diminished by reason of the following facts. The American adjusters have proceeded on the basis and the hull underwriters agree that the hull underwriters are on any view liable for a considerable part of this sum. Broadly speaking, the amount to be deducted from the above figure of 84,000 dollars, and indisputably falling upon the hull underwriters is about 55,000 dollars to 56,000 dollars, leaving an amount in controversy of about 29,000 dollars. The main reason for this reduction in amount, as I gather, is as follows: the point of view of the American adjusters adopted by the underwriters was

that for the purpose of ascertaining the ship's proportion of general average the value of ship and cargo had to be looked at and assessed at the time of the fire and of the collision respectively. So far as this point of view is advanced, as it is advanced, as a ground for limiting the extent of the liability of the hull underwriters, I will discuss later in my judgment. At present I am merely explaining how the net figure in dispute of approximately 29,000 dollars is arrived at. To show what is the real controversy between the parties the explanation of how this figure of about 29,000 dollars is arrived at may be stated in another way as follows: The American adjusters treated two sums not recovered from cargo but arrived at on the basis of the notional valuation of the cargo at the times of the fire and collision respectively as constituting cargo's proportion of general average (beyond the sums of about 18,000 and 26,000 dollars in fact contributed). These sums were about 24,862 dollars in respect of the fire, and about 4780 dollars in respect of the collision, or somewhat more than 29,000 dollars in all. This way of looking at the matter is, I think, useful in considering the case generally, and particularly in connection with the liability of the special risk underwriters. The liability of these underwriters falls to be considered and determined before the liability of the other defendants is dealt with. Whatever the special risk underwriters are liable for diminishes the liability, or possible liability, of the other defendants. The contracts for the special risk insurances were made soon after the fire and before the vessel started on her voyage. The actual policies were issued considerably later. These policies are in all material respects of the same tenor which may be summarised as follows: The assured were insured at and from New York for a total amount of 30,000 dollars on cargo's proportion of general average disbursements as per specification attached. The specification or average disbursements clause contained the following amongst other stipulations: "On average disbursements applicable to cargo only interest admitted—amount at risk to be subsequently declared and valued. To pay the proportion attaching to any amount by which the property may be reduced in value owing to any subsequent accident, loss, damage, general average, salvage or charges without benefit of any other insurance." By the proportion of average disbursements applicable to cargo was meant the disbursement made in connection with the first (fire) general average, and it was not suggested that the special risk policies extend to the second (collision) general average. The question, therefore, is for what part of the 24,862 dollars above mentioned are these defendants liable. The two main points at issue between the plaintiffs and these defendants were: (*a*) The plaintiffs contended that as between themselves and these defendants the 18,000 dollars realised from the cargo which was not carried on from New York did not come into the account. These defendants contended at first that they were entitled to credit for the whole amount. (*b*) These defendants submitted that the plaintiffs were not the persons who expended all the moneys claimed to be general average expenditure by ship, or, put another way, that the plaintiffs were not interested to the full amount of their claim. As to (*a*) I hold that the 18,000 dollars must come into the account for the following, amongst other, reasons: The cargo which went on from New York was reduced in value by the collision and second general average from about 193,000 dollars to nothing. Had there been no collision the full contribution recoverable from cargo in respect of the first general average (fire) would have been recovered. But if the cargo which went on to meet with the collision had not met with that collision and the resulting reduction in value, the cargo which remained at New York would not have been liable to make contribution up to 100 per cent., as it, in fact, did in the circumstances as altered by the collision. The contract sued upon being a contract of indemnity this must be taken into account and some credit given in respect of the contribution of 100 per cent. by the cargo worth about 18,000 dollars. The question is for how much? The figures finally contended for by Mr. Mitchison for the special risk underwriters were as follows: Deduct 18,000 from a figure of about 32,000 dollars appearing in the New York average statement and leave 14,000 as the sum lost by the collision for which his clients were responsible subject to his other points. I incline to the view that this figure is approximately correct, but I am not sure precisely how a figure of about 19,000 dollars arrived at by the New York adjusters was arrived at, and whether this figure may not be more correct than the figure of 14,000 dollars. Accordingly, whilst deciding that the 18,000 dollars does come into the account, I leave for further settlement and determination the result in figures of this finding.

Since preparing this judgment there has been sent to me the report of a judgment of the United States Circuit Court of Appeals in the suit of Armour and Co. against the present plaintiffs. By this judgment the judgment of Mr. Justice Wolsey (37 Lloyd's List Rep. 178), and which was referred to in the arguments of counsel in the present case, was reversed. Armour and Co. were owners of cargo on this voyage, and the action related to their rights against and in respect of the sum recovered from the owners of the other steamship, the *Alexander*, concerned in the collision. It may be—I do not know that it is so—that this reversal of Mr. Justice Wolsey's judgment may affect the figures in the present case and the figures relating to the first general average and the 18,000 dollars. At any rate, I am fortified in the opinion I had already arrived at that the figures ought to be left in such a way that the parties could consider them afresh without any binding decision from me at the present stage on any question of amount.

As to (*b*)—that is the contention as to the interest—this is really a question of fact. I have no doubt on the facts that the New York Adjusters were correct in treating all the expenditure, the subject matter of the claim, as made by or on behalf of the shipowners. Further interest is admitted by the policies and I think this was interest in the whole of the expenditure, the subject matter of the claim.

Whatever figure is finally arrived at as representing the liability of the special risk underwriters, be it 14,000 dollars or 19,000 dollars or some intermediate or other sum, it is apparent that there remains of the plaintiffs' claim a balance of some 10,000 to 15,000 dollars, which, on the basis I have adopted above, is not recoverable from the special risk underwriters. The real question is whether the hull underwriters or the club are liable for this balance, which for convenience is hereafter described as the balance. Counsel for the club argued somewhat faintly that the club might not be liable even if the hull underwriters were not liable. But the real strength of his argument went in support of the plaintiffs' contention that the hull underwriters are liable for the balance. If I were not of opinion that the hull underwriters are so liable I should certainly hold that the balance in those circumstances fell within the description of rule 2 (*c*) of the club's indemnity rules, that is to say, would be cargo's proportion of general average not otherwise recoverable. But I have arrived at the conclusion that the parties liable for the balance are the hull underwriters. This question to my mind presents very great difficulty and is also, in my view, one bare of authority. Its decision seems to me to depend upon the terms and meaning of sect. 66, sub-sect. (4), of the Marine Insurance Act 1906. The sub-section is in the following terms: "Subject to any express provision in the policy, where the assured has incurred a general average expenditure, he may recover from the insurer in respect of the proportion of the loss which falls upon him; and, in the case of a general average sacrifice, he may recover from the insurer in respect of the whole loss without having enforced his right of contribution from the other parties liable to contribute." The rest of sect. 66 has some bearing upon the matter. Sub-sects. (1) to (3) define or formulate the rules of general average as between the parties to the contract of affreightment. The rest of the sub-sections deal with the rights of the assured or liabilities of insurers. Sub-sects. (6) and (7) call for no comment. Sub-sect. (5) deals with the case where the assured has not made an expenditure, but has paid or is liable to pay a contribution to another party's expenditure. That contribution he can recover from his insurer. Sub-sect. (4) deals with two cases: general average expenditure and general average sacrifice. The latter an assured can recover in full, as it was decided he could in *Dickenson* v. *Jardine* (3 Mar. Law Cas. (O.S.) 126; 1868, 18 L. T. Rep. 717; L. Rep. C. P. 639). It was suggested by the plaintiffs that some small part of the so-called expenditure in the present case consisted of sacrifices. Counsel for the hull underwriters at once agreed that if this were so his clients were liable to that further extent and no question as to that falls to be determined in this judgment. The real question was, and is, this: The plaintiffs and the club contended that the whole of the general average expenditure which had been incurred by the plaintiffs and was not met by contributions from the cargo represented and constituted the proportion of the loss which fell upon the plaintiffs and that this proportion of the loss, or rather, the balance after recovery from the special risk underwriters, was recoverable from the hull underwriters. On the other hand, Mr. Raeburn, for the hull underwriters, supported the view put forward by the New York adjusters that the proportion of the loss which fell upon the assured should, for the purpose of the hull insurance, be arrived at by assessing the values of the respective interests at the time when the expenditures were incurred for and on behalf of those interests. Moreover, he strenuously contended that the New York adjusters had so dealt with the matter and had apportioned the sums now claimed as cargo's proportion of general average and that their decision could not be reviewed. The decision of Mr. Justice Gorell Barnes and of the Court of Appeal in *The Mary Thomas* (7 Asp. Mar. Law Cas. 495; 71 L. T. Rep. 104; (1894) P. 108) was relied upon in support of this contention, and also as an authority directly and wholly opposed to the plaintiffs' claim upon the hull underwriters. As to the construction of sect. 66, sub-sect. (5), it was conceded by Mr. Raeburn that though this was a codifying Act it might alter the law (see *Polurrian Steamship Company Limited* v. *Young*, 13 Asp. Mar. Law Cas. 59; 112 L. T. Rep. 1053; (1915) 1 K. B. 922), but it was said that it required clear words to lead to the conclusion that the law was altered by the Act and that so far from the words being clear in that direction they could themselves bear the construction which these defendants contended for and which they said was to the same effect as the law as laid down in *The Mary Thomas* (*sup.*).

I will deal shortly with these various contentions, but before doing so it is to be observed that the rules laid down by sect. 66 are laid down subject to any express provisions in the policy. There is no express provision in the policy now in question varying in favour of the insurers the rules of sub-sect. (4). So far as there is express provision bearing on the matter in dispute, it is contained in the provision making general average rules govern the rights and liabilities of the parties, and that provision, in my opinion, operates in favour of the assured in the present case.

As to the contention that the New York adjustment is binding and cannot be

reviewed, it was held in *Harris* v. *Scaramanga* (1872, 1 Asp. Mar. Law Cas. 339; 26 L. T. Rep. 797; L. Rep. 7, C. P. 481), *De Hart* v. *Compania Anonima De Seguros Aurora* (9 Asp. Mar. Law Cas. 345, 454; 89 L. T. Rep. 154; (1903) 2 K. B. 503) and *The Mary Thomas* (*sup.*), that the foreign adjustments were binding because the contracts provided that general average was payable according to (or per) foreign statements. Here there is no such stipulation but merely clause 9 of the Institute Clauses, and it seems clear from the language of Romer, L.J. in the second of the above cases (89 L. T. Rep., at p. 158; (1903) 2 K. B., at p. 509) that had the Institute Clauses stood alone the foreign adjustments would not have been held to be binding. In my judgment there is nothing in the present case making the New York adjusters' views or statement binding upon the parties as to the effect of provisions of the York-Antwerp Rules or as to any matter now in controversy.

As to the more general application of the decision in the case of *The Mary Thomas* (*sup.*), I do not regard that decision as supporting these defendants' contention. It was a case where the foreign adjusters, whose adjustment both Gorell Barnes, J. and the Court of Appeal held to be binding, had apportioned a certain amount to cargo as its contribution. The Dutch courts had held that the shipowner could not recover that contribution because his servant, the master of the vessel, had been negligent. The English courts held that the shipowners could not go behind the foreign adjustment and recover from their underwriters what they had failed to recover from the cargo-owners. It is also to be observed that, as was expressly stated by Lindley, L.J., "Nothing turns on York-Antwerp Rules," and I respectfully agree with the observation of Scrutton, L.J. in *Chellew* v. *The Royal Commission on the Sugar Supply* (15 Asp. Mar. Law Cas. at p. 397; 103 L. T. Rep., at p. 108; (1922) 2 K. B., at p. 20) that Gorell Barnes, J. in *The Mary Thomas* (*sup.*) was adopting the view that by English law, as apart from York-Antwerp Rules, the rights and liabilities of the parties were to be assessed as at the time when the expenditure was incurred rather than at the time when the adventure terminated. In these circumstances I feel that the decision in *The Mary Thomas* (*sup.*) not merely does not conclude this case, but affords me little, if any, guidance for its decision. Apart from *The Mary Thomas* (*sup.*), counsel were unable to refer me to any case before or after the date of the Act arising on facts and documents comparable with the facts and documents in the present case. Mr. Raeburn, for the hull underwriters, relied upon the fact that no case was to be found as an indication that such a claim was foreign to our law, and he suggested that the observations in *Chellew's* case (*sup.*) of Mr. Mackinnon (the arbitrator who stated the special case) and of Scrutton, L.J. as to special insurance of the risk of loss of cargo, indicate that the idea of an existence of a claim against ordinary underwriters on ship was also foreign to the minds of those high authorities on the law of marine insurance. I think the observation is not without weight, but the point never really arose for discussion, still less for determination, in *Chellew's* case (*sup.*), and I must now decide it for myself as a matter of first impression on the true effect and construction of sub-sect. (4) of sect. 66 of the Act in its application to the facts of this case. In my opinion, where the contract of insurance provides for the adjustment of general average according to York-Antwerp Rules if the contract of affreightment so provides (as it did here), then as between the insurer and the assured as well as between the parties to the adventure the values which are alone material are the values at the termination of the adventure. It seems to me to be unnatural, if not impossible, to adopt and act upon values estimated or assessed at two different dates, the termination of the adventure and the incurring of the expenditure. The intention of an insurance contract in the present form seems to me to be that as regards general average the contract of affreightment and the contract of insurance shall in respect of the matters now in question proceed upon the same basis and principles. Accordingly, if a shipowner, being the assured under a policy in the present form, incurs expenditure for general average and the cargo's contribution falls short of what is hoped or expected by reason of the diminution or extinction of its value before the adventure terminates, then I think that loss falls into the category of the proportion of the loss which falls upon the assured, the shipowner, and is within the meaning of those words in the Marine Insurance Act, s. 66, sub-s. (4).

I, therefore, hold that the plaintiffs are entitled to recover the balance of their claim against the defendants, the hull underwriters.

The result of these findings is that I give judgment for the plaintiffs against the defendants, the London Assurance, the defendants, the British Traders' Insurance Company Limited, and the defendant, Arthur Henry Henderson, for their respective proportions of the divers sums or items which I have held above to be in principle the sums or items recoverable under the several policies. I give judgment for the defendant association.

Judgment for the plaintiffs.

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

Solicitors for the defendants, The London Assurance, British Traders Insurance Company, and A. H. Henderson, *Waltons* and *Co.*

Solicitors for the United Kingdom Mutual Steamship Assurance Association, *William A. Crump* and *Son*.

Supreme Court of Judicature.

COURT OF APPEAL.

March 9 *and* 10, 1931.

(Before SCRUTTON, GREER and SLESSER, L.JJ.)

THE VARING. (*a*)

ON APPEAL FROM THE COURT OF PASSAGE OF THE CITY OF LIVERPOOL.

Charter-party—"Scanfin" charter-party—Mode of discharge—Consignee entitled to select any one or more of alternative modes "if customary and available"—Alternative mode selected not available—Delay—Damages.

The defendants were consignees of certain wood goods shipped in the plaintiff's vessel V. *under bills of lading incorporating the terms of the Scanfin form of charter-party. By clause* 13 *of the said charter-party it was provided that the cargo was to be discharged in the customary manner "on to the quay and (or) into lighters and (or) craft and (or) wagons and (or) on to bogies and thereon stowed and (or) stacked as customary at the port of discharge, the consignees having the right to select any one or more of these alternatives if customary and available at the time of discharge."*

The V. *duly proceeded to the port of* G., *which was the port of discharge. At* G. *the customary mode of discharge for cargoes which require sorting or storing is into railway wagons known as "domestic" wagons, in which the cargo is conveyed to storage grounds which are under the control of the railway company, who also own the docks at* G. *In the case of cargoes which do not require to be sorted or stored, the customary mode of discharge is into main line railway wagons for conveyance direct to destination.*

When the V. *arrived at the port of* G., *the railway company, owing to congestion of storage grounds, refused to admit to a discharging berth any vessel whose cargo required to be taken in "domestic" wagons to the storage ground, but they were willing to admit and discharge any vessels whose cargo could be discharged into main line wagons and dispatched to its destination without requiring to be taken to the storage ground. The defendants, who had not sold their cargoes, insisted upon them being taken to the storage ground. The railway company thereupon refused to admit the* V. *to a discharging berth, and she was accordingly delayed. The plaintiffs claimed damages.*

Held (reversing the decision of the presiding judge of the Liverpool Court of Passage) that although discharge into "domestic" wagons for conveyance to the storage ground was a customary mode of discharge at the port of G., *it was not an available mode of discharge at the time when the* V. *arrived, and that the consignees were not therefore entitled to insist upon their cargo being taken to the storage ground. The plaintiffs were therefore entitled to recover damages in respect of the delay of the* V.

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

APPEAL from the Liverpool Court of Passage. The plaintiffs, Fornyade Rederiaktiebolaget Commercial, owners of the steamship *Varing*, appealed against the judgment of the presiding judge of the Liverpool Court of Passage (Sir W. F. Kyffin Taylor) dismissing their claim for demurrage amounting to 195*l*., or alternatively for damages, against the defendants, W. V. Blake and Co., timber merchants, Manchester, and Joseph Green, a timber merchant of Keighley.

The *Varing* was chartered under the terms of two Scanfin charter-parties, dated respectively the 9th and 10th Aug. 1927, to load part cargoes of wood goods and to proceed to Garston "or so near thereto as she could safely get." The defendants were the holders of bills of lading incorporating all the terms and conditions of the said charter-parties, including the following clause:

Clause 13. The cargo shall be discharged by the vessel in the customary manner as fast as the vessel can deliver during the ordinary working hours of the port, on to the quay and (or) into lighters and (or) craft and (or) wagons and (or) on to bogies and thereon stowed and (or) stacked as customary at the port of discharge, the consignees having the right to select any one or more of these alternatives if customary and available at the time of discharge.

The charter-parties further provided that demurrage was to be payable at the rate of 30*l*. per day in the event of the vessel not being loaded or discharged with despatch, and that the steamer should have liberty to complete with the same and (or) other goods for the same and (or) other ports.

The plaintiffs alleged that before the *Varing* arrived in the Mersey they were informed by the dock authorities, the London Midland and Scottish Railway Company, that owing to congestion they were unable to accept any more vessels for which storage accommodation was required for any material portion of the cargo, but that they would accept vessels where the whole of the cargo was to be discharged into railway wagons and sent direct from ship to destination; that the plaintiffs indicated this to the defendants, who refused to allow their timber to be so dealt with, and moreover on the 15th Sept., when the vessel arrived at Garston Docks, that the defendants required their timber to be sorted and stored on the dock estate, with the result that the dock authorities refused to allow the vessel to enter; that the dock authorities stated that they could not say when a berth would be available for the vessel whose consignees required such services; that it might be two or three months, but it was impossible to say; that the plaintiffs were ready and willing to take their vessel into dock for discharge into main line railway wagons direct or by any other method, but the

defendants, although well aware of the position, throughout persistently refused to agree to the above method of discharge, whereby the *Varing* was unable to enter the said dock or to get further until the midnight tide of the 27th Sept. 1927, when she was allowed to dock, the defendants having then agreed to discharge into main line wagons without sorting or storing.

The plaintiffs brought an action in the Liverpool Court of Passage, claiming that the *Varing* was an "arrived" ship on the 15th Sept. 1927, and that thereupon her time for discharge began to run, or alternatively they claimed damages for breach of contract by wrongfully preventing the discharge of the *Varing* or failing to accept delivery of their cargo.

The presiding judge of the Liverpool Court of Passage (Sir W. F. Kyffin Taylor) gave judgment for the defendants, and stated his findings of fact and conclusions as follows :

A substantial portion of the *Varing's* cargo belonging to the defendants had not been sold or disposed of, and wherever delivered was under the necessity of being sorted and stored until the defendants were in a position to dispose of it. This fact at all material times was known both to the defendants and the plaintiffs and the dock authorities.

On the 10th Sept. the dock authorities asserted that the sorting ground at Garston Park Dock was so congested with timber that they were disabled from receiving any more cargoes of timber which required thus to be dealt with, and this condition continued in fact until the end of the year, and on and after the end of September this prospect was known to be probable.

It was essential that the dock authorities should know before allowing any vessel with timber to enter their docks whether the cargo required thus to be dealt with. If the timber cargo had been disposed of and could be loaded into wagons and sent direct from the dock estate to the destination outside, there was in fact less difficulty, although there might be some delay. This also was known to the plaintiffs and to the defendants.

The fact that a portion of the cargo had to be sorted and stored was originally known only to the defendants, and while that fact did not concern the plaintiffs, the plaintiffs and the defendants were bound on the insistent inquiry of the dock authorities to disclose it.

The mode of discharge at Garston for timber cargoes is by shore crane to wagons. If the cargo has to be sorted and stored it is landed into domestic wagons and transported to the sorting ground on the estate. If it is to be sent away it is delivered into main line wagons ; the domestic wagons never leave the estate and are unfit for transit on main lines though in cases of emergency main line wagons are sometimes used for domestic purposes.

On the 15th Sept. the *Varing* arrived in the Mersey and anchored in the Sloyne, and remained there until she entered the Garston Dock. I find that the Sloyne is a customary and usual place or area where vessels anchor to await entrance to Garston. I understood that other anchorages were sometimes used. No evidence was given as to the precise distance from the Sloyne to Garston, nor as to whether or not it was practicable to anchor nearer to Garston, nor of any custom to regard a vessel destined for Garston and anchored in the Sloyne as being as near as she could safely get to Garston, in fact vessels could get safely to the dock gates, but there was no evidence as to whether a vessel could lie near the said gates and deliver cargo into lighters.

On the 11th Sept. the master of the *Varing* and Mr. Beck, ship's agent, saw Mr. Thompson, of the dock authorities, for the purpose of "stemming" the vessel, that is to enter particulars as to the vessel in the stemming book, which entry indicates acceptance of the vessel by the dock authorities and decides the order of admittance to the dock.

As a substantial portion of the cargo had to be sorted and stored no entry was made in the stemming book, but particulars in writing were taken and admission was refused. When the vessel was allowed to enter on the 27th Sept. entry was made in the stemming book by interlineation as to the 15th Sept.

If the cargo could have been sent away after delivery to a destination outside Garston the vessel could have been admitted into the dock on the 24th Sept. A discussion then began between the plaintiffs, the defendants, and the dock authorities, chiefly by correspondence, as to what was to be done and as to alternative ports of discharge.

The plaintiffs, from consideration of the expense to the defendants—and incidentally to themselves—did not desire to act in a high-handed manner and adopt an alternative port. Preston, Liverpool, and Manchester were debated, but I find that Preston was in fact so congested as not to be available, Liverpool was expensive and objected to by the defendants, and Manchester required expenditure on additional freight canal dues, dock dues, pilotage, and towage. Time was consumed in controversy.

The plaintiffs maintained the view that the defendants should receive the cargo into main line wagons to be carried direct to points outside Garston, and that this was a customary and available method of discharge, and the only one available at the time. The defendants throughout insisted on their alleged right to have the cargo delivered at Garston, and that the expenses of an alternative port should be paid by the plaintiffs, and later, that they should be shared.

The plaintiffs ultimately proposed that the cargo should be delivered without prejudice to the settlement of liability for extra expenses being decided by legal process if unavoidable. Objection was made by the defendants to this portion of the correspondence being read as being "without prejudice." I admitted it, being of opinion that it would be difficult to appreciate the position without knowledge of it, and considering that it did not constitute an offer to settle made without prejudice, but contained a suggested expedient for saving time and reservation of the question of liability for later discussion.

Whatever course had been adopted, this question, in the absence of final agreement, would have remained for decision. The plaintiffs never adopted an alternative port or place of discharge, although very near to such a decision on the 19th Sept. (the learned judge referred to the correspondence), but this attitude was not persisted in.

The difficulty was solved on the 27th Sept. by the dock authorities, who obtained a storage ground at Widnes which they agreed to regard "as if" Garston in all respects. Neither the plaintiffs nor the defendants had any share in this solution in which, as it suited their interests, they both acquiesced.

I have read all the authorities cited to me in argument which I hope I have understood, and as a result of consideration of the cases and the facts

of this case, I find that the *Varing* was not an "arrived" vessel until the 27th Sept. She arrived at Garston on that date, and not before, and also was not before that date as near as she could safely get so as to deliver the cargo, always afloat. I think the onus is on the plaintiffs to satisfy me as to this.

The circumstances were such as to make it reasonable for the plaintiffs to adopt an alternative port or place for delivery of the cargo if the ship was as near as she could safely get, but the plaintiffs never did adopt or select an alternative or substituted port or place for the discharge, nor did they give any effective notice to the defendants of any such suggestion.

The contention of the plaintiffs that the defendants ultimately agreed to something which they had at first wrongfully and unreasonably refused, namely, to discharge into main line wagons without sorting or storing, is not supported by evidence. The *Varing* was refused entry because the dock authorities knew that a substantial portion of the cargo had to be sorted and stored at Garston. This was a fact which the defendants had to concede and were unable to alter, and this cargo in fact required sorting and storing.

They did not refuse discharge into main line wagons, but they did state that their timber, not being disposed of at any destination outside of Garston, required sorting and storing there. This fact, known to the dock authorities, was, in my view, the cause of the refusal to allow entry and of the consequent delay, and was not, in my judgment, a breach of their contract by the defendants.

The defendants did insist on delivery at Garston, but this insistence was not the cause of the refusal by the dock authorities nor of the delay. It may be that the defendants were unreasonable in rejecting the plaintiffs' proposals and demanding a share of the expenses of delivery. This may have caused some of the delay, but this was not the cause of action, nor was it relied upon by counsel nor discussed, nor was any attempt made to apportion any part of the delay attributable to this cause. The plaintiffs, on the facts existing up to the 27th Sept., could have cut the knot but refrained.

If the proposal of the plaintiffs had been accepted the loss by delay might have been diminished, but the question of liability would have remained for settlement.

I think the plaintiffs fail, but in case my view of the facts or the law is held to be erroneous, and the plaintiffs are held to be entitled to recover, I think the amount claimed is correct and assess provisionally the damages at 195*l*.

I give judgment for the defendants with costs.

The plaintiffs appealed.

Gething for the appellants.

Sellers for the respondents.

Scrutton, L.J.—This is an appeal from the Court of Passage, the claim being a claim for either demurrage or what I may call quasi demurrage in respect of a Norwegian ship called the *Varing*, which was chartered under the Scanfin form of charter to proceed to a Scandinavian port to load timber, and therewith proceed to Garston, or so near there as she could safely get. At the discharging port, by clause 13, the cargo of the ship was to be discharged by the vessel "in the customary manner as fast as the vessel can deliver during the ordinary working hours of the port, on to the quay and (or) into lighters and (or) craft and (or) wagons and (or) on to bogies and thereon stowed and (or) stacked as customary at the port of discharge, the consignees having the right to select any one or more of these alternatives if customary and available at the time of discharge."

It is always important to remember that this Scanfin charter is a general form of charter made out so as to be applicable to a large number of ports, and consequently some of these words frequently have no application whatever to the particular case which is then under consideration; and that is particularly true of clause 13, because there are many ports at which you cannot discharge into lighters, and there are many ports which have not got many bogies, and there are some ports which have not got a quay. Clause 13, therefore, has to be considered in the particular instrument by the circumstances of the particular port for which the Scanfin charter has been used. This court had, about a year ago, a case of the owners of the ship *Svendborg* suing the railway company which own the docks at Garston: (*Dampselskat Svendborg* v. *London, Midland, and Scottish Railway Company*, *ante*, p. 27; 141 L. T. Rep. 521; (1930) 1 K. B. 83). There was a great deal of evidence, and the question there was, inasmuch as the regular mode of delivery at Garston is into wagons, at what point of transit from the ship to the wagon does the ship's liability to expense cease and the consignees' liability for expense begin? There was a long discussion as to which party was to stow the timber that came in the crane as it was dropped into the wagon. It was quite clear, in all that discussion, that the ship had nothing whatever to do with the matter after the timber reached the wagon. Consequently, it never became necessary to look into the question which is the subject matter of this case, namely, what is to happen to the cargo when it comes away in the wagon, and therefore nothing will be found about that part of the case in the judgment. But I see that I reserved my opinion on a matter which might have some relevance in this case, and that is where the ship delivers its consignments of timber in a heap or in a lump. I said in the course of my judgment (*ante*, p. 29; 141 L. T. Rep. at p. 523; (1930) 1 K. B. at p. 93): "I mention, to show that I had not overlooked it, that it is not ordinarily good delivery to tender goods to two consignees claiming different marks mixed up together and to leave the consignees to sort them," unless the consignees have acquiesced in that form of delivery. Obviously the ship must make delivery of each parcel to each consignee in the absence of express agreement, and must not discharge all its contents in a heap and say: "Now sort it out for yourself." In many ports, to avoid the delay of sorting, the goods are tumbled out in a heap and sorted by the dock company, as agents partly of the ship

and partly of the consignees, and then delivery is made to the respective consignees.

Now what has happened in this case is this: I should mention, first of all, that the charter purports to be to Garston, not to Garston docks, and if there had been another place of delivery in Garston—in the locality known as Garston—the circumstances would have been quite different from what they are in this case where it is admitted that there was no "usual place of delivery" in Garston, except Garston Dock. At the time that this timber was shipped there was great congestion of timber in the Lancashire ports with the result that the storage ground at Garston docks into which cargo which had to be sorted, or which the consignee wished to store until he had sold it, was put, was full up for a very considerable time. Other Lancashire ports were also in somewhat similar difficulties, and the congestion was so great that the London, Midland, and Scottish had to put up notices that in the case of a ship with timber coming into their dock, if the consignees were not ready to take it straight away by what are called "main line trucks" on the railway, but wanted to have it stored, the railway company could not take that ship into dock because they had no room to store the timber which the consignee desired to have sorted and stored until he could sell it. "On the other hand," said the railway company, "if what you want to do does not involve sorting and storing, but if the ship is ready to make delivery to you into railway wagons which will go straight out, we can take the ship if the whole of the cargo is ready, or substantially the whole of the cargo is ready, to go that way." That was the position at the time that this vessel arrived off Garston. When she got to Garston (I will explain what I mean by that in a moment) on the 15th Sept., that was the position. One can illustrate it by two letters. On the 15th Sept., the day on which the *Varing* arrived in the neighbourhood of Garston, a letter was written to Blake, one of the consignees. There were three consignees of timber—Mr. Blake, Mr. Green, and Mr. Craig—having between them about 500 standards, of which Blake had about 300, Green 100 or a little over, and Craig a little under 100—ninety, I think. The letter I refer to reads: "We are in receipt of your letter of yesterday's date with respect to the above steamer, and have taken this matter up with the railway company, but regret to have to advise you that they will not accept this steamer for Garston unless practically the whole of her cargo can be loaded into main line wagons at ship's side, and sent away from Garston, without sorting or measuring on this estate"—that is, the Garston estate. That was answered by Blake direct to the railway company on the next day, the 16th: "We understand from Messrs. Ed. Nicholson Limited this morning that you are refusing to accept this steamer for Garston unless practically the whole of her cargo can be loaded into main line wagons at the ship's rail and sent away from Garston without measuring or sorting and we must kindly ask you to reconsider your decision. Failing this, we beg to advise you that we have no option but to hold you responsible for any loss which we may sustain through your refusal to accept this vessel at your port, as no notice was given of this refusal before the vessel sailed from the loading port."

The position therefore was this. The railway company say: "We can take no ship which claims that its cargo shall be sorted and stowed on our storing ground." The consignee says: "I insist on your taking the ship, and I am going to have the cargo sorted and stowed on your storage ground." The consequence of that was that for some days—I will not mention how many days for the moment—the ship was refused admission to the dock because the consignees said: "We insist on the cargo when it is landed on the quay"—in the way I will describe in a moment—"we insist on its being sorted and stored on your estate until we have sold it and until we can know where we are going to send it to." The question is what is the effect of that attitude of the consignees to the claim of the ship? The ship proceeded to the usual place in the River Mersey—which is not Garston—where ships waiting to get into dock lie, a place on the opposite side of the Mersey called the Sloyne Channel. It is agreed that the Sloyne is not a usual place of discharge, though it is a usual place of waiting, and the charter-party said "to Garston," or as near thereto as she could safely get. The liability and rights of a ship in that position have been laid down once and for all in *Nelson* v. *Dahle* (3 Asp. Mar. Law Cas. 392; 1880, 44 L. T. Rep. 381; 6 App. Cas. 38), and an infinite number of differences arise which give opportunities to industrious counsel to cite a number of other cases which are not the case before the court, and to explain in what respect they differ or agree with the case before the court. But, after all, one goes back to *Nelson* v. *Dahle* (*sup.*), and as I understand the decision of the House of Lords, it is this: When you are chartered to go to a discharging place and cannot get there, first of all you are bound to wait a reasonable time before having recourse to the clause "or as near thereto as she can safely get." You cannot arrive and, when you find that you cannot get in at the exact minute, or on the exact day you desire, immediately go off to a place which you describe as "as near thereto as she can safely get." When a reasonable time has elapsed, and when there is no chance of your getting in to your discharging place within a reasonable time, the ship is at liberty to go to a reasonable discharging place—"as near thereto as she can safely get"—and can call upon the consignee to take delivery at the substituted place. But the shipowner must make up his mind what he is going to do and give notice to the consignee, saying "I am going to such-and-such a place, being the nearest discharging berth to which I can safely get, and you must take my cargo there." Obviously, inasmuch as it involves

the question whether the ship has waited a reasonable time, and as it involves the question whether a particular place is a reasonable place —" as near thereto as she can safely get "—shipowners should always be slow before taking a decided course of that sort, and landing themselves with a lawsuit in which it will be uncertain what the result may be on the facts. In the present case, although everybody wrote a great many letters, the plaintiffs never did take the decided course of saying : " We are going," for instance, " to Liverpool and shall tender you the cargo there and you will be liable for all costs if you do not take the cargo at the place, 'as near thereto as we can safely get,' where we propose to discharge it."

The consignees held out for a considerable time in their insistence on storing and stowing their timber at Garston; and the dock authorities held out for a considerable time that they were not going to let a ship in to stow and store its cargo at Garston. The shipowners also insisted that, in some way or other, they were going to claim the costs of the delay occasioned to them by the claim of the consignees which, said the shipowners, " is one which you have no right to make."

Various suggestions were made—I am only going to refer to one of them—and a number of these suggestions were without prejudice to the ultimate rights (that is to say, the fact they were made was not to prejudice the ultimate rights) of the consignees, Blake and Craig, who were, apparently, acting in concert with Green. Messrs. Blake wrote, for instance : " We are prepared, entirely without prejudice, to arrange for our goods to be sent away all direct *ex* ship at Garston, avoiding sorting and storing at this port, but the extra expenses we shall incur doing this will amount to about 12*s*. 6*d*. for standard."

I now come to a question which arises on the charter. It appears that in Garston you do not discharge on to the quay and you do not discharge on to lighters or into carts; you do discharge into wagons but into two sorts of wagons. If you are going to send the goods straight away you discharge into main line railway wagons. If you are going to store the goods at the port you discharge into what are called " domestic or red wagons," which take the timber away to the sorting ground. If a ship does deliver in such a way that all its cargo has to be sorted, then the cargo is taken away in the domestic wagons to the sorting ground. The right which the consignee has of selection is the right to select any one or more of those alternatives if customary and available at the time of discharge. Now, taking goods that are going to be stored in domestic wagons to the sorting ground is customary, but it is quite clear that it was not available at the time of discharge, for, if the consignee had said to the dock company : " We are going to have these goods stored at Garston dock," the ship would never have got into dock because the railway company, having no more room in the storing ground for any more cargo of that sort, would have refused to take them in.

In these circumstances, were the consignees right in insisting that they were going to store at Garston ? In my view they were not right because the method of discharge into domestic wagons to go into store at Garston was not then available. Consequently, in my opinion, unless a certain state of facts existed (which I will mention in a moment), the consignees were preventing, and wrongfully preventing, the ship from reaching the place provided for in the charter. The result would not be demurrage technically, but it would be damage for preventing the ship from reaching her place of discharge—which would have practically the same result as if there were a claim for demurrage.

Now the state of facts which presents a difference to that position is this : a ship, if required to do so, must deliver to each consignee separately and the ship must do the sorting necessary to make delivery. It is only by some special form of contract or custom that the ship can do what is done in many timber ports—tumble the whole of the cargo out and then pay for the sorting on the dock premises. An attempt was made here to prove that delivery could not have been made without sorting on the quay or the storing ground. In my opinion it failed. The defendants called no evidence at all, and, therefore, one was left on the facts as proved by the plaintiffs plus some evidence given by Mr. Topham, the manager of the dock. Mr. Topham's expressed opinion was—perhaps as the result of long experience of such timber cargoes—that he really would not have been able to deliver direct to wagons without sorting, and he went so far as to say that the cargo in this particular ship—about which I do not think he remembered much—could not have been delivered without sorting. The answer to that is that it is not a fact, because one of the three consignees did take his cargo right away from the ship in railway wagons without any storing at all. It appears that the cargo was so stowed in the ship that by means of stowage plans it could have been delivered, without sorting, direct to the railway trucks and it could have gone away. That is borne out by the letter to which I have already referred in which Blakes themselves offer to have the cargo go straight away, without sorting, in railway trucks. That is the state of facts, and in the view which I take of the facts it follows that there is a claim for damages against these two consignees for preventing the ship from going into dock to her place and discharging so that she never became an " arrived ship " and did not become an " arrived " ship until a later date. In effect, the consignees were endeavouring to put upon the ship a burden occasioned by the fact that the consignees had not sold their cargo on the arrival of the ship, and therefore wanted to store it at Garston.

The learned and very experienced judge of the Court of Passage has taken a different view,

but having read his judgment very carefully I have really not been able to ascertain why he took that view. I have stated the view which, in my opinion, ought to have been taken. Part of the learned judge's opinion is, I think, the result of a mistake of fact. He says: "They"—that is the consignees—"did not refuse discharge into main line wagons, but they did state that their timber was not being disposed of at any destination outside Garston, and required sorting and storing there. This fact, known to the dock authorities, was, in my view, the cause of the refusal to allow entry and of the consequent delay, and was not, in my judgment, a breach of their contract by the defendant." Then he goes on: "The defendants did insist on delivery at Garston, but this insistence was not the cause of the refusal of the dock authorities nor of the delay." I do not know why the learned judge says that. It was their insistence on having the goods stored at Garston which was the cause of the dock company refusing to admit the ship into Garston and the cause of the delay.

For the reasons I have given, I think the learned judge came to a wrong conclusion. The only question that remains is how much the learned judge has found by way of damages, in case he is wrong. He found for the plaintiffs in 195*l.* damages. But I think, again, he has not appreciated all the facts. It was proved by Mr. Topham that if the consignees had not insisted on having their goods stored at Garston, the *Varing* would have got into Garston Dock on the 24th. But she did not, as a matter of fact, get into Garston until, I think, the night tide of the 27th and the morning of the 28th. She got in because the dock company, making a great effort to get rid of the congestion which prevailed, arranged to take the goods, without any extra expense, to the storing ground at Widnes, ten miles from Garston, a thing which would not have fitted in with the contract at all unless the ship and the consignees were agreed about it. The result of that appears to me to be that there being some slight difference as to the exact times, the 195*l.* which the learned judge has suggested to be the damages, should be reduced to 100*l.*, which would substantially represent the damage, in my view, caused by the breach of contract by the consignees.

The appeal must be accordingly allowed and judgment entered for the plaintiffs against the consignees, for 100*l.*, with the costs here and below.

Greer, L.J.—I agree. But for the fact that the learned and accomplished judge who presided over the Court of Passage has held that the plaintiffs made no case against the defendants, I should have thought that this was a case in which the plaintiffs were plainly entitled to succeed—at least for the amount which my Lord has mentioned.

There were three consignees, holders of bills of lading, of wood cargo on board the *Varing*. The bills of lading were incorporated in the terms of the two charter-parties. My Lord has read clause 13, and I begin the consideration of this case with the well-known principle that the discharge of a ship is a double operation in which the consignees have got to take their part and the ship has got to take its part. The ship has nothing to do with enabling the consignees to perform the consignees' duty. The law was laid down a long time ago by the late Lord Esher in *Peterson* v. *Freebody* (8 Asp. Mar. Law Cas. 55, at p. 56; 73 L. T. Rep., at p. 164; (1895) 2 Q. B. D. 294, at p. 297), in these words: "The operation, therefore, which is to take eight days"—there were eight lay days in that case—"is an operation to be performed as between the shipowner and the consignees. Whichever word be used, whether it be called a 'discharging' or a 'delivery,' and whatever be the circumstances of the delivery, one party is to give and the other is to take, delivery at one and the same time, and by one and the same operation. It follows that both must be present to take their part in that operation. Those parts are, the ship has to deliver and the consignee to take delivery—where? Each has to act within his own department. The shipowner acts from the deck or some part of his own ship, but always on board his ship." That last sentence has to be modified by reason of some subsequent decision, but the rest of the words to which I desire to call attention refer to what a receiver has got to do—which is the important matter to consider in the present case. The learned Master of the Rolls went on to say: "The consignee's place is alongside the ship where the thing is to be delivered to him. If the delivery has to be on to another ship, he must be on that ship; if into a barge or lighter, on that barge or lighter; if on to the quay, on the quay." It seems to me it is no concern of the ship what the consignee may desire as to the kind of vehicle in which he is going to receive his cargo. He has got to be at the place of discharge with his vehicle—if it is to be delivered into a vehicle—ready to receive the cargo.

In this case there were three consignees and three separate bills of lading, and the evidence satisfies me, beyond any reasonable doubt, that it was possible for the ship to distinguish between the cargo covered by each of these three bills of lading and to deliver to each consignee if he was ready to receive it, the cargo, the subject of his bill of lading. "But," the defendants say, "I could not take delivery because the railway company refused to store and sort the goods." The goods did not want sorting and the railway company could not store them because they had not got storage room. That seems to me entirely to be a matter for which the consignees must take the responsibility and not a matter for which the ship is in the least responsible. The consignee has got to be there with wagons that will take the cargo. If they prove that some unforeseen event made it impossible for them to have the wagons there at all, then they might have a good defence to the action, but they did not prove anything of the kind. All

they proved was that the only wagons they could get there ready to receive the consignment were wagons which would immediately go off the dock premises, and they could not get wagons in which the dock company would agree to take the goods to a storage place and there store them. That seems to me to be a matter with which the consignees alone are concerned.

These considerations, in my judgment, are sufficient to enable the court to say the plaintiff was entitled to damages. It was no answer for the consignee to say : " We did not want these goods in main line wagons. We wanted them in wagons which would be taken by the dock company so that they could be stored at the dock premises." By their continued refusal to take these goods, unless they were delivered into wagons for storage on the dock premises, they were breaking their contract. The contract was that, as soon as the vessel was an "arrived ship," they were to take the goods which were tendered to them by the ship. Now the vessel at one time, it was suggested, was an " arrived " ship—on the 15th Sept. On the evidence, however, it appeared that she could not get into the place where she had to go, namely, the usual loading place in Garston Dock on the 15th Sept.—and only got there on the 24th Sept., and, therefore, she cannot claim anything in respect of the delay up to the 24th Sept. But by reason of the attitude taken up by the consignees, and the demands they made, she was subjected to a further delay until the 28th Sept., and, therefore, she was entitled to claim damages in respect of that delay. She is not entitled to demurrage properly so-called, because, after she got to the place of discharge, she was discharged within the contract time. But what she is entitled to is damages for detention during the four days in which she was prevented, by the wrongful attitude taken up by the receivers, from getting into the place of discharge. It is not definitely proved that the delay was four days ; it may have been only three days and part of a day. Accordingly, I think the case will be met by awarding the plaintiffs the amount of damages which my Lord has mentioned, namely, 100*l*.

Slesser, L.J.—I agree. Were it not that we were differing from the learned and experienced judge who heard this case, I should have been content to have added no more. But there are one or two indications as to the issues which were really at stake in this case which, I think, may profitably be considered. The substance of the defence is contained in par. 5, where the pleader says that by clause 13 of the charter-parties, when the *Varing* became an " arrived " ship the defendants had the right to select any one or more of the customary methods of discharge, if available at the time. On the *Varing's* arrival on the 28th Sept. 1927 none of the customary methods of discharge of a cargo destined for Garston was available owing to congestion. The defendants were asked for particulars of what they meant by " customary methods of discharge," and in their further particulars the defendants divide " customary methods of discharge " into two classes, namely, firstly, " goods destined for Garston or which required sorting before being forwarded by rail in wagons," and, secondly, " cargo that is destined for direct dispatch into main line wagons." As to the former, they say " they should be taken in ' red ' or ' domestic ' wagons to the storage ground."

My Lord has pointed out that these charter-parties are of general application, and that in clause 13 they deal with a number of definite ways in which cargo may be discharged, some of which are appropriate for one port and some for another. It is said that the consignees have the right to select any one or more of these alternatives if customary or available at the time of discharge. There is little doubt, I think, upon the evidence that, so far as customary alternative is concerned, that was the system of discharging into wagons. The question arises then whether such customary alternative was available. It is said that the wagons which were available were not the kind of wagons which were indicated in the intention of the parties and in the custom, because here the only wagons into which the consignee could properly call for the goods to be discharged were " red " or " domestic " wagons, and the reason the defendants gave for that, as I read their particulars, is that the cargo was destined for Garston itself or required sorting.

I do not find in the instrument any trace that one type of wagon is distinguished from another. I think that the customary and alternative methods that are there set out are alternative—not strictly alternative, because there are more than two—delivery into lighters, or into wagons, or into bogies, and the particular method here selected was that of wagons ; and so far as that is concerned the railway company were prepared to discharge into wagons, that is to say into main line wagons, and it is clear that that class of wagon was available. I cannot see any indication in the charter-party that the destination would be in any event anywhere but Garston. Garston was the port of discharge, and it was no concern of the ship's whether after the goods were discharged at Garston, they were to be left at Garston or sent to Liverpool or any other port of the United Kingdom. The obligation of the ship is to discharge at Garston " in the customary manner." That leaves only the alternative distinction, that the method of using " red " or " domestic " wagons must be invoked, when the cargo requires sorting. The learned judge has found upon that that these goods would require sorting. Although it is true that one witness, Mr. Topham, used language which might bear that construction, it is abundantly clear that when the facts of the case are considered, and the letters written

by the defendants themselves are considered, that they were under no such apprehension. On the 28th Sept., for example, in addition to what my Lord read, Messrs. Blake and Co. say: "We confirm telephone conversation with Mr. Thompson this morning when we understand that you propose giving this vessel a berth at 1 p.m. to-day, and that it is your intention to load goods direct from ship into wagons." Now that means without sorting, and in the next sentence they say: "We agree to your adopting this course on the understanding that the charges would be the same as if the goods were handled at Garston, and we understand this to be the case."

In my view, in the light of that letter it is for the defendants to say what sorting was necessary before the goods could properly be discharged. But there is, I think, a slight confusion of thought with regard to two different matters here. It may well be that it is the duty of the shipowner, where he carries a mixed cargo, to sort it before he delivers it. That is one thing; the question of the construction of this particular charter-party is another, and so far as this charter-party is concerned the obligation is to deliver into wagons, and the mere fact that sorting is there required—which may be required under the general law—does not justify the reading of the obligation as an obligation to deliver into "domestic" or "red" wagons in the way that has been contended for here by the defendants.

The result, therefore, of the evidence here is this: that on the 24th Sept. the goods could have been discharged into wagons in the customary manner, discharged into wagons by means of cranes at this port. It might have been possible, in spite of that, for the defendants to have argued that these goods were so mixed that in fact they physically required sorting, altogether apart from the construction of the charter-party. The evidence, however, is clear, that not only the goods of Mr. Blake, but the goods of Mr. Craig were delivered at Widnes. The learned judge is consequently mistaken in coming to the conclusion that they needed sorting. In my opinion the defendants are without any defence to the claim for breach of contract, and I agree with my Lord that this appeal must be allowed to the extent, and with the consequences, that he has stated.

Solicitors for the appellants, *Alsop, Stevens, and Collins Robinson.*

Solicitors for the respondents, *Weightman, Pedder, and Co.*, agents for *Andrew Jackson and Co.*, Hull.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Thursday, March 26, 1931.

(Before BATESON, J.)

THE RING. (a)

Practice—Undertaking by solicitor to appear and put in bail—No writ issued—Vessel subsequently sold in other proceedings—Writ issued by party to whom undertaking given—Delay—Whether undertaking enforceable.

A solicitor who has given an undertaking to enter an appearance and put in bail in any proceedings which may be commenced by parties to whom the undertaking is given, thereby securing the freedom of the vessel from arrest, will not be relieved of such undertaking if the writ is in fact not issued until after the vessel has been sold in other proceedings in rem.

MOTION on originating summons by Messrs. Ince, Roscoe, Wilson, and Glover, a firm of solicitors, asking to be relieved of their undertaking to enter an appearance and put in bail in any proceedings commenced by the plaintiffs against the owners of the Norwegian steamship *Ring.*

In June 1930 the *Ring* brought a cargo of timber to Warrington and Manchester. The plaintiffs, owners of cargo laden on the *Ring*, made a claim in respect of damage to their cargo, and threatened to arrest the *Ring*. Thereupon Messrs. Ince, Roscoe, Wilson, and Glover, in order to avoid the arrest of the *Ring*, gave an undertaking to the solicitors acting for the plaintiffs to accept service and provide bail on behalf of the *Ring*. No writ was issued by the plaintiffs until the 14th March 1931, after Messrs. Ince, Roscoe, Wilson, and Glover had taken out the present summons. In the meantime the *Ring* had been sold by order of the court in other proceedings. Messrs. Ince, Roscoe, Wilson, and Glover accordingly moved the court to release them from their undertaking.

Wilmer for the motion.—The *Ring* has already been sold in an action *in rem*, and the plaintiffs cannot now arrest her. The consideration for which the undertaking was given has thus failed, and the solicitors are no longer bound by it. Alternatively, the undertaking was to enter an appearance and provide bail to a writ issued within a reasonable time, and this writ was not issued within a reasonable time.

Sir *R. Aske* for the plaintiffs.—At the time when the undertaking was given the *Ring* could have been arrested, and the undertaking was therefore given for a good consideration.

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

It does not matter that the *Ring* cannot now be arrested. There was nothing unreasonable in waiting from June until March before issuing the writ, and the solicitors have not been prejudiced by the delay.

BATESON, J.—The *Ring* brought a general cargo from Riga about June of last year for Manchester and Warrington, and the cargo owners, thinking they had some claim against the ship for damage to cargo, were threatening, apparently, to arrest her. They got into touch with Messrs. Weightman, Pedder, and Co., their solicitors, who, in turn, got into touch with Messrs. Ince, Roscoe, Wilson, and Glover, who, fearing that arrest, telegraphed to Messrs. Weightman, Pedder, and Co. as follows: "*Ring*. Please accept this telegram undertaking accept service provide bail on behalf of *Ring*." That was on the 5th June. No writ was sent by Messrs. Weightman, Pedder, and Co., who acknowledged receipt of the telegram, and the question that arises is whether, having sent that offer with acceptance of service, and, in fact, no writ being issued for some months, Messrs. Ince can now retract from it. On the 12th June the *Ring* left the jurisdiction again and, I think, on the following day correspondence between the solicitors ceased for a time.

On the 29th Dec. the matter awakened and a letter was sent by Messrs. Weightman, Pedder, and Co. to Messrs. Ince with information that the cargo and general average of various claims had now been made and "we are now in a position to inform you of the amount of bail required." The ship, in fact, was sold under some other proceedings on the 7th Jan. 1931. On the 2nd March Messrs. Ince issued the originating summons in this case for the determination of the following question: Whether Messrs. Ince are still bound by the undertaking to accept service, appear and provide bail on behalf of the *Ring* given by them as solicitors for the owners in June 1930.

It is that question that I have to decide. I think Messrs. Ince are bound by the undertaking. It is, in terms quite plain, an undertaking to accept service when the writ was issued, that is to say they must accept service. The point is taken that no writ was issued for many months and they were now not bound to accept service when it is. Now, it is quite clear that if the writ had been issued they would have been bound to accept it. Can they be bound to accept it now? Does it make any difference because the writ was not issued? I think not. The point Mr. Wilmer so skilfully took does not appeal to me. He says now the owners of the cargo cannot bring an action because the ship has been sold. That might or might not be perfectly true, but I do not think it makes the least difference because the shipowners through their solicitors have undertaken to accept service of the writ, appear and provide bail. It is said the contract is mutual on the part of one side to issue the writ and on the other side to give the undertaking, but I do not see that anywhere in the contract. In his affidavit Mr. Ernest Wilson, a member of the firm of Messrs. Ince, in par. 14 says he always understood it to be the practice of solicitors in the Admiralty Division when an undertaking is given to commence proceedings at once or while the vessel is still within the jurisdiction of the court. He does not say that the writ must be issued before the undertaking is given but only while the vessel is within the jurisdiction. He also submits that the issue of the writ is essential directly the undertaking is obtained, showing it is not necessary for the writ to be in existence, as I do not think it is.

I see in the affidavit of the managing clerk for Messrs. Weightman that he says his view is not quite the same. He says he has known many cases in his own personal experience in which the writ has not been issued until the vessel has left the jurisdiction; indeed, it is not uncommon for solicitors' undertakings to be limited in point of time. I am satisfied that there is no necessity for the writ to be actually in existence, it may be it can be issued afterwards. In most cases the writ is issued straightaway and the real bargain, as I understand it, is that the solicitor gives an undertaking that he will accept service when the writ is issued and appear and give bail. The consideration is that the ship shall not be arrested and shall be allowed to go as soon as she wishes to do so. In the case of a foreign ship it is important that she should not try to avoid service. The fact that they have got into difficulties and got the ship sold makes no difference in the matter I have to construe.

Then it has been said that it is the same as a caveat, which can always be withdrawn at any time. But they have not withdrawn their undertaking in this case. I do not know that they could, because they gave it for good consideration to get their ship freed from arrest, and to withdraw a caveat is not the same thing. The ship must be in the country. It is also said that the writ must be issued within a reasonable time. Having regard to the evidence connected with this ship, I cannot say that a wait of six months to issue the writ is an unreasonable time. The mere putting of the writ on the file to issue it does not seem to me to be a serious matter at all, because nothing could be done under the writ until they had got to know the exact position and what the state of things was with regard to the cargo and the averages taken. I cannot grant this application on this originating summons, and it will be dismissed with costs.

Solicitors: *Ince, Roscoe, Wilson*, and *Glover*; *Botterell* and *Roche*, agents for *Weightman, Pedder*, and *Co.*, Liverpool.

May 20 *and* 21, 1931.

(Before BATESON, J. and Elder Brethren.)

THE CARLTON. (*a*)

Towage—Contract—Port of London Authority—Vessel in tow of Authority's tugs—Damage by striking dock walls — Negligence of Authority's signalman—Towage conditions—Indemnity—Damage arising " in the course of and in connection with the towage or transport."

The plaintiffs' steamship when about to pass through the Connaught Road Cutting in the London Docks, which was under the control of the servants of the defendants, sustained damage by striking the dock wall, owing to the negligence of the defendants' signalman in charge of the signalling arrangements at the cutting. The steamship was at the time being towed by the defendants' tugs under a towage contract or order which contained (inter alia) *the following conditions :*

" 4. *The owners . . . of the ship . . . being towed or transported hereby agree and undertake to bear and pay for any damage to any of the Port Authority's property . . . or premises occurring in the course of and in connection with the towage or transport which may arise from or be occasioned by the following causes, perils, or other things, namely, perils of . . . navigation, collisions . . . whether such causes, perils or other things have been caused or contributed to by the negligence, default or error in judgment of any officers or servants of the Port Authority whatsoever.*"

" 5. *The owners . . . of the ship so being towed or transported hereby agree and undertake to indemnify and hold harmless the Port Authority against all claims for and in respect of . . . loss or damage of any kind whatsoever and howsoever or wheresoever arising in the course of and in connection with the towage or transport, and whether such loss or damage be caused or contributed to by any negligence, default or error in judgment on the part of any officers or servants whatsoever of the Port Authority. . . .*"

Held, that the negligence of the defendants' signalman in signalling the plaintiffs' vessel into the cutting was not negligence arising in the course of and in connection with the towage or transport so as to render the plaintiffs liable to indemnify the defendants under clause 5, which was framed as an indemnity against claims by third parties.

Held further, that the defendants were not entitled to recover from the plaintiffs damages for the injury done by the steamship to the dock wall, since clause 4 was confined to damage occurring " in the course of and in connection with " the towage.

DAMAGE ACTION.

The plaintiffs, owners of the steamship *Carlton*, claimed damages from the defendants, the Port of London Authority, for damage sustained by the *Carlton* by striking the dock walls whilst manœuvring in the Connaught Road Cutting, leading from the Royal Albert Dock to the Royal Victoria Dock, in the London Docks. The *Carlton* was being towed by two of the defendants' tugs. The cutting was under the control of the defendants' servants. The defendants counterclaimed for damage done by the *Carlton* to their dock walls.

The facts, arguments of counsel, and material terms of the towage contract under which the *Carlton* was being towed by the defendants' tugs, fully appear from the judgment.

Raeburn, K.C. and *Hayward* for the plaintiffs.

Dickinson, K.C. and *Carpmael* for the defendants.

The following cases were referred to : *The President van Buren* (16 Asp. Mar. Law Cas. 444 ; (1924) 132 L. T. Rep. 253), and *Durnford and Sons* v. *Great Western Railway* (1928, 139 L. T. Rep. 145).

May 21, 1931.—BATESON, J.—In this case I think there must be judgment for the plaintiffs. The damage to the *Carlton* was due to the negligence of the defendants, and I cannot see that the *Carlton* did anything wrong, and the Elder Brethren agree with me.

The accident happened to the *Carlton* shortly before six o'clock on the 29th Dec. 1930 in the Connaught Road Cutting, which passes between the Royal Albert Dock and the Royal Victoria Dock. The *Carlton* is a steel screw steamship of 5000 odd tons gross, 390ft. long and 53ft. beam, and she was bound to the Royal Victoria Dock from the Royal Albert Dock. In order to get from the one to the other she had to pass through the Connaught Road Cutting, which is a cutting about 300ft. long and 80ft. wide. There is a road bridge over the cutting, and that road bridge can be swung towards the north side of the cutting so as to allow ships to pass in and out.

The wind was fresh from the S.S.W.—that would be from the south towards the north side of the cutting. The weather was dark and clear, and, of course, there was no tide in the dock. There were a certain number of lights about the cutting—exactly where they were, or what sort of lights they were, I do not think was proved.

The *Carlton*, in charge of a transporting pilot, had two *Sun* tugs—which were at that time in the employ of the Port of London Authority—fast to her, one ahead and one astern. The *Sun VIII.* was the one ahead, and the *Sun VIII.* was attached to the *Carlton* by a scope of rope which allowed a space of water between the stern of the tug and the stem of the *Carlton* of about 10ft., according to the master of the *Sun VIII.* There was a good deal more rope out between the two, and having regard to the places on the two ships where it was made fast, and the angle from the bow down to the hook, the tug-master's view was that his stern was only about 10ft. from the bow of the *Carlton*.

Both tugs and ship had their regulation lights all burning. The bridge was against the

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

Carlton. She could not go through ; it had to be swung off to let her through, and a man named West was apparently working the bridge and signalling for the purpose of letting the *Carlton* through.

The bridge was swung off, and before it was completely swung West had given instructions to a tug called the *Deanbrook* to go through out of the Victoria Dock into the Albert Dock, the opposite way to which the *Carlton* was coming. It was a very foolish thing for West to do, but the *Deanbrook*, no doubt, thought it might be a good opportunity to get out of the Victoria Dock into the Albert Dock, and she proceeded to go down the cutting, following the bridge round—*i.e.*, as the bridge was swinging off she was proceeding through the cutting. She got a substantial distance through the cutting, but before she got as far as she did ultimately the *Carlton* was seen coming into the cutting, West having signalled to the *Carlton* to come in, so that West had told the two vessels, the one to go out and the other to come in, much about the same time, but probably the *Deanbrook* was the first that he signalled to to come in.

The *Deanbrook* is a twin screw steam tug 90ft. 9in. long and 21ft. beam, so that there was just room in the cutting for the beam of the *Carlton* and the beam of the *Deanbrook*, with a few feet to spare. But as the tug saw the *Carlton* and the *Carlton* saw the tug the courage of the tug-master to go through and chance it failed him. He thought he could not get through, and so he backed out of it. The *Carlton* came in with her engines at slow, and the *Sun* tug ahead, pulling with her engine at full speed, holding the ship up to windward as well as she could. In these circumstances it was really obvious to the people on the *Carlton* that the *Deanbrook* could not get past her with any hope of safety, but not knowing what she was going to do—they saw she was coming along—she came through past where the roadway naturally crossed the cutting—there was considerable risk of collision under the circumstances.

The *Carlton* and the *Deanbrook* went astern full speed. The tug backed away and the *Carlton* was able to pull up sufficiently so as not to touch the tug. They got, in fact, to within 100ft. to 115ft. of each other as it was. In thus avoiding collision the *Carlton* got out of position. No doubt the propeller reversing would help it, and the wind on the port bow, and the *Sun* tug not being, perhaps, able to give as much angle as she might have done owing to the presence of the *Deanbrook* in the cutting, the *Carlton's* bow fell against the north side of the cutting about 120ft. or so from the north-east corner, and received damage. Then she bounced off and hit the other side of the cutting with her other bow also, which received damage. It is that damage to the bows that the *Carlton* sues for in this case.

There is no question that West, who signalled both vessels to come in—he was the signalman at the bridge—was negligent.

The point was made that the *Carlton* ought to have done nothing because the tug could quite easily have backed away and did, in fact, back away in time. I do not take that view myself. The *Carlton* could not possibly tell what the *Deanbrook* was going to do. She had come from the north-west angle of the cutting down through the cutting more than half-way, and there was space for her to go past the *Carlton*—there was space for her to go past the forward end of the *Carlton* because, of course, the forward end is narrower than the broadest part of the beam, and whether she was going to try and get through before the bulk of the *Carlton* got into the cutting, or whether the *Carlton* was coming rather faster than would permit of that, the people on the *Carlton* could not tell and something had to be done by both, as one of the witnesses agreed.

If the *Carlton* had done nothing—as was suggested by the Port of London people that she should have done—and an accident had happened it might have been a very serious one. The master of the *Carlton* was put in the position of having to choose whether he would damage his side on the dock wall, or whether he would, perhaps, squeeze the tug with very disastrous results to anybody down below in the engine room of the tug, and, of course, possibly sink the tug in the cutting, which would have been a very serious thing to happen.

The tug gave no indication of any sort or kind of when or how soon she was going to put her engines astern and back away. She never gave three blasts on her whistle, and I think that, even if it could be said that the *Carlton* could have escaped by doing nothing, ordinary prudence would have required her to take some step to assist in avoiding collision with the *Deanbrook*. My view is that unless both had taken action there was almost certain to have been a collision between the two. There is no doubt that the *Deanbrook* entered the cutting at an improper time and that West was negligent. There is no doubt that the *Carlton* had no warning about what the *Deanbrook* was going to do, and there is no doubt that the *Carlton* was approaching quicker than was anticipated by West and, probably, by the *Deanbrook*.

It has been so often said in this court that vessels must get their way off in time to avoid collision, and when we find a steamer has done what was constantly being laid down in this court is what should be done, I think it is impossible to say that she was the author of her own wrong in this case.

I am satisfied that the pilot of the *Carlton* here chose the right course.

I think it is a clear case of damage due to the negligence of the defendants and there was no negligence of any sort or kind on the part of the plaintiffs.

Now that does not dispose of the case, because the defendants rely upon the terms of

the towage contract, and the towage contract is in these terms:

Please supply upon the terms and conditions endorsed hereon two tugs to tow the vessel *Carlton* from lock to berth, such assistance, which includes removal to and from any intermediate berth or mooring which the vessel may occupy, to be supplied at your published rate for one charge only payable by .... and we hereby accept and agree to be bound by the said terms and conditions.

Now it is quite clear that that is a contract for towage from the lock to the berth, including removal. It is called a "towage order." On the back of it are the following terms and conditions:

1. For the purpose of these terms and conditions the towage or transport shall be deemed to have commenced when the tow rope has been passed to or by the tug and to have ended when the tow rope has been finally slipped.

2. During and for all purposes connected with the towage or transport the masters and crews of the tugs and the transport men shall cease to be under the control of the Port Authority and shall become subject in all things to the orders and control of the master or person in charge of the ship, vessel, or craft being towed or transported, and shall be held to be identified with and to be the servants of the owner or owners of and (or) the person or persons interested in the same.

3. The port authority, its servants and agents, shall be bound before and at the beginning of the towage to exercise due diligence (*a*) to make the tug, her engines, equipment, and gear in all respects seaworthy and fit for the said towage or transport; and (*b*) properly to man, equip, and supply the tug.

4. The owner or owners of and (or) the person or persons interested in the ship, vessel, or craft so being towed or transported thereby agree and undertake to bear and pay for any loss of or damage to any of the port authority's property (including the tug or tugs engaged in such towage or transport), or premises occurring in the course of and in connection with the towage or transport which may arise from or be occasioned by the following causes, perils, or other things, namely, perils of the seas, rivers, or navigation, collisions, strikes, lockouts, riots, civil commotions, labour disturbances or disputes, or anything done in contemplation or furtherance thereof, whether the port authority be parties thereto or not, bursting of boilers, breakage of shafts or tow ropes, breakdown of or accident to or latent defect in the tug or any portion of her equipment or gear, and whether such causes, perils, or other things have been caused or contributed to by the negligence, default, or error of judgment of any officers or servants of the port authority whatsoever, provided always that the said causes, perils, or other things have not resulted from any breach by the port authority, its servants or agents, of the obligations referred to in clause 3 hereof, but the burden of proof of any such breach shall be upon the owner or owners of and (or) the person or persons interested in the ship, vessel, or craft so being towed or transported.

5. The owner or owners of and (or) the person or persons interested in the ship, vessel, or craft so being towed or transported hereby agree and undertake to indemnify and hold harmless the port authority against all claims for or in respect of loss of life, or injury to person or loss or damage of any kind whatsoever and howsoever or wheresoever arising in the course of and in connection with the towage or transport, and whether such loss, injury, or damage be caused or contributed to by any negligence, default, or error of judgment on the part of any officers or servants whatsoever of the port authority, provided always that such loss, injury, or damage has not resulted from any breach by the port authority, its servants or agents, of the obligations referred to in clause 3 hereof, but the burden of proof of any such breach shall be upon the owner or owners of and (or) the person or persons interested in the ship, vessel, or craft so being towed or transported.

By clause 1 towage commences from the time the tow rope is fast and ends when it is finally slipped. Clause 2 makes the masters and crews of the tugs the servants of the hirer of the tugs. Clause 3 puts the obligation on the Port of London Authority to supply a proper tug, properly manned—I am only summarising the clauses. Clause 4 makes the hirer liable for damage to the port authority's property occurring in the course of and in connection with the towage or transport arising from certain specified causes. Clause 5, which is the one chiefly in question, is an indemnity clause. The main question argued on that clause is whether that is an indemnity against third party claims, or whether it is a clause under which the hirer is prevented from recovering for damage to his own ship. I come to the conclusion that clause 5 is no more than an indemnity against third party claims, as Mr. Raeburn argued. Clause 5 is said to relieve the defendants of liability in this case, because—omitting unnecessary words—"the plaintiffs undertake to indemnify and hold harmless the port authority against all claims for damage of any kind arising in the course of and in connection with the towage caused by negligence." There is a proviso, of course, that clause 3 of the conditions has to be complied with by the port authority, namely, to supply seaworthy tugs.

I do not agree with that contention. The clause, I think, is framed to protect the port authority from third party claims, not claims made by the hirer of the tug. There is no part of this clause, to my mind, which protects the authority from claims due to the negligence of their own servants which does not arise in the course of, and in connection with, the towage or transport.

The damage in this case arose from the negligence of their servant West, in the course of signalling that the road was clear for the *Carlton* to proceed. He had signalled two ships into the cutting instead of only one. It had nothing to do with the towage, or the tugs, or the crews of the tugs, or the transporting. Transporting, I think, in this clause means either towing or shifting of ropes or heaving on the ship by means of ropes from one position to another.

If the port of London Authority want to protect themselves from such negligence as there was in this case, they ought to use clear terms, and they have not done so. The damage must arise in the course of and in connection with towage. The word is "and." It is not "or,"

and I think it is impossible to say that this accident, and the damage due to it, was in connection with the towage. It had nothing to do with the towage at all, it was damage which was occasioned by the ship coming astern to avoid the negligence of West in ordering two ships into the cutting at the same time. The tugs had nothing whatever to do with it.

Mr. Dickinson relied for his contention that it covered not only third party claims, but party and party claims, on the proviso.

The proviso only provides that the authority must supply seaworthy tugs and so on. He says that because that relates to party and party obligations clause 5, as a whole, must also relate to party and party as well as to third party. I do not see that that is necessary at all as I understand the clause. Put shortly in a concrete case, it means that the authority say to the hirer, "You indemnify me against a claim by a third party provided I give you a seaworthy tug"—which seems to be quite good sense.

It does not follow, to my mind, that because the Port of London Authority have to give a seaworthy tug—which is a party and party bargain—that you must, therefore, indemnify the authority against your own claim against them. There is no necessity to conclude this as an inference from the proviso, which makes perfectly good sense without it. It seems to me that the words "indemnify and hold harmless" are apt words for third party claims. Mr. Dickinson says that they mean the same as "insured." I think they might have said so if that is what they meant. I think that the two cases I was referred to of *Durnford and Sons v. Great Western Railway* (139 L. T. Rep. 145) and the *President van Buren* (16 Asp. Mar. Law Cas. 444; (1924) 132 L. T. Rep. 253), so far as they go support my view.

Finally what the authority want is a guinea or so for damage to their wall under clause 4. Clause 4 is confined to damage occurring in the course of and in connection with the towage, and I have already said what I have got to say in regard to those words. I do not think that this damage occurred in the course of and in connection with the towage.

Moreover, I doubt very much whether what happened here—which was an accident in the regulating of a ship from one dock into another through the cutting—is covered by the particular clause with regard to causes. I am satisfied that this accident did not happen in connection with the towage as I have said. Mr. Raeburn also made the point that, even if they were liable, his clients would be entitled to recover over against the authority by adding to the amount of their claim the amount of the counter-claim.

For these reasons the plaintiffs succeed and there must be judgment for them for an amount to be found by the registrar.

Solicitors for the plaintiffs, *Botterell* and *Roche*, agents for *Botterell, Roche,* and *Temperley*, West Hartlepool.

Solicitor for the defendants, *J. D. Ritchie.*

House of Lords.

April 30, *May* 1, 4, *and June* 26, 1931.

(Before Lords DUNEDIN, WARRINGTON, ATKIN, THANKERTON, and MACMILLAN.)

LOUIS DREYFUS AND CO. v. TEMPUS SHIPPING COMPANY LIMITED. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Charter-party—General average—Fire in bunkers—Expenditure at port of refuge—Claim for general average contribution—Unseaworthiness—York and Antwerp Rules 1924, *r. D—Exceptions—Fault—Privity—Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60), *s.* 502.

By sect. 502 *of the Merchant Shipping Act* 1894: *"The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely,* (i.) *where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship." The steamship* Campus, *having carried coal from England to the Plate, was chartered to load a cargo of grain in the River Plate and bring it to certain British or Continental ports as ordered. The charter-party, which was dated the 16th May* 1928, *and described the steamer in the words "on passage Wales/Las Palmas since 11th inst., with cargo and after discharge proceeds in ballast," was in the Chamber of Shipping River Plate Charter-party* 1914 (*Homeward*) *form, and contained a number of clauses which included the following: clause* 29, *"the steamer shall not be liable for loss or damage occasioned by . . . perils of the sea . . . fire, from any cause or wheresoever occurring . . . or any latent defect in hull machinery or appurtenances . . . even when occasioned by neglect default or error of judgment of . . . the servants of the shipowners (not resulting however in any case from want of due diligence by the owners of the steamer . . .)"; and by clause* 31, *"Average if any payable according to York-Antwerp Rules* 1924." *Rule D of the York-Antwerp Rules was as follows: "Rights to contribution in general average shall not be affected though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure; but this shall not prejudice any remedies which may be open against that party for such default." The steamer went to the River Plate and loaded a cargo of grain, as required, at Rosario and Villa Constitucion. In order to save the expense of coaling at the Plate the ship had carried sufficient bunkers on the outward voyage to take her home. Having loaded, the ship started for home. It was*

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

then found that the bunker coal was in a dangerous condition. Some of it had caught fire and she had to put into Montevideo as a port of refuge to have her fire extinguished. Port of refuge expenditure was incurred. In the result part of the defendants' cargo was damaged and part of it was lost. The shipowners sued the cargo owners for contribution to general average expenditure, to which the cargo owners replied that as the expenditure was occasioned by the fault of the shipowners in sending an unseaworthy ship to sea, they could not recover such expenditure. The cargo owners claimed the value of the maize destroyed by fire. The shipowners replied that sect. 502 *of the Merchant Shipping Act* 1894 *protected them.*

Held, (1) *there being no actionable wrong in what the shipowners did, the shipowners were by virtue of sect.* 502 *of the Merchant Shipping Act* 1894 *entitled to recover against the cargo owners a contribution towards general average expenditure incurred through a fire by the unseaworthiness of the ship; but* (2) *that the counterclaim of the cargo owners for the value of the cargo destroyed by fire failed, the shipowners being protected by sect.* 502, *as the damage by fire had occurred without their actual fault or privity.*

Milburn and Co. *v.* Jamaica Fruit Importing and Trading Company of London (9 *Asp. Mar. Law Cas.* 122; 83 *L. T. Rep.* 321; (1900) 2 *Q. B.* 540) *applied.*

Greenshields, Cowie and Co. *v.* Thomas Stephens and Sons (11 *Asp. Mar. Law Cas.* 167; 99 *L. T. Rep.* 597; (1908) *A. C.* 431) *explained.*

Virginia Carolina Chemical Company *v.* Norfolk and North American Steam Shipping Company Limited (12 *Asp. Mar. Law Cas.* 82; 105 *L. T. Rep.* 810; (1912) 1 *K. B.* 229) *and* Ingram and Royle *v.* Services Maritimes du Tréport Limited (12 *Asp. Mar. Law Cas.* 387; 109 *L. T. Rep.* 733; (1914) 1 *K. B.* 541) *followed.*

Decision of the Court of Appeal (*ante, p.* 152; 144 *L. T. Rep.* 13; (1931) 1 *K. B.* 195) *affirmed.*

Appeal from the decision of the Court of Appeal (Scrutton, Greer, and Slesser L.JJ.) reported *ante*, p. 152; 144 L. T. Rep. 13; (1931) 1 K. B. 195.

The facts, which are sufficiently summarised in the headnote, appear fully from their Lordships' judgments.

The Court of Appeal held (Scrutton, L.J. dissenting) that having regard to *Virginia Carolina Chemical Company* v. *Norfolk and North American Steam Shipping Company Limited* (12 Asp. Mar. Law Cas. 233; 105 L. T. Rep. 810; (1912) 1 K. B. 229) it must be assumed that damage by fire caused by unseaworthiness was within the protection of sect. 502 of the Merchant Shipping Act 1894, if the shipowners established that such unseaworthiness was without their fault or privity, and there was nothing in the facts of this case which deprived the shipowners of the right to contribution claimed in the action. It was not suggested that the section relieved the shipowners from their liability to contribute, but only that it put them in such a position that they could not be deprived of their right to a contribution from the cargo owners on the ground that the expenses were incurred merely on their own behalf and not on behalf of the cargo owners. Nor was it contended that the shipowners were freed from making their own contributions to the general average, but only that there was nothing in the facts that deprived them of the right to say that as between them and the cargo owners the cargo owners must contribute to the general average expenditure which was incurred on behalf of all the interests concerned. Held also by the court, as regards the counterclaim for the loss of the cargo, that the shipowners were protected by the exceptions in the charter-party of "fire" and "latent defects in appurtenances," and that as the damage by fire had occurred without their actual fault or privity they were protected by sect. 502 from liability. The cargo owners appealed.

Sir *Thomas Inskip*, K.C., Sir *Robert Aske* and *F. Martin Vaughan* for the appellants.

W. N. Raeburn, K.C. and *R. I. Simey* for the respondents.

The House took time for consideration.

Lord Dunedin.—The respondents are the owners of the steamship *Campus*, and the appellants are the owners of a cargo of maize and grain shipped on board the *Campus* on a return voyage from the River Plate to the United Kingdom. Shortly after starting on the homeward voyage fire broke out in the ship's bunkers, which heated and destroyed a part of the maize and threatened to spread and destroy more cargo and endanger the ship. The captain accordingly put into the port of Monte Video, threw part of the maize overboard, and put more of it into lighters, some of which, from its condition, had to be destroyed. In doing this, general average expenses were incurred.

The present action was raised at the instance of the ship against the cargo owners for a contribution to the general expenses so incurred. The cargo owners denied liability, and counterclaimed for the value of the maize destroyed. This they did upon the ground that the fire was due to bad bunker coal or, in other words, the unseaworthiness of the ship. The case was heard before Wright, J. who held that the ship was unseaworthy. He held that the claim by the ship for general average contribution was not good, and that the counterclaim for damage to the cargo failed on account of the provisions of sect. 502 of the Merchant Shipping Act of 1894. That section, so far as the material part is concerned, is as follows: "The owner of a British sea-going ship, or any share therein, shall not be liable to make

good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely: (1) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship." Wright, J. held that the loss happened without the actual fault or privity of the owners and that the destroyed maize was lost by reason of fire on the ship.

An appeal being taken to the Court of Appeal, that court unanimously upheld Wright, J.'s judgment as to the counter-claim, but differed as to the claim for general average. Scrutton, L.J. agreed with Wright, J. but Greer and Slesser, L.JJ. held that the claim for general average succeeded.

Appeal is now being taken to this House by the cargo owners.

There are thus two questions distinct in themselves, and it is expedient to consider them separately.

First, as to the claim of the cargo owners for the destruction by fire, the fire being caused by a condition of things which amounted to unseaworthiness. Now, as to authoritative decision on this point, so far as the courts below were concerned, there can be no doubt. Where there was an exception in the bill of lading of fire on board, it had been held that that did not protect the ship when the fire was due to unseaworthiness. But whether the statutory exception against fire was elided by proving that the fire was due to unseaworthiness came up for decision in the *Virginia* case (*Virginia Carolina Chemical Company* v. *Norfolk and North American Steam Shipping Company Limited* (12 Asp. Mar. Law Cas. 82; 105 L. T. Rep. 810; (1912) 1 K. B. 229), where Bray, J. held that it was not, and his judgment was affirmed unanimously by the Court of Appeal in *Ingram and Royle* v. *Services Maritimes du Tréport Limited* (12 Asp. Mar. Law Cas. 387; 109 L. T. Rep. 733; (1914) 1 K. B. 541). Now these cases, though binding on the Court of Appeal, are not binding on your Lordships, and if you thought that they clearly were wrong it would be your duty to hold that they were wrongly decided. But these cases were not only the unanimous decision of learned judges but they have ruled the conduct of shipping for seventeen years, and it would obviously be against your Lordships' custom to disturb such a practice unless, as I say, you thought they were clearly wrong. I cannot say any such thing. As far as my own opinion is concerned, I think they were rightly decided. No doubt the point was very arguable. The arguments *pro* and *con* are most clearly and candidly put by Kennedy, L.J. in the *Virginia* case (*sup.*). But what turned the scale was that, to come to the result opposite to that of the decision would be, as Vaughan Williams, L.J. put it (12 Asp. Mar. Law Cas. at p. 86; 105 L. T. Rep. at p. 812; (1912) 1 K. B. at p. 238): "to change the words of the section from 'a British sea-going ship' into 'a British sea-going seaworthy ship.'" The judges in the *Virginia* case (*sup.*), while thus pronouncing on the interpretation of sect. 502, held that in that case sect. 502 was impliedly excluded by the terms of the bill of lading, and the appellant has put forward the same argument in this case. The same argument was urged in the case of *Ingram and Royle* v. *Services Maritimes du Tréport Limited* (*sup.*) but was unsuccessful, it being pointed out that the reason of the exclusion in the *Virginia* case (*sup.*) was based on the fact, not that the bill of lading mentioned fire as one of the exceptions, but that it went on in the concluding part to deal exhaustively with the question of seaworthiness, while in *Ingram and Royle's* case (*sup.*) there was no such concluding part. The same answer must be made in this case. In other words, the bill of lading equiparates with the bill of lading in *Ingram and Royle's* case (*sup.*), and not with the bill of lading in the *Virginia* case (*sup.*).

I am, therefore, for these reasons, of opinion that the decision of the courts below on the first point, that is to say, the counterclaim for damage to the maize, was right.

The second question, whether the ship could demand a general average contribution under the circumstances of the case, is not dealt with by direct authority. But there is a body of decided authority on several propositions, and the question is how that general authority is to be applied to this case. That the expenditure here was of the class which gives rise to a claim for general average contribution is not denied. It was incurred in order to save the ship and cargo from the further peril from fire. "But then," say the appellants to the respondents, "the fire was caused by unseaworthiness due to your fault, and therefore, on the authority of *Schloss* v. *Heriot* (1 Mar. Law Cas. (O.S.) 335; 8 L. T. Rep. 246; 14 C. B. (N.S.) 59), an authority upheld by *Strang, Steel and Co.* v. *Scott and Co.* (6 Asp. Mar. Law Cas. 419; 61 L. T. Rep. 597; 14 App. Cas. 601), you cannot recover because it was your own fault which necessitated the average expenditure." To which the respondents retort: "It was settled by *The Carron Park* (6 Asp. Mar. Law Cas. 543; 63 L. T. Rep. 356; 15 Prob. Div. 203), and again by *Milburn and Co.* v. *Jamaica Fruit Importing and Trading Company* (9 Asp. Mar. Law Cas. 122; 83 L. T. Rep. 321; (1900) 2 Q. B. 540) that where there was an exception in the bill of lading against fault as causing fire the rule has no application, and the statutory exception against fire in sect. 502 must have the same effect." These counter propositions, so far as based on the cases quoted, are all correct, so that the crucial question is whether the statutory exception of liability introduced by sect. 502 has the same effect as had the exception in the bill of lading in *The Carron Park* (*sup.*) and *Milburn and Co.* v. *Jamaica Fruit Importing and Trading Company of London* (*sup.*). It is also possible to contend, and the appellants' counsel did so contend, that the two cases of *The Carron Park* (*sup.*) and *Milburn and Co.* v. *Jamaica Fruit*

Importing and Trading Company of London (*sup.*), which are not binding on your Lordships, though they were on the courts below, were wrongly decided.

It is, I think, best first to consider the ground on which the answer to a demand for contribution is made when the circumstances which give rise to the necessity for general average expenditure are due to the fault of the person claiming the contribution. The most authoritative statement is to be found in the opinion of Lord Watson in *Strang, Steel and Co.* v. *Scott and Co.* (*sup.*). In that case, that which caused the necessity of sacrificing something for the general safety of all was negligent navigation by the master. The loss incurred was by the jettison of cargo. The litigation arose in a somewhat peculiar way. The ship having arrived, the agents for the ship gave notice to all the consignees of cargo that they would not be allowed to remove their goods unless they made a deposit of 5 per cent. on the value "against probable average claims." In order to get their goods, certain consignees paid the deposit under protest and then raised action to get back the money so paid. They also said they had made a sufficient tender, but that aspect of the case may be disregarded. In their pleadings the plaintiffs added a plea that they were not liable to contribute to general average on account of the ship or cargo (*i.e.*, sacrificed cargo) because the jettison was rendered necessary by the negligence of the master. The recorder at Rangoon, before whom the case was defended, gave effect to this plea and ordered the return of the money. This could only be right if under the circumstances there could not arise any general average claim. Lord Watson, in delivering judgment, which reversed the decision of the recorder, said (6 Asp. Mar. Law Cas. 420; 61 L. T. Rep. at p. 598; 14 App. Cas. at p. 605): "In the course of the argument upon this appeal, three separate points were raised and fully discussed: The appellants argued (i.) that innocent owners of cargo sacrificed for the common good are not disabled from recovering a general contribution by the circumstance that the necessity for the sacrifice was brought about by the shipmaster's fault; (ii.) that in respect the bills of lading for the cargo of the *Abington* specially excepted 'any act, neglect, or default whatsoever of pilots, master, or crew in the management or navigation of the ship,' the owners of cargo saved are not, so far as concerns any question of contribution, in a position to plead the fault of the master," and then the question of tender, which may be disregarded.

Lord Watson then went on to discuss the origin of the doctrine of general average based on the Rhodian law, and his opinion may be summed up in the words of the headnote (14 App. Cas. 601): "The rules of maritime law relating to the rights and remedies resulting from a proper case of jettison are: (1) Each owner of jettisoned goods becomes the creditor of ship and cargo saved. (2) He has a direct claim against each of the owners of ship and cargo for a *pro rata* contribution towards his indemnity, which he can recover (*a*) by direct action; (*b*) by enforcing through the shipmaster, who is his agent for that purpose, a lien on each parcel of goods sold to answer its proportionate liability."

Then (6 Asp. Mar. Law Cas. 421; 61 L. T. Rep. on p. 599; 14 App. Cas. on p. 608) Lord Watson went on to discuss the exceptions to the law of general contribution, and he expressed himself thus: "When a person who would otherwise have been entitled to claim contribution has, by his own fault, occasioned the peril which immediately gave rise to the claim, it would be manifestly unjust to permit him to recover from those whose goods are saved, although they may be said, in a certain sense, to have benefited by the sacrifice of his property. In any question with them he is a wrongdoer, and, as such, under an obligation to use every means within his power to ward off or repair the natural consequences of his wrongful act. He cannot be permitted to claim either recompense for services rendered, or indemnity for losses sustained by him, in the endeavour to rescue property which was imperilled by his own tortious act, and which it was his duty to save.

And then, after approving of *Schloss* v. *Heriot* (*sup.*), he sums up thus (6 Asp. Mar. Law Cas. 421; 61 L. T. Rep. at p. 600; 14 App. Cas. at p. 609): "The fault of the master being matter of admission, it seems clear, upon authority, that no contribution can be recovered by the owners of the *Abington*, unless the conditions ordinarily existing between parties standing in that relation have been varied by special contract between them and their shippers."

Now, it will be observed that contention (ii.), as above, was exactly the contention in *The Carron Park* case (*sup.*). That contention (ii.) Lord Watson refused to decide because it was not proved that the bills of lading did all contain the exception, but I think it is clear that he inserted the rider: "Unless the conditions ordinarily existing between parties standing in that relation have been varied by special contract between them," because he foresaw that the same case as subsequently arose in *The Carron Park* (*sup.*) might emerge. He refused, as I have already said, to decide it, but he pointedly said that the case would be open when the question of the average adjustment came to the front.

Now, that brings me to the case of *The Carron Park* (*sup.*) itself, as approved of in *Milburn and Co.* v. *Jamaica Fruit Importing and Trading Company of London* (*sup.*). I should say that I think that Lord Watson's opinion in *Steel and Co.* v. *Scott and Co.* (*sup.*) gives one an indication that he would have approved of the judgment in *The Carron Park* (*sup.*), and that for two reasons. In the first place, he was examining the whole law, and if he had thought that the second point was irrelevant as stated, I think he would have said so, instead of saying

that he would not decide because he was not sure of the facts. In the second place, in his general discussion he had clearly put the exception as being based on the tortious act of the shipowner and his agent, the captain, and it was that conception of tortious act which postulates an actionable wrong that was the prevailing argument in *The Carron Park* (*sup.*) and *Milburn and Co.* v. *Jamaica Fruit Importing and Trading Company of London* (*sup*). And here, again, we are faced with the question of interfering with judgments which have held the field for a long time, and on which shipping practice has been based, for *The Carron Park* (*sup.*) was decided in 1890 and *Milburn and Co.* v. *Jamaica Fruit Importing and Trading Company of London* (*sup.*) in 1900, and now we are in 1931. I am therefore of opinion that it would be wrong for your Lordships to hold that *The Carron Park* (*sup.*) and *Milburn* v. *Jamaica Fruit Importing and Trading Company of London* (*sup.*) were wrongly decided.

And now arises the last and most difficult question. *The Carron Park* (*sup.*) and *Milburn and Co.* v. *Jamaica Fruit Importing and Trading Company of London* (*sup.*) were both cases where the cause of the danger which led to the position of general average was the negligence of the captain. Though unseaworthiness was pleaded in *The Carron Park* (*sup.*), the President found against that plea and put the negligence as a negligence during the voyage. *Milburn and Co.* v. *Jamaica Fruit Importing and Trading Company of London* (*sup.*) was a case of collision by negligence, and there is no doubt that, had the trouble arisen from unseaworthiness, the decisions would have been, apart from a possible argument on the statute of 1894, the other way, for a mere exception against fault in the bill of lading does not cover unseaworthiness—*Steel and another* v. *State Line Steamship Company* (3 Asp. Mar. Law Cas. 516; 37 L. T. Rep. 333; 3 App. Cas. 721).

Does, then, sect. 502, decided as it has been to include unseaworthiness, bring about a position the same as that of *The Carron Park* (*sup.*)? This is what has caused the difference of judicial opinion in the courts below, and I do not hesitate to say that the first inclination of my mind was to agree with Scrutton, L.J. and Wright, J.; but in the end I have come to the opposite conclusion. The argument for their opinion is, I will not say based, but greatly fortified by, the dictum of Lord Halsbury in *Greenshields, Cowie and Co.* v. *Thomas Stephens and Sons* (11 Asp. Mar. Law Cas. 167; 99 L. T. Rep. 597; (1908) A. C. 431) where, dealing with this very section, he said (10 Asp. Mar. Law Cas. at p. 169; 99 L. T. Rep. at p. 598; (1908) A. C. at p. 436): "The statute is not dealing with average at all." Moreover, at first sight, it is startling that a section which was framed as one to limit liability, *i.e.*, so to speak, is of a negative complexion, may be used to give a right which does not otherwise exist, *i.e.*, so to speak, is of a positive complexion. The argument which prevailed in the end with me was this: the answer to the exception of the right to claim general average which was held good in *The Carron Park* (*sup.*) and *Milburn and Co.* v. *Jamaica Fruit Importing and Trading Company of London* (*sup.*), which I have already held were rightly decided, turned entirely on the question of whether the shipowner, as in a question with the shipper, had committed an actionable wrong.

Now sect. 502 says that, if fire is the cause of the trouble, there is no actionable wrong committed by the shipowner however much he may have caused the fire; and by decision (which here, again, I have already approved) this is explained to embrace fire when caused by unseaworthiness. Therefore in this case there is no actionable wrong in what the shipowner did, and consequently the answer to the exception is not a good one, just as was found in *The Carron Park* (*sup.*) and *Milburn and Co.* v. *Jamaica Fruit Importing and Trading Company of London* (*sup.*). Put in other words, the argument may read thus: "The effect of sect. 502 is to incorporate that section in every bill of lading," or, if it is better expressed, "to impose an added contract besides that expressed in the bill of lading." Once so incorporated or added, there is obviously no actual wrong committed by the owner of the ship, and the principle of *The Carron Park* (*sup.*) and *Milburn and Co.* v. *Jamaica Fruit Importing and Trading Company of London* (*sup.*) applies. I ought, perhaps, to add that as the expression in sect. 502 is "shall not make good any loss," the appellants argued that there was still an actionable wrong, and that all the statute did was to say you shall not pay for it. I think that argument is the argument of a drowning man. An actionable wrong for which you can recover nothing is a contradiction in terms.

Now, as to the dictum of Lord Halsbury. It was a case where coal caught fire by spontaneous combustion, and it was argued that the owner of the rest of the coal which had been damaged by water poured on it could not claim a general average contribution because the whole trouble had come from what was termed the inherent vice of the coal. But Lord Halsbury disposed of that by pointing out that "inherent vice" was really a faulty expression. Had the fire been traced to an actual fault on the part of the owner of the coal it would have been otherwise, on the principle of *Schloss* v. *Heriot* (*sup.*), but there was no fault on the part of the owner of the coal. He knew nothing wrong about it, and the shipowner approved without demur, to the shipping of that particular coal. Then an additional argument upon sect. 502 was brought in. It was said that, as sect. 502 says the shipowner is not to be liable to pay for any loss by fire, he cannot be called on to contribute to general average for the benefit of the coal-owner, to which the obvious answer was that a general average contribution does not rest on any idea of loss on the part of the person called to make it, or, in other words, a section

which absolves you from loss does not absolve you from something which is not loss at all, and Lord Halsbury added the observation in question. It was quite true, as he said, that the section was not dealing with general average, but none the less the result of the section may have an effect on general average. I therefore think that the argument I have set forth is not displaced by Lord Halsbury's remark.

I move that the appeal be dismissed with costs.

Lord Warrington.—The respondents in the present appeal are the owners of the steamship *Campus* and were plaintiffs in the action in which the appeal arises. The appellants are the owners of cargo shipped on the *Campus* and were defendants in the action.

The claim of the respondents was for a contribution to certain expenses, now admitted to be general average expenses, to which the appellants, as cargo owners, would *primâ facie* be bound to contribute. They defended the action on the ground that the emergency giving rise to the expenditure was caused by the unseaworthiness of the ship, and that the shipowners were therefore in default, and, under the well-established principles of the law of general average, were debarred from claiming contribution from the owners of the cargo. These principles are stated in the judgment of the Judicial Committee prepared by Lord Watson in *Strang, Steel and Co.* v. *Scott and Co.* (6 Asp. Mar. Law Cas. 419; 61 L. T. Rep. at p. 599; 14 App. Cas. at p. 607), and as so stated are not in dispute. To this defence it was replied by the respondents that under the provisions of sect. 502 of the Merchant Shipping Act 1894, they were under no liability to the appellants for loss or damage to their goods, and were therefore not in default, in spite of the fact that they had committed a breach of the contract of carriage in respect of the unseaworthiness of the ship. The question, therefore, in the action is whether the reply of the respondents is well founded. It was rejected by Wright, J., who dismissed the action. In the Court of Appeal it was accepted by the majority, Greer and Slesser, L.JJ.; Scrutton, L.J. dissenting.

The material facts on this point are no longer in dispute, and I will only summarise the result.

The trouble was fire on board arising from the character and condition of the coal carried in the bunkers, and the damage to cargo was occasioned by the near proximity of one of the holds, in which maize was stored, to a bunker, the coal in which took fire, and the insufficient protection of the hold against fire in the bunker. These circumstances were found by Wright, J. to constitute unseaworthiness causing the loss of and damage to cargo, and this finding is accepted.

The material part of sect. 502 is as follows:

502. The owner of a British seagoing ship or any share therein shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely, (i) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship.

In the present case the loss of or damage to the appellants' cargo happened by reason of fire on board the ship, and without any actual fault or privity on the part of the respondents, the shipowners. The shipowners were therefore completely freed from any liability to make good such loss or damage. It is not alleged that the breach of the ordinary implied warranty of seaworthiness gave rise to any other pecuniary claim.

The first question to be decided is what, under the circumstances, is the true effect of the contract of carriage in the present case. In my opinion, inasmuch as there is nothing in the contract expressed in the bill of lading by reference to the charter-party to exclude the operation of sect. 502, the provisions of that section become an addition to the terms expressed in such contract. I am further of opinion, on the authority of *Ingram and Royle* v. *Services Maritimes du Trépori Limited* (*sup.*), that the terms of the section are operative, notwithstanding that the cause of the trouble was the unseaworthiness of the ship. It follows that in the present case no part of the loss of or damage to the cargo can be recovered from the shipowners, but the whole of it falls upon the cargo owners themselves. On the other hand, of course, any damage to the ship falls to be borne by the shipowner.

The next question is, how does the contract between the shipowner and the cargo owner affect the right of the former to contribution by the latter to general average expenses? I agree with Greer, L.J. that the right to contribution arises whenever the expenditure is incurred or the sacrifice made in the interest of both the parties and not of one of them alone. In the present case, inasmuch as the whole of the loss of or damage to the cargo falls on the cargo owner, the expenditure in question is incurred in the interest of both parties, and a due proportion thereof in the shape of contribution in general average would be recoverable by the shipowner.

If the immunity of the shipowner were derived simply from a bill of lading absolving him from liability in the event which happened the case would be completely covered by *The Carron Park* (*sup.*) and *Milburn* v. *Jamaica Fruit Importing and Trading Company of London* (*sup.*). Can it make any difference that the immunity is found in the added term supplied by sect. 502? I can see no logical reason for so holding. The statutory provision is as much part of the contract as if the parties had written it out in the bill of lading itself. In my judgment, therefore, the decisions in the two cases above mentioned are applicable to the present case. I agree that they were rightly decided, but even if I were doubtful on this point I should not, for reasons expressed

in the opinion of my noble and learned friend Lord Dunedin, which I have had the advantage of reading, have been prepared now to overrule them.

I am of opinion, therefore, that the order of the Court of Appeal, reversing the judgment of Wright, J. in the original action, should be affirmed.

As to the counterclaim, I agree that the order appealed from should be affirmed.

It remains only to say a few words about the dictum of Lord Halsbury in *Greenshields, Cowie, and Co.* v. *Thomas Stephens and Sons* (11 Asp. Mar. Law Cas. 167; 99 L. T. Rep. at p. 598; (1908) A. C. at p. 436), that "sect. 502 is not dealing with questions of general average." On the facts of that case the provision of sect. 502 was really irrelevant to the claim of the cargo owner to contribution by the ship, and the statement of Lord Halsbury was a dictum only. But though, in a sense, it is true that the section is not dealing with general average, yet when, as in the present case, its provisions become an added term of the contract of carriage, and the rights and liabilities of the several parties to contribution in general average depend, as they do, upon the terms of the contract, the provisions of the section of necessity affect those rights and liabilities.

On the whole I agree that the appeal should be dismissed with costs.

Lord Warrington.—I have been asked to say that my noble and learned friend Lord Macmillan concurs in the judgments that have been delivered.

Lord Atkin.—The question in the present case arises on the claim of the respondents, the owners of the steamship *Campus*, against the appellants, the owners of a grain cargo shipped on board the *Campus*, for contribution in respect of a general average expenditure occasioned to avert a loss caused by fire on board. The appellants reply that the fire was caused by the respondents' fault in that it was due to unseaworthiness of the ship. The respondents rejoin that the appellants cannot rely on any such fault by reason of the provisions of sect. 502 of the Merchant Shipping Act 1894. This raises an interesting issue in the law of general average, at one time the subject of controversy, but, as I venture to suggest to your Lordships, now settled by authority of the Court of Appeal and accepted by the shipping world for about a generation. It will only be necessary to deal shortly with the facts, as many of the issues that arose in the course of the proceedings have disappeared in the progress of the case to this House.

The ship proceeded from Cardiff with a cargo of coal and sufficient bunkers to take her outwards to the Argentine and part of the way home. On her way out she was chartered by an Argentine company on the terms of the Centrocon charter-party to load a cargo of grain at Argentine ports and proceed to a Continental or United Kingdom port. The exception clause of the charter provides: "The steamer shall not be liable for loss or damage occasioned by . . . fire from any cause or wheresoever occurring . . . even when occasioned by the negligence, default or error of judgment of the master, mariners or other servants of the shipowners or persons for whom they may be responsible." The charter also provides: "Average if any payable according to York-Antwerp Rules 1924." The ship duly loaded a cargo of maize under bills of lading of which the appellants are the holders, which merely incorporate the terms of the charter as to exceptions and expressly repeat the terms adopting the York-Antwerp Rules of 1924. Having received a full cargo she started on her homeward voyage, but before she left the Plate fire broke out in the bunkers and reached part of the cargo. The ship in consequence put in to Montevideo, discharged part of the damaged cargo, and incurred expenditure which, it is common ground, was general average expenditure. The question in dispute is whether the ship can recover a contribution for it from the cargo. It has been found that the fire was due to unseaworthiness without the fault or privity of the owners. The ship therefore cannot rely on the exceptions which are not so drawn as to include unseaworthiness. In these circumstances the cargo owners apparently thought themselves in a position to counter-claim for damage to their cargo caused by fire, including the general average contribution, if any, to which they were liable. This claim was defeated by the provisions of sect. 502 of the Merchant Shipping Act. It was contended by the cargo owners that the protection given by the section was not extended to cases of fire occurring in an unseaworthy ship. I am satisfied that this contention fails. It has been decided to the contrary in the Court of Appeal; I see no reason why a condition so important, and, if included, so easily expressed, should be read into a clause which was obviously intended to give relief against possibly overwhelming claims to shipowners who were themselves not in actual fault.

The case therefore before us has been confined to the shipowners' claim for contribution. The answer of the cargo owner is based on the finding that the fire was due to unseaworthiness. The shipowner, says the cargo owner, cannot claim contribution where the peril threatening the whole adventure is due to his fault. The reply of the shipowner is that such a defence can only be made where the alleged fault is an actionable wrong, and that it has been held that where the contract of carriage relieves the shipowner from responsibility for what otherwise would be an actionable wrong the rule no longer applies, and that in the present case the statute has the same effect as an express exception relieving the shipowner from liability for unseaworthiness causing fire. The cargo owner in this House has made a double rejoinder. In the first place he attacks

the decisions which allow the shipowner in general average to rely upon contractual exceptions to relieve himself of the consequences of fault; in the second place he says that assuming such decisions to stand, the statutory provisions have not the same effect and cannot be used as having any influence at all on any question of general average.

It is now well established in our municipal law that a shipowner cannot claim a contribution for a general average sacrifice or expenditure where the peril that occasioned the sacrifice or expenditure was due to the fault of himself or his servants. But this proposition is of little practical value until a correct connotation is given to the word "fault." The first appearance of the doctrine in a reported case so far as I am aware is to be found in *Schloss* v. *Heriot* (*sup.*). That was an action by a shipowner against cargo owner for contribution in respect of a general average loss. The defendant for a fourth plea averred that the ship was unseaworthy at the commencement of the voyage, and that the average loss "was caused and occasioned and arose and happened from and in consequence of such unseaworthiness." The case was decided on demurrer, counsel for the defendant arguing that the plea was good inasmuch as it showed that the loss was occasioned by the actionable negligence and misconduct of the plaintiff himself. Erle, C.J., in giving judgment, said (14 C. B. (N. S.), on p. 641): "The fourth plea, I think, is a good one. It shows that the plaintiff was himself the cause of the loss—that his actionable negligence and misconduct produced the very damage for which he seeks to recover contribution from the defendants. Further, I am of opinion that, if necessary, the plea is sustainable on the ground that the defendants would be entitled in a cross-action to recover back the whole sum claimed by the plaintiff in this action." Willes J. and Keating, J. concurred. It is plain that the decision in that case proceeded on the footing that the fault relied on was actionable: the first head of the judgment is that the plaintiff himself caused the loss by his actionable negligence and misconduct; the second head is circuity of action which necessarily involved actionable fault. In *Prehn* v. *Bailey and others* (4 Asp. Mar. Law Cas. 465; 45 L. T. Rep. 399; 6 Prob. Div. 127), the owner of a ship which had been sunk by a collision for which the ship was to blame had raised the ship, and having limited his liability in accordance with the statute claimed a contribution from the cargo owner for either salvage or general average. The Court of Appeal refused contribution, Brett, L.J. saying if the general average contribution arose by reason of a default of his he cannot claim anything. Cotton, L.J. said that it would be against equity to say that a person who himself has done the wrongful act which caused the expenditure shall claim from anyone else. I think it plain that Brett, L.J., in speaking of "default," and Cotton, L.J., in speaking of "wrongful act," had in mind the class of act which was the subject of their discussion, namely, an actionable wrong, in that case negligence causing collision. Similarly in *Strang, Steel and Co.* v. *Scott and Co.* (6 Asp. Mar. Law Cas. 421; 61 L. T. Rep. at p. 599; 14 App. Cas., at p. 608), Lord Watson, in stating the principle that where a person has by his own fault occasioned the peril it would be unjust to permit him to recover from the cargo owners, proceeds to say that in any question with them he is a "wrongdoer" and must seek to mitigate the consequences of his "wrongful act." He then refers to the property imperilled "by his own tortious act" and cites *Schloss* v. *Heriot* (*sup.*) as the leading English authority. The English law on this matter is to be found in these authorities; and I can find no trace of any principle other than that the fault which deprives the claimant of his right to contribution must be fault which is an actionable fault against the person from whom contribution is claimed. A statutory limitation of liability of course does not defeat the principle: it leaves the fault actionable, as was decided in *The Ettrick* (*sup.*). I myself find it difficult to conceive of a fault in this relation which, though not actionable, is yet in some manner so blameworthy as to deprive the party of his right to contribution. It is further to be noted that the principle does not prevent an act which otherwise complies with the conditions from being a general average act. For such a purpose one does not look at the cause of the peril, but the quality of the acts done to avert it. In other words, a cargo owner who has suffered a general average sacrifice may claim contribution from his fellow cargo owners though the peril be incurred by the negligence of the ship. If any authority be required for this it is to be found in *Strang, Steel and Co.* v. *Scott and Co.* (*sup.*). The question, therefore, always is one of the immediate relations between the claimant for contribution and the contributory interests.

I have dwelt upon the necessity for the fault to be actionable to illustrate the cases relied on by the shipowner which seem to me to decide that, where the act causing the peril is by convention of the parties not actionable, the claimant who has committed the act is not precluded from obtaining contribution.

The first of these is *The Carron Park* (*sup.*), decided by Sir James Hannen in 1890. There a cargo of sugar was loaded on the defendant's ship on the terms of a charter-party which contained an exception clause, "neglect or default whatsoever of the pilot master crew or other servants of the shipowner always excepted." The cargo was damaged by water through a valve being negligently left open by one of the engineers of the vessel. The action was for damage to cargo; the shipowner pleaded the exception and counter-claimed for a general average contribution. The President gave effect to the exception on the claim, and held the shipowner entitled to contribution in general average. He says (6 Asp. Mar. Law Cas. at p. 545; 63 L. T. Rep. at p. 358; 15 Prob. Div. at p. 207): "The claim for

contribution as general average cannot be maintained where it arises out of any negligence for which the shipowner is responsible; but negligence for which he is not responsible is as foreign to him as to the person who has suffered by it." After citing from Lord Watson in *Strang, Steel and Co.* v. *Scott and Co.* (*sup.*), he proceeds: "Here it appears to me that the relation of the goods owner to the shipowner has been altered by the contract—that the shipowner shall not be responsible for the negligence of his servants in the events which have happened." This decision, which was criticised at the time by a writer of great authority on such matters, the late Judge Carver, in his work, Carriage of Goods by Sea, 4th edit., s. 373 (*b*), was affirmed and followed by the Court of Appeal in *Milburn and Co.* v. *Jamaica Fruit Importing and Trading Company of London* (*sup.*). In that case the shipowners had chartered the *Port Victor* to the defendants by a charter-party which contained an exception clause, "negligence of the master . . . or other servants of the shipowner or charterers always mutually excepted." The captain was to be at liberty to sign bills of lading at any rate of freight the charterers might choose without prejudice to the stipulations of the charter-party, and the charterers agreed to indemnify the owners from any consequence that might arise from the captain signing bills of lading. During the currency of the charter the captain by the charterers' instructions signed bills of lading for cargo without a negligence clause. The ship collided with another ship through the negligence of the captain. The ship in consequence incurred certain general average expenditure. The shipowners sued the charterers for an indemnity, alleging that by reason of the absence of the negligence clause they had lost their right to a contribution against the bill of lading holders. The defence, argued by Mr. Carver, K.C., and Mr. Scrutton, was that if the bills of lading had contained a negligence clause still the shipowner would not have been entitled to contribution, and that the decision in *The Carron Park* (*sup.*) was wrong. The court by a majority, A. L. Smith, L.J. and Romer, L.J.; Vaughan-Williams, L.J. dissenting, gave judgment for the shipowner and affirmed *The Carron Park* (*sup.*). A. L. Smith, L.J., a judge of large experience in these matters, said (9 Asp. Mar. Law Cas. at p. 124; 83 L. T. Rep. at p. 323; (1900) 2 Q. B. at p. 546): "To create the shipowner a wrongdoer as regards the cargo owner there must be the breach of some duty, and, if by agreement between the two it has been agreed that it shall be no breach of duty for the master to be guilty of negligence, in other words, that as between the two the negligence of the master shall be always excepted, it cannot be said that it is a breach of duty towards the cargo owner for the master to be guilty of that which the cargo owner and shipowner have agreed shall be no breach of duty at all." Romer, L.J. expressed the same reasoning, pointing out that with the negligence clause at the moment of the sacrifice shipowner and cargo owner between themselves stood on a footing of equality.

Since that date the decision has stood undisturbed by any authority. It has been followed in Scotland. Countless contracts of carriage by sea must have been made on the footing that it was correct, and general average claims adjusted accordingly. Even if one were to assume that had the case at the time come on appeal for decision before your Lordships, the balance of argument would have been on the side of the cargo owners, I apprehend that at the present date your Lordships would have felt the greatest difficulty in overruling a decision not unreasonable in itself upon which so many people have acted and regulated their mutual obligations in an important branch of commerce. It is noteworthy that the statutory exceptions in the Carriage of Goods by Sea Act 1924 must have been agreed to on the footing that the law was as laid down in these cases. I should therefore myself have been content to accept the decision on this ground alone. But I think the reasoning correct. If by convention between the parties the so-called fault is an act which is not actionable, as between them the foundation for the doctrine invoked disappears. It is no longer a wrong of the shipowner which has caused the peril: it is no longer inequitable for him to enforce a contribution. Counsel for the cargo owner fell back upon another argument. Assume, they said, that the ship recovers if the exception is so drawn as expressly to displace the duty, as by saying negligence excepted, yet if the exception does not expressly displace the duty but merely says that the ship is not responsible for the consequences of the negligence then the original principle survives. My Lords, this seems to me much too narrow a view to find a place in the construction of a commercial contract. The object of the exception is to protect the person committing the act in question from liability for any consequences of it; and this is effectively secured whether it is said that there shall be no duty to avoid doing the act, or no obligation to pay any compensation if it is done. Both forms of words, according to English law, prevent any liability from arising either in contract or tort.

I think that up to this point there has been no difference of opinion in the courts below. I see no disposition on the part of Wright, J. or Scrutton, L.J. to question the correctness of the decisions in *The Carron Park* (*sup.*) and in *Milburn and Co.* v. *Jamaica Fruit Importing and Trading Company of London* (*sup.*). The only difference has been upon the effect of sect. 502. As a matter of principle I am unable to see any distinction in this context between a contractual exception and a statutory exception. If the words of the statute had been written into the charter-party there could be no doubt that the right to contribution would not be defeated, always

assuming that *The Carron Park* (*sup.*) was, as I have held, rightly decided. That the act or omission is made by statute not actionable, rather than by agreement, can hardly be a circumstance affecting the ultimate liability. By the most effective method it is prescribed that in cases falling within the statute there is no actionable fault. If so the right to contribution is not destroyed. With unfeigned respect to the two very learned judges who took a different view, whose opinions on such a matter are of the greatest weight, they have, I think, imputed to a sentence of Lord Halsbury in *Greenshields, Cowie and Co.* v. *Thomas Stephens and Sons* (*sup.*), more than it was intended to convey. In that case fire having broken out in a cargo of coal the whole cargo was damaged by water in the course of saving both ship and cargo. The cargo owners claimed against the ship contribution in general average. The ship set up the provisions of sect. 502. This House, affirming Channell, J. and the Court of Appeal, held that the section afforded no answer. It applied to a liability sought to be imposed upon a shipowner for damage to goods by fire where otherwise he would be liable on his contract of carriage or by reason of his custody of the goods. Lord Halsbury said: "The statute is not dealing with average at all." This statement seems in its context to be reasonably plain. Similarly if the shipowner had sought to protect himself from a contribution by relying on a bill of lading exception it would rightly be said the bill of lading is not dealing with average at all. For, I think, there can be no doubt that the bill of lading exceptions operate to relieve the shipowner from the consequences of non-delivery of goods or delivery of damaged goods in breach of duty arising from his having agreed or assumed to carry them: *Schmidt* v. *Royal Mail Steamship Company* (4 Asp. Mar. Law Cas. 217*n*; 45 L. J., Q. B. 646; *Crooks and Co.* v. *Allan and another*, 4 Asp. Mar. Law Cas. 217; 41 L. T. Rep. 800; 5 Q. B. Div. 381; and *Burton and Co.* v. *English and Co.*, 5 Asp. Mar. Law Cas. 187; 49 L. T. Rep. 768; 12 Q. B. Div. 218). Indeed, if it were otherwise, the exception of "perils of the sea," alone, the oldest of exceptions, would have made the cargo owners' right of contribution against the ship of little practical value. The statute then is not dealing with average, but it is dealing with actionable fault, and as the suggested defence to the claim for contribution is actionable fault of the claimant the statute defeats such a defence. I have not thought it necessary to deal with the decision of the Supreme Court of the United States in *The Irrawaddy* (171 U. S. Rep. 187), because, as pointed out by Greer, L.J., in the Court of Appeal, that case was decided on distinctions then existing between the law of the United States and this country to which the majority of the Supreme Court expressly drew attention. In my opinion the view of the majority of the Court of Appeal in this case ought to prevail, and this appeal should be dismissed with costs.

Lord Thankerton.—I have had the opportunity of reading and considering the opinion of my noble friend, Lord Dunedin, and I entirely concur in it.

Appeal dismissed.

Solicitors for the appellants, *Ince, Roscoe, Wilson*, and *Glover*.

Solicitors for the respondents, *Botterell* and *Roche*, agents for *Vaughan* and *Roche*, Cardiff.

Supreme Court of Judicature.

COURT OF APPEAL.

May 11, 12, 13 *and* 22; *June* 15, 1931.

(Before Scrutton, Greer and Slesser, L.JJ., assisted by Nautical Assessors.)

The Bremen. (*a*)

ON APPEAL FROM THE ADMIRALTY DIVISION.

Collision—Fog—Whistle of steamship heard a little abaft the beam—Whistle heard again on the same bearing—Failure to stop—Regulations for Preventing Collisions at Sea, art. 16 *—Nautical Assessors—Disqualification of an assessor.*

Art. 16 *of the Regulations for Preventing Collisions at Sea requires a steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, to stop her engines and then navigate with caution until danger of collision is over.*

The B., *an Atlantic liner, was bound down channel in dense fog, making about four knots, when those on board heard abeam or a little abaft the beam the fog signal of the steamship* B. G. *The fog signal was again heard on four or five occasions on the same bearing, louder and drawing nearer. The* B. *then starboarded, and also used her engines to assist her helm. Very shortly afterwards the* B. G. *appeared crossing the course of the* B. *from starboard to port, and the two vessels came into collision.*

Held (*Greer, L.J. dissenting*) *that although art.* 16 *did not apply, good seamanship nevertheless required the* B. *to stop her engines when the fog signals of the* B. G. *were heard on the same bearing getting louder and nearer, indicating danger of collision, and that the* B. *was* 20 *per cent. to blame for failing to do so.*

Decision of Bateson, J. affirmed.

Per Scrutton, L.J.: Where one of the nautical assessors summoned to assist the Court of Appeal has at any time been in the service of either of the parties to the appeal, such service should be disclosed before the hearing of the appeal is begun.

(*a*) Reported by Geoffrey Hutchinson, Esq., Barrister-at-Law.

Appeal and cross-appeal from a judgment of Bateson, J. holding the plaintiffs' steamship *British Grenadier* 80 per cent. to blame and the defendants' steamship *Bremen* 20 per cent. to blame for a collision between the *British Grenadier* and the *Bremen*, which took place in the English Channel off Dungeness on the 24th April 1930.

The *British Grenadier* was a steel screw steamship, 6888 tons gross and 4078 tons net register, 440ft. in length, 57ft. beam, fitted with geared turbine engines of 642 h.p. nominal, and at the time of the collision was in the course of a voyage from Abadan to Grangemouth with a cargo of about 9300 tons of crude petroleum.

The *Bremen* was a steel quadruple screw steamship belonging to the port of Bremen, 51,656 tons gross and 21,583 tons net register, 939ft. in length and 102ft. beam, fitted with geared turbine engines of 96,000 h.p. indicated, carrying a crew of 1005 hands. She was on a voyage from Bremerhaven to New York via Southampton and Cherbourg with 971 passengers.

The collision took place at about 10.21 a.m. on the 24th April 1930, in the English Channel, about four-and-half miles off Dungeness during a dense fog. Bateson, J. held that the *British Grenadier* was 80 per cent. to blame for the collision, and that the *Bremen* was 20 per cent. to blame. The case is reported on the question of the liability of the *Bremen*. The facts material to her navigation were found by Bateson, J. as follows:

After 9.8, when she encountered fog, the *Bremen* felt her way down channel, dealing carefully with the traffic, of which there was a good deal, and from 9.22 she worked her way mostly with her two inner screws only, which at half speed give her about four knots. About 10.11 she was all stopped and she blew the two long blast signal certainly once, perhaps twice. At 10.12½ she went on half speed on the two inner screws sounding a long blast. About 10.16 the *Bremen* heard the *British Grenadier* for the first time, apparently a little abaft the starboard beam. I am satisfied that the whistle of the *British Grenadier* was somewhere about the beam or a little abaft it. Under these circumstances there was no necessity under art. 16 for the Master of the *Bremen* to stop his engines and he did not do so. To go on after hearing one whistle on the beam is perfectly safe in that position, because the rule as to stopping only applies to a sound signal apparently forward of the beam. Then the whistle sounded louder and nearer. The master heard it about six times and always on the same bearing, and thereafter, I think, it indicated risk, but he kept on until about 10.19½, when he decided that he must act, and he starboarded his helm. He had not seen the *British Grenadier* at that time. The *Bremen* did not go off as quickly as the master wished under her starboard helm, and he increased his engine power, first putting both starboard engines full speed ahead to assist the helm, and then all four engines. Almost immediately afterwards he saw the *British Grenadier* at a distance of about 100-150 yards bearing about six or seven points on the starboard bow, crossing and passing him. As soon as he saw her he put all four engines full speed astern, but the two vessels came together at 10.21, the starboard bow of the *Bremen* striking the port side of the *British Grenadier*.

The learned judge went on to say that he had no doubt that the *British Grenadier* was more to blame than the *Bremen*, and then continued:

"The navigation of the *Bremen*, on the other hand, was most careful. In the last ten minutes she had been all stopped for fog. She heard the whistle of the *British Grenadier* on her beam as she thought, and I think she was right. But there is a difficult question in her case. I think she was very unlucky to have met the *British Grenadier*, but I cannot excuse her entirely for her navigation after hearing the fog signals of the *British Grenadier*. I have considered carefully with the Elder Brethren the following matter, and I put it to them not exactly in the form of a question, but in this way: The *Bremen* heard single long blast signals of the *British Grenadier* abeam, or abaft the beam. That vessel must be either a ship on the same course, an opposite course, a diverging course, or a converging course. If it is one of the first three of those it does not matter—it is only the last that matters. If the vessel is on a converging course going up-channel the courses would intersect astern of the *Bremen;* if the vessel is going down-channel, there is a danger of the courses intersecting ahead of the *Bremen.* The fact that the signals keep the same bearing, and get louder and nearer, is a clear indication of danger of collision. What ought a good seaman to do? I think—and the Elder Brethren think—the right navigation is to wait and see. That is to say, stop your engines as soon as you realise that the bearing is not changing. You are not bound to stop under the rules because the whistle signals are not forward of your beam, but when the vessel abeam of you is blowing signals on the same bearing, getting nearer and louder, I think a ship ought to stop. If you stop, the bearing may draw ahead, or it may remain the same. If it does not draw ahead, but remains the same, still getting nearer, at any rate you will know what the ship is doing and you will be prepared for any action that may be necessary. You have then ascertained what the other ship is doing; if it draws ahead you remain stopped. If the master was afraid of his flank—having regard to the number of lives he had got on board his ship—he might perhaps when he stopped have reversed his port propellers and starboarded his helm, and he might not then be to blame if he guesses right. But I think there would be even a risk in that. At any rate, it seems to me that stopping was the right manœuvre. In this case the master of the *Bremen*, a fine seaman, thought it best to preserve his flank from attack if he could, and he thought it best to keep his speed, such as it was, and turn his ship away. He was in a difficult position, but I think the right navigation is that which I have described. He ought to have stopped when he knew for certain, as he would after the second

or third blast, that the ship was approaching on the same bearing causing danger of collision. It is perhaps rather hard measure under these circumstances, but when one remembers how important it is in fog to stop your engines I do not think I am wrong in saying that he is somewhat to blame in this particular case. I have marked my view of the difference between the negligence of the two ships in the proportions which I have arrived at."

The defendants appealed, and the plaintiffs cross-appealed.

Raeburn, K.C. and *Hayward* for the appellants, the owners of the *Bremen.*

Dunlop, K.C. and *Noad* for the respondents and appellants in the cross-appeal.

SCRUTTON, L.J.—The *Bremen*, the well-known Atlantic liner, and the *British Grenadier*, an oil tanker, came into collision off Dungeness in thick fog. On the collision action being tried by Bateson, J., assisted by Trinity Masters, both ships were found to blame in the proportions of 80 per cent. attributable to the *British Grenadier* and 20 per cent. to the *Bremen*. Both ships appeal.

The actual hearing of the appeal took place as usual with two nautical assessors. But at the close of the hearing one of the parties brought to the attention of the court the fact that some years before one of the assessors had been in the service of one of the parties. On enquiry this was found to be so, though, of course, none of the professional gentlemen engaged were aware of it. The service referred to was nine years ago, and there had been no pecuniary or other relations between the parties since. Of course, such a relation should have been disclosed before the hearing of the appeal commenced, though in view of the fact that judges are not disqualified from hearing a case by the fact that when at the Bar they have appeared for or against one of the parties in other cases, it is quite intelligible that the assessor should not have appreciated the necessity for disclosure of his previous relations. The court gave the parties the opportunity of a re-hearing with other assessors, but the parties agreed, with the sanction of the court, that the court should treat the appeal as heard without assessors, discarding from their consideration any advice they had received from their assessors, and only considering as evidence the advice given by the assessors below.

The appeal of the *British Grenadier* can be shortly disposed of. There is, in my opinion, no ground for lessening the liability the judge has placed on her. [The learned Lord Justice then dealt with the navigation of the *British Grenadier*, and continued :] In my opinion, there is no ground for attributing to the *British Grenadier* a less percentage of blame than the 80 per cent. with which the judge has burdened her.

The appeal of the *Bremen* raises much more difficult questions. She was proceeding at a slow speed, three to four knots, in dense fog, sounding her long blast for fog at intervals of about a minute. At 10.16 she says she heard slightly abaft her beam on her starboard side a long blast. She heard it again, apparently, on the same bearing and getting louder, five or six times before the collision, at 10.21. That it appeared to be on the same bearing showed risk of collision. The *Bremen* did not stop her engines, but proceeded at the same speed, but under a starboard helm. The ships came into collision at an angle of 45 degrees leading forward on the *British Grenadier.* The question is, whether under these circumstances, the *Bremen* should have stopped as soon as the second and (or) third whistle heard from the *British Grenadier*, apparently on the same bearing as the first whistle and getting louder, told her there was risk of collision.

The judge, after discussing the matter with his assessors, summarises their joint opinion in the judgment that under these circumstances the master of the *Bremen* ought to have stopped when he heard the second or third blast getting louder, and, apparently, on the same bearing. I have come to the same conclusion as the judge below, as advised by his assessors. I treat the opinions of the assessors as evidence which I must consider, and form my own judgment upon. The appellant, however, is not supported by the opinion of any nautical men.

In my opinion the less ships move in fog, the better. If all ships stopped when there was fog, and either anchored or remained stationary where there was no risk of their drifting into danger of stranding, there would be no collisions. Rule 16 is imperative in requiring a vessel hearing apparently forward of her beam a fog signal to stop her engines, so far as the circumstances of the case admit, although from one whistle she cannot tell the course of the other ship, or what she is doing. Lord Gorell's well-known judgment in *The Campania* (9 Asp. Mar. Law Cas. 151, 153 ; 84 L. T. Rep. 673 ; (1901) P. 289, 296) disposes of the suggestion that large liners must go through fog at nine knots or so, and the same judge's remarks in *The Britannia* (10 Asp. Mar. Law Cas. 65 ; 92 L. T. Rep. 634 ; (1905) P. 98) negative the view that if the whistle heard seems a long way off the hearing vessel need not stop. In *The Aras* (10 Asp. Mar. Law Cas. 358 ; 96 L. T. Rep. 95 ; (1907) P. 28) Lord Gorell held that a steamer after stopping her engines was not justified in going slow ahead on the assumption that the sound of the whistle was broadening on her bow. He asked the Elder Brethren a question (10 Asp. Mar. Law Cas. at p. 360 ; 96 L. T. Rep. at p. 98 ; (1907) P. at p. 34) which shows his view as to the course which should be adopted, the reason for it being the uncertainty of bearings of whistles in fog. Lord Gorell said : "I have asked the Elder Brethren this question : 'When the *Oakmore* continued on her course'—the explanation of that is that according to her evidence she stopped, and then, finding she was falling off, put her engines ahead again and brought herself on to her course and kept on

for something like twenty minutes—' were the indications such as to show to her master, distinctly and unequivocally, that if both vessels continued to do what they appeared to be doing they would pass clear without risk of collision ?' The answer is 'No.' Then the Elder Brethren were asked by me: 'What ought to have been done in those circumstances on board the *Oakmore* ?' And their view is that she ought not to have continued on in the way she was doing, with that big steamer coming closer and closer and doing what I have already said, but that she ought to have stopped, it may be only from time to time, even at the risk of falling off somewhat, because recollect, there is a sound signal to be given if a vessel is absolutely stopped; that even if it would not have been advisable to keep continually stopped, by a touch ahead from time to time she could have been kept sufficiently on her course and under control instead of going on for something like twenty minutes at slow speed." Rule 16, however, only applies in terms to whistles heard, apparently, forward of the beam. The results of hearing a whistle slightly abaft the beam are not very clear as far as the express rules are concerned. The vessels may, in fact, be on crossing courses so as to involve risk of collision. In such a case, in clear weather, the *Bremen* would have to keep out of the way and the *British Grenadier* to keep her course and speed (art. 19). But Lord Gorell (then Barnes, J.) held in *The Cathay* (9 Asp. Mar. Law Cas. 35, at p. 36; 1899, 81 L. T. Rep. 391, at p. 392) that, in such a case, the stand-on vessel, in clear weather must, in fog, not stand on, but act on rule 16 rather than on rule 21: "It seems to me that although art. 21 is a general rule, it is qualified by art. 16 in cases where the latter article applies; and this is one of those cases, because this vessel undoubtedly heard, forward of her beam, the fog signal of the *Clan Macgregor*. It is said by Mr. Walton that those on board the *Cathay* could and did ascertain the position of the whistle which was heard. I do not agree with that contention, nor do the Elder Brethren. It is clear that the captain did not, and could not, properly ascertain the position of the vessel, and was not in the least justified in assuming she would pass under his stern. To my mind, on hearing that vessel he should have stopped the engines and navigated with caution until the danger was over. If he had done so there would have been no collision. No doubt her speed was kept up until the last moment, and then she crashed into the *Clan Macgregor* and sank her. I think it would be extremely dangerous to hold that in a dense fog, when vessels can be seen only at a very short distance, the vessel, which from an ultimate knowledge of the respective courses, is shown to be the one which in clear weather should keep her course and speed is to be held to be justified in keeping her course and speed when there is such a fog that the vessels cannot see each other at all, and cannot be certain of each other's position. I hold, without any doubt, that a ship in the position of the *Cathay* ought to have stopped her engines and taken off her speed in order to comply properly with art. 16." I appreciate, of course, that in the present case the judge has found, contrary to the case of the *British Grenadier*, that the *Bremen* did not hear the *British Grenadier's* whistle forward of her beam. But a similar question would arise if the whistle was heard more than two points abaft the beam.

The overtaking rule (art. 24) is said to apply to vessels coming up with another vessel from any direction more than two points abaft the overtaken vessel's beam, and if by day the overtaking vessel is in doubt she must assume she is an overtaking vessel. The overtaking vessel will not become a crossing vessel as she comes up to the overtaken vessel. The limitation "by day" is inserted because by night, if the weather is clear, she will see the sidelights of the overtaken vessel at less than two points abaft the beam of the overtaken vessel. The position in fog was discussed by Lord Gorell (then Barnes, J.) in *The Britannia* (10 Asp. Mar. Law Cas. 67; 92 L. T. Rep. 634; (1905) P. 98). The *Ribera*, proceeding dead slow in dense fog, heard the whistle of a vessel apparently overtaking her on her port quarter. The *Ribera* did not take any action for this whistle. The *Ribera* said she did not stop because she was afraid of the overtaking vessel coming up and striking her. Lord Gorell treated this as "a flimsy excuse" and, apparently, took the view that both vessels should have stopped on hearing each other's whistles. The case is also interesting as showing Lord Gorell's considered views on the unreliability of whistle signals in fog. I refer to his remarks: (10 Asp. Mar. Law Cas. 67, at p. 68; 92 L. T. Rep. at p. 636; (1905) P. at p. 103). As rule 16 refers to whistles heard forward of the beam and rule 24 to whistles heard more than two points abaft the beam, whistles supposed to be heard abaft the beam but not more than two points abaft seem to be in a position not expressly dealt with. It may be that, in view of the unreliability of the inferences to be drawn as to the position shown by sounds in fog, the master should, except in very clear cases, treat such sounds as either before the beam or more than two points abaft the beam, and in either case in fog stop his engines. He is told in rule 24 to give the benefit of the doubt, if in doubt, to the conclusion that a vessel is an overtaking ship, as defined in that rule. I think Lord Gorell's general view, as shown in his decisions, was that on hearing a whistle in fog a vessel should always stop. If every vessel acted on this, and blew whistles in fog, there would be very few collisions. The views expressed by the House of Lords in *The Otranto* (*ante*, p. 193; 144 L. T. Rep. 251; (1931) A. C. 194) as to stopping if in doubt support this opinion.

The note at the commencement of the Steering and Sailing Rules, before art. 17, emphasises the importance of no change of bearings when two vessels are approaching, as showing risk of collision. When two cars are approaching on intersecting roads, each being

visible to the other, if as the cars come on the bearing does not alter it is common knowledge that they will arrive at the point of intersection at the same time, unless their relative speeds alter, and that the fact of no change of bearings involves risk of collision. The note emphasises the same point in clear weather at sea. In fog the sound of the whistle, if getting louder on the same bearing, affords a similar test of risk of collision, though not so certain because of the uncertainty of sound in fog. In the present case the *British Grenadier's* whistle was heard from the *Bremen* to get louder, apparently, on the same bearing, and the assessors below take the view that at the second, certainly at the third, whistle the *Bremen* should have stopped. She could, at a speed of four knots, by stopping and reversing have taken her way off in fifty yards, one-sixth of her length. Complaint was made that this point as to stopping at the second or third whistle was not put to the master of the *Bremen* at the trial. But the first question put to him in cross-examination was why he did not stop on hearing the first whistle. He had given in his log, after careful consultation with his officers, the reason why he acted as he did. He appears to have acted on the view that the approaching whistle was that of an overtaking vessel "more aft than abeam," and, therefore, he need not alter his speed. But the judge's finding negatives the suggestion that the whistle was "more aft than abeam." If it were, Lord Gorell's views as expressed in *The Britannia* (*sup.*) would require the *Bremen* to stop its engines. If the whistle was heard forward of the *Bremen's* beam, art. 16 would require the *Bremen* to stop. I find it difficult to see any reason why for a whistle supposed to be between abaft the beam and two points abaft the beam, but apparently continuing on the same bearing, good seamanship did not require the *Bremen* to stop, especially in view of the difficulty of getting precise information as to the position of a ship whistling in fog.

In my opinion, in fact, if the *Bremen* had stopped when she heard the second whistle, apparently on the same bearing, the collision would not have happened, as the *British Grenadier* would have passed ahead of the *Bremen* in safety. On the finding of the judge as to the respective speeds of the two ships, the *British Grenadier* must have heard the *Bremen's* whistle forward of her beam and should have stopped under rule 16. If, then, both vessels had stopped still less would there have been a collision. I gather the argument for the *Bremen* is that she could not really tell what the *British Grenadier* was doing, and she might have been going to cross astern. But rule 16 requires the vessel hearing one whistle forward of her beam to stop her engines though she cannot know from one whistle what the other ship is doing. I think the judgments of Lord Gorell already referred to point to the conclusion that in fog, unless the vessel, hearing a whistle, is quite clear that to continue course and speed will not involve risk of collision, she should stop her engines. And in this case the *Bremen* did, from the whistles, form the opinion that the *British Grenadier* was continuing her course and speed so as to involve risk of collision if the *Bremen* kept her speed.

In my opinion the decision of the judge, and the opinion of the assessors below, as to the liability of the *Bremen* were correct, and there was no ground for interfering with the judge's proportion of damage.

Each appeal fails, but to avoid any expensive taxation of the costs incurred by each respondent there should be no costs of the two appeals.

GREER, L.J.—On the 24th April 1930 the *British Grenadier*, a steel screw steamship of 6888 tons gross, 440ft. in length, and 57ft. in beam, came into collision with the *Bremen*, a vessel of 51,656 tons gross, 939ft. in length and 102ft. beam, in the English Channel, about four-and-a-half miles from Dungeness. The owners of the *British Grenadier* brought an action *in rem* against the owners of the *Bremen* for damages due to the negligent and improper navigation of the *Bremen*. The owners of the *Bremen* defended the action on the ground that the collision and the consequent damage were not due to any negligence on their part, and they counter-claimed for the damages suffered by their vessel, alleging that the *British Grenadier* was alone to blame for the collision. Bateson, J. had no difficulty in finding that the navigation of the *British Grenadier* was negligent, and that her negligence was one of the effective causes of the collision, but he held with considerable reluctance that the *Bremen* was also "somewhat" to blame, and he apportioned the damage by finding that 80 per cent. should be borne by the *British Grenadier* and 20 per cent. by the *Bremen*.

From this decision the owners of the *Bremen* appeal, and there is a cross-appeal by the owners of the *British Grenadier*, who allege that the collision was caused entirely by the negligent navigation of the *Bremen*.

The learned judge who heard the witnesses believed the witnesses called on behalf of the *Bremen* with regard to her navigation up to the time when the two vessels came into collision, and he disbelieved the account given by the witnesses on board the *British Grenadier* with regard to her navigation, and this appeal is to be determined by accepting the learned judge's decision as to the credit to be attached to the evidence given by the witnesses on the one side or on the other. The question, therefore, whether the *Bremen* was in any respect to blame falls to be determined by the evidence given by those on board the *Bremen* which the learned judge has accepted as both truthful and accurate.

It seems to me unnecessary to consider the history of the *Bremen's* navigation before 10.16 on the morning in question. There was a dense

fog in the channel. The *Bremen* was proceeding down-channel in a south-westerly direction at about 228 degrees true, when a whistle was heard from a vessel slightly abaft her starboard beam. She was then proceeding at about four-and-a-half knots per hour, which the judge rightly held to be a safe speed under the circumstances provided that she continued, as she had done coming down-channel, to exercise reasonable navigating care, and to attend to the sound signals made by other vessels. The whistle that sounded from slightly abaft her beam showed that if the vessel so signalling was approaching her, such vessel should, under art. 16, stop her engines and then navigate with caution until danger of collision would be over. The *Bremen* was, therefore, entitled to proceed on her course, giving the usual signal, as she in fact did, that she was so proceeding. When she heard the second and third signals she must have known, of course, that the approaching vessel had not stopped her engines. Her witnesses say that they judged by the sounds that the bearing of the approaching vessel continued to be the same. I understand this to mean that they knew approximately that she was not altering her direction, but was keeping in the same direction, and that as the sounds grew louder she was approaching the course the *Bremen* herself was on, and that the two courses were bound sooner or later to intersect, and that there was, therefore, risk of collision. But I think the bearing could only be approximately judged, and I do not think that those on board the *Bremen* could ascertain exactly how near the course which the *British Grenadier* was keeping was to the course which the *Bremen* was on. The navigation of the *Bremen* is to be judged not by the event, but by what would appear to be the circumstances under which the master of the *Bremen* was called upon to act. In fact, if the *Bremen* had on hearing the second or third whistle from the *British Grenadier* stopped her engines, the *British Grenadier* would probably have passed ahead of her and there would have been no collision, but I do not think that those on board the *Bremen* were able sufficiently to gauge the distance the course of the *British Grenadier* was from their course so as to enable the master to decide whether it would be safe for him to stop the engines of his vessel. If the course of the *British Grenadier* was nearer to the course of the *Bremen* than it turned out to be, the latter would have been running a very grave risk by stopping her engines and presenting what would very nearly be a broadside target to the *British Grenadier*. The master had to choose between two courses: (1) To stop his engines and if necessary reverse, or (2) to go ahead and try to keep as nearly as possible on a parallel course. He chose the latter alternative, which, by reason of facts which he could not know, was the wrong course, as events turned out, but, inasmuch as if the master of the *Bremen* had taken the other course and stopped his engines, there might, so far as the facts appeared to him at the time, have been a much more serious collision than the one which in fact took place, I find it impossible to hold that this "fine seaman," who had navigated the vessel with conspicuous care and skill until a few minutes before the collision, was guilty of negligence in failing to appreciate that he was wrong in thinking that to stop his engines would have placed his long, heavy, and valuable ship, with its crew of 1005 hands and 971 passengers, in grave danger.

It is clear in the findings of the learned judge that the *British Grenadier* was guilty of a breach of art. 16 of the Regulations for Preventing Collisions at Sea. It is equally clear on the findings that the *Bremen* did not break any of the express rules as to navigation in a fog. The only blame that can be alleged against her is that she neglected some precaution required "by the ordinary practice of seamen or by the special circumstances of the case" within the meaning of art. 29. This means that, though she did not break any of the rules, she still may be found to blame if she was negligently navigated under the circumstances. The complaint in the statement of claim with regard to the *Bremen's* failure to stop was that she failed to stop on hearing the whistle of the *British Grenadier* forward of her beam. The learned judge has found that the witnesses for the *Bremen* are right in saying that the whistle that was sounded was the whistle of a vessel abaft the *Bremen's* beam. I do not think that without an amendment of the statement of claim it was open to the *British Grenadier* to make the case that the *Bremen* should have stopped if the *British Grenadier's* whistle was abaft her beam. Nor do I think that the cross-examination of the *Bremen's* witnesses was directed to this point at all. Mr. Raeburn told us that the form of Mr. Dunlop's question did not convey to his mind that the plaintiffs were alleging that even if the whistle of the *British Grenadier* was slightly abaft the beam of the *Bremen*, the *Bremen* ought to have stopped. But though the questions were put from a different point of view the captain did get an opportunity of stating why he did not stop the *Bremen*. He was asked: "If you had stopped your engines at 10.16 this collision would not have happened?" His answer is: "It would happen much dangerous—much more—because she would not hit us on the head, she might hit us right on the bridge." This accords with the account of the collision given in Capt. Ziegenbien's deposition: "Together with several other signals at 10.16 a.m., the distinct navigation signal of a steamer was suddenly heard on starboard side from an afterly direction. Her subsequent signals becoming louder proved that she was approaching strikingly quickly. Steamship *Bremen* was heading 228 true at a speed of three knots. Visibility was 100–150 metres. Replying to the signal of the steamer, navigation signals were sounded in short intervals with the typhoon. The steamer approached strikingly rapidly, the signals of the steamer, from the time she was heard first until she came into sight, were heard five or six times and answered about ten times.

The position was unanimously judged as follows: The other vessel is an overtaking one. She is approaching from a direction more aft than abeam, without altering her bearing. Therefore our fog signals must be heard by her in any case from a forward direction. (Therefore, from the moment she heard our signal for the first time, it was her duty to stop.) Stopping did not come into question, for the steamship *Bremen*, because: (1) The signals of the other steamer were heard from a direction more aft than abeam; (2) the approach of the other vessel, judging by the increasing strength of sound of her signals, took place so rapidly that there was an immediate danger of the steamship *Bremen* then being rammed broadside at a blunt angle; (3) in case of stopping the *Bremen*, the danger of the collision broadside would have remained to completely the same extent, if the other vessel reduced her speed. For these reasons, at 10.19 a.m., when the signals were heard in the immediate vicinity from an afterly direction, at the moment of immediate danger, when a collision was inevitable if the course were kept, it was tried to turn the steamship *Bremen* to port by means of hard-a-starboarding the helm, and, if possible, to bring her on to a parallel course with the invariably nearing vessel: (arts. 21, 27 and 29 of the Regulations for Preventing Collisions at Sea). As altering the course at the low speed was not possible within the time still at disposal, solely by means of helm action, the intended turn had to be assisted by means of propeller action on the rudder. (With first of all 'starboard full ahead,' then 'all ahead'—working propellers and the helm 'hard over,' the vessel, according to experience, is turned from a stationary position almost at the spot in the smallest circle)."

Sound signals in a fog can only give an approximate guide to the bearing or course of an approaching vessel. As that experienced Admiralty judge Sir Gorell Barnes says in *The Britannia* (10 Asp. Mar. Law Cas. at p. 768; 92 L. T. Rep. at p. 636; (1905) P. at p. 103): "It is not correct to say that a whistle having been heard can be located so as to be certain it is a precise bearing on the bow." In the circumstances of this case it seems to me that the court ought not to have found the *Bremen* guilty of negligent navigation. She was faced with the problem of dealing with an unascertainable situation. The captain could not know where the point of intersection of the two courses would be. If he stopped his engines the point of intersection might be somewhere near the amidships section of his long vessel. If the course of the *British Grenadier* should be further away than it actually was, the manœuvre that the *Bremen* executed might have brought the vessels in parallel courses so that a collision would have been avoided, and in any case the results of a collision would by his action be much less serious than they would be if a collision took place with his ship amidships. I cannot think that the court was right in holding the *Bremen* guilty of negligence or unseamanlike navigation. If this case fell to be determined by my judgment the cross-appeal of the *Bremen* would be allowed with costs and the appeal of the *British Grenadier* dismissed with costs and judgment entered for the *Bremen* with costs.

I have said nothing about the assessors in this court, because the facts have been fully stated by my Lord, but I may say that my provisional opinion was not altered when I read the answers that the assessors gave to the questions my Lord put to them.

SLESSER, L.J.—In this case the learned judge has accepted the history of this collision as recounted by the oral evidence and documents tendered on behalf of the *Bremen* and rejected the evidence and documents of the *British Grenadier* as far as they conflict with the story told by the *Bremen*. That history has been sufficiently set out by Scrutton, L.J. I content myself, therefore, with the following facts immediately material to my judgment.

The *Bremen* was travelling down-channel on a south-westerly course at three to four knots in a thick fog at about 10 a.m.—she was sounding a powerful whistle about every minute. There is no evidence that she was off her normal course about opposite Dungeness. At about 10.16, summer-time, the *Bremen* first heard a long blast abaft her beam on the starboard side. She continued to hear it five or six times increasing in volume approximately on the same bearing. The *Bremen* did not stop her engines, but continued under a starboard helm at the same speed. At 10.21 a.m. the vessels collided at 45 degrees.

The learned judge, in agreement with the Trinity Masters, has found the *Bremen* to blame, to the extent of 20 per cent., in that she should in his opinion have stopped, at least on hearing the third whistle of the *British Grenadier*, which was, as I have said, getting louder on the same bearing, thus indicating a convergence. It must be added that the judge has accepted the evidence of the *Bremen* that she did not hear the whistle of the *British Grenadier* forward of her beam. In these circumstances she has rightly held that rule 16 did not require the *Bremen* to stop her engines as she did not hear the fog signal of the *British Grenadier* apparently forward to her beam. The question remains, however, whether, apart from rule 16. under rule 29 the master of the *Bremen* did not neglect a precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case. The navigation of the *Bremen* is found to have been most careful coming down through the traffic. But for the last ten minutes before the collision she had been almost stopped for fog. The visibility was not more than 150 metres. Having regard to the fact that distance and bearing cannot be exactly determined in a fog (see Gorell Barnes, J. in *The Britannia*, 10 Asp. Mar. Law Cas. 65; 92 L. T. Rep. 634;

(1905) P. 98), and that the weather was apparently such that the *British Grenadier* could not be seen in time to avoid her, I agree with Bateson, J. that the *Bremen* ought to have stopped notwithstanding that rule 16 did not apply or at least reduced her speed after hearing the second or third blast of the *British Grenadier*, for a time had arrived when there was certainly a serious risk of collision: (see *The Ceto*, 6 Asp. Mar. Law Cas. 479; 1889, 62 L. T. Rep. 1; 14 App. Cas. 670; *The Dordogne*, 5 Asp. Mar. Law Cas. 328; 1884, 51 L. T. Rep. 650; 10 Prob. Div. 6). In *The Otter* (2 Asp. Mar. Law Cas. 208; 1874, 30 L. T. Rep. 43; L. R. 4 A. & E. 203), Sir Robert Phillimore said: "I am of opinion that the Legislature could not have intended to lay down the rule that there may not be circumstances in which it may become the duty of a steam vessel, when she finds herself in a fog to bring up." If the case falls within art. 16 the duty to stop is absolute; here the duty to stop or reduce speed, in my opinion, arose imperatively after hearing the whistle of the *British Grenadier* three times on the same bearing rapidly increasing in volume.

Moreover, even if there was not a duty absolutely to stop, in the uncertainty of the dense fog, I think on the evidence, notwithstanding the view of the learned judge, it was scarcely possible for the *Bremen* to know whether the whistles which she heard were or were not more than two points abaft her beam. I think it is not unfair to her captain to say that, having regard to all the circumstances, including the unexpected direction from which the *British Grenadier* was approaching, that he was really in doubt whether the *Bremen* was forward of or abaft this direction. He should, therefore, as a matter of prudent seamanship have slackened, stopped, or reversed (rules 23 and 24).

Giving every fair consideration to the rapidity with which the emergency developed and to the reckless and incalculable behaviour of the *British Grenadier*, I have come to the conclusion that for the *Bremen* to go ahead and try to keep as nearly as possible on a parallel course was not the right manœuvre, and I am glad to think in coming to a decision in this difficult question that the Trinity Masters are themselves of the same opinion. I agree, therefore, with Scrutton, L.J. that the appeal of the *Bremen* must be dismissed with the consequences by him stated.

With regard to the appeal of the *British Grenadier*, I agree with my Lords that this appeal should be dismissed and I have nothing to add.

Appeal and cross-appeal dismissed.

Solicitors for the appellants, the owners of the *Bremen*, *Constant* and *Constant*.

Solicitors for the respondents, the owners of the *British Grenadier*, *Wm. A. Crump* and *Son*.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Friday, July 31, 1931.

(Before LANGTON, J.)

THE ADRIATIC. (a)

Conflict of laws—Claim for distance freight—Freight engagement notes made in Egypt—Charter of Swedish vessel—English charter-party—English bills of lading—Law of flag—Lex loci contractus.

M. and P., a partnership firm registered and carrying on business in Egypt, by freight engagement notes made in Egypt with the defendants, an English firm having a branch in Egypt, contracted for shipment of cotton seed from Egypt to England. In order to perform their part of the contract M. and P. chartered a Swedish vessel through brokers in London, and subsequently bills of lading were issued to the defendants. The freight engagement notes, the charter-party and the bills of lading were all in English, the latter documents being in well known English forms. The goods were duly shipped, but were lost during the voyage to England. M. & P. claimed distance freight, alleging that the contract contained in the freight engagement notes was to be construed by the law of the flag, namely, Swedish law, or by the lex loci contractus, *namely, Egyptian law. By either of these systems of law distance freight is recoverable. The defendants contended that the intention of the parties was that English law should apply.*

Held, that in order to ascertain the intention of the parties, regard must be had to all the circumstances in which the contract was made, and that consideration of these circumstances in the present case showed that the intention of the parties was that the contract should be governed by English law.

TRIAL of a preliminary point of law in an action *in personam* in which the plaintiffs, J. P. Mitchell and L. Polnauer, claimed distance freight on the carriage of a cargo of cotton seed in the Swedish steamship *Adriatic* against the defendants, Behrend and Co. Limited.

Throughout the year 1929 the plaintiffs, J. P. Mitchell and L. Polnauer, were a firm carrying on business at Alexandria, Cairo, Port Said, Port Sudan and Khartoum, the principal office being at Alexandria. The partners in the plaintiff firm were J. P. Mitchell, who is a Scotsman and was at all material times registered at the British Consulate-General, Alexandria, as a British subject, and L. Polnauer, who was at all material times a Hungarian subject.

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

The plaintiff firm was at all material times registered in Egypt under Egyptian law.

The defendants, Behrend and Co. Limited, are an English limited company, whose registered office is at 31, Great St. Helens, London, E.C. 3, and they have a branch office at Alexandria.

The owners of the steamship *Adriatic* were at the material times the Atlantic Transport Line A/B (manager, J. Kallmann), of Gothenburg, a Swedish corporation incorporated under the Swedish law.

The steamship *Adriatic* was at all material times a Swedish steamship of 3024 tons gross register, and classed 100 A1 at Lloyds.

On the 9th July 1929 and the 19th Nov. 1929 two freight engagement notes were entered into between the plaintiffs and defendants, by which the parties contracted for the carriage of a cargo of cotton seed from Alexandria to London.

On the 11th Oct. 1929 F. C. Lohden and Co. Limited, an English limited company of London, acting as agents for the plaintiffs, entered into a charter-party with Matthews, Wrightson and Co., Limited, an English limited company, of London, acting as agents on behalf of the owners of the *Adriatic*, whereby the *Adriatic* or substitute was chartered to the plaintiffs for a voyage from Alexandria to the United Kingdom, Rotterdam, or Hamburg. The charter-party, which was signed in London, was in English, in a printed form.

On the 30th Dec. 1929 or thereabouts the plaintiffs loaded on board the steamship *Adriatic* the cargo referred to in the freight engagement notes together with certain other cargo belonging to other shippers, and on the 31st Dec. 1929 the plaintiffs signed the bill of lading for the defendants' cargo "for B/L as agents only." The bill of lading was in the form of the General Produce Black Sea Azoff and Danube Steamer Bill of Lading 1890, approved by the London Corn Trade Association. During the voyage the *Adriatic*, having been damaged in collision, put into Cadiz, when she was found to be a total loss. The defendants accordingly took delivery of the cargo at Cadiz. The plaintiffs claimed distance freight.

The case was set down for trial of the preliminary question whether the contract was governed by Swedish or Egyptian law, as the plaintiffs contended, or by English law, as the defendants contended. It was admitted that if Swedish or Egyptian law applied distance freight was payable, but that it was not payable if the contract was governed by English law.

Raeburn, K.C. and Sir *Robert Aske* for the plaintiffs.

A. T. Bucknill, K.C. and *David Davis* for the defendants.

LANGTON, J.—This case belongs to a difficult class—in fact, I think it was only the peculiarly refined intelligence of Lord Halsbury that ever enabled him to describe a case of this class as "simple." I have found it a particularly difficult example of what I believe to be a difficult class, and I wish to say that I arrive at my judgment with the greatest possible diffidence. If reflection would enable me to express it with greater confidence, I should certainly have deferred giving my judgment in order to consider the matter. But I am afraid that I should have reached the position, which Mr. Raeburn tells me he has already reached, of being able to discover only this, that there is abundance of authority for practically any proposition that has been put forward. It will suffice, perhaps, to say that four counsel have addressed me in this case. Each of them has, in turn, captivated me by the convincing note of his address, but neither of those who have been in the position of followers have, in any way, repeated what was said by their colleagues in advance. That, I think, will show how possible it is to deduce an excellent argument and an excellent authority for every kind of proposition that is necessary in this case. The choice lies—as between the plaintiffs and the defendants—between finding that the law applicable to the case is the law of the flag—or, alternatively, the law of the place in which the contract was made (which is the plaintiffs' contention); or, finding that it is the law of England (which is the defendants' contention). It is perhaps noteworthy in passing that those three alternatives have, in reality, a fourth lurking behind, in that the main arguments for saying that the proper law to apply is the law of England, all reinforced by those arguments which go to say that the *lex loci solutionis*—which is the law of the place where the contract is to be finally carried out—is also open to the defendants. So that perhaps it may be said that there are four alternatives—two open to the plaintiffs, and two open to the defendants.

Now the facts of the case are succinctly set out in the statement of facts, and I need, therefore, not recite them any further. The only matter in the agreed statement of facts which has turned out not to be completely agreed is an assertion in that statement that the plaintiffs' firm was, at all material times, registered in Egypt under Egyptian law. It is a very small matter, and whether it be the fact or not, my judgment would have been quite unaffected by it. There is no doubt that the firm of Mitchell and Polnauer do carry on business in Egypt, and the mere fact of their registration one way or the other would not greatly strengthen or weaken the position. Otherwise, the agreed statement of facts, I think, may be taken to express the general position.

The claim is a claim by the plaintiffs for distance freight—a class of claim which is unknown to English law, but a class of claim which is recognised by other Continental nations. Fortunately, I have not to determine what the effect may be of the judgment which I have to give. Now, amidst much that is obscure, one thing at least appears to be completely plain. Everybody is agreed that

the test, or criterion, of what law is to apply is to be found in the intention of the parties. That statement, I think, runs through all the authorities and therefore I need not cite any particular authority in its favour. But just how one is to arrive at the intention of the parties no authority is precise to define. Sir Robert Aske, on behalf of the plaintiffs, commenced his argument by pointing to certain presumptions, and he began with the excellent authority of Professor Dicey—the fourth edition of Dicey's Conflict of Laws, p. 644, rule 166B, which is as follows : " Subject to the exception hereinafter mentioned, the effect and incidents of a contract of affreightment (*i.e.*, a contract with a shipowner to hire his ship or part of it, for the carriage of goods) are governed by the law of the flag.

" Provided that the contract will not be governed by the law of the flag if, from the terms or objects of the contract, or from the circumstances under which it was made, the inference can be drawn that the parties did not intend the law of the flag to apply."

Now that is a statement as to a presumption that the law of the flag will apply unless the evidence shows that the parties intended something else. Mr. Raeburn further elucidated the position as regards presumptions by reminding me that in ordinary cases of contracts the usual presumption of law was that the *lex loci contractus* was the law which applied. He said that that presumption in a contract of affreightment was no departure from the ordinary rule, but was in effect only the application of it to a contract of affreightment in that a ship must be taken to be a part of the country whose flag she flies. Therefore, if you are dealing with a contract of affreightment you would naturally take the law of the flag as being, to all intents and purposes, the actual *lex loci contractus*. That, I think, states the presumption of law as accurately as it can be stated, and what I have to determine here is in all the circumstances (and I am bound to look at all the surrounding circumstances) is there evidence here to show that the intention of the parties was to displace that *primâ facie* presumption.

Now, turning to the facts of this case, Mr. Bucknill reminded me that there are three principal documents which are recited in the statement of claim. The first of those documents is a charter-party between the owners of the *Adriatic*, who were a Swedish company—the Atlantic Transport of Sweden—and the plaintiffs, in this case Mitchell and Polnauer. Mr. Raeburn said, as regards that charter-party, that it really was a comparatively irrelevant document in this case. The shipowners were not parties to this action, and the charter-party was in no way incorporated in the bills of lading, and, therefore, the defendants in the action had no knowledge of the charter-party. Now, that at first sight, seems to be quite an accurate statement of the case. I should not for a moment suggest that anything which Mr. Raeburn said was not an accurate statement, but I am not quite sure that it is a comprehensive statement. The plaintiffs, it is true, are Messrs. Mitchell and Polnauer, but, seeing that the claim is for distance freight—and therefore a claim which is in reality a claim on behalf of the shipowners—I am not sure that it is correct to say that the charter-party is an irrelevant document. I am not sure that it is even comparatively irrelevant. I think it is, in this case, part of the surrounding circumstances of the case. The essence of the matter as appears from the statement of facts was this. The defendants, Behrend and Co. Limited, were anxious to get transport for certain parcels of cotton seed. The step that they took to this end was to engage space by certain freight engagement notes with the plaintiffs, Mitchell and Polnauer. The freight engagement notes did not specify in any way the identity, or nationality of the ship. The plaintiffs merely engaged the ship to carry cotton seed from Alexandria to London and stated the form of bill of lading which would be used for that shipment. Indeed, so much did the plaintiffs deal with the matter " on their own " that although one of these freight engagement notes was entered into subsequent to the charter-party, they did not even then tell the defendants. I am not suggesting that they were wrong in doing so, but they did not, as a matter of fact, tell the defendants that the ship on which they were proposing to ship this parcel was of any particular nationality or, indeed, in any way did they reveal the identity of the ship. In the meantime they had, by this charter-party, chartered the *Adriatic* to load a full cargo from Alexandria to London. I thought at first that from the language of the charter-party it might not be quite clear that they had chartered the whole of the ship, but Mr. Raeburn put all my doubts on that subject to rest. They had undoubtedly chartered this ship to load a full and complete cargo of some kind of seed or produce, for shipment from Alexandria to London, therefore I think it is material to look at the charter-party. I do not say for one moment that the charter-party forms any part of the contract between the parties who are actually here at grips, but I bear in mind the fact that Mitchell and Polnauers, having no claim for this distance freight upon their own account, are claiming here only as trustees for the shipowners, and I do think in these circumstances that it is relevant at least to look at the bargain between themselves and the shippowners as one of the surrounding circumstances. Now when one looks at that document—I agree that it is the least important of the three—nothing more English than that document could very well be devised.

It is on a printed form at the instance of the well-known charterers, Fred C. Lohden and Co. Limited, 2 and 4 St. Mary Axe, London. It was entered into between those brokers and Matthews, Wrightson and Co. Limited, another equally well-known firm of London brokers.

It was entered into in English, with every circumstance accompanying the ordinary English charter-party, including the agreement that any dispute under the charter should be settled by arbitration in London, each party appointing an arbitrator, and that the decision of the umpire selected by them should be final. It, indeed, has no feature about it whatever which could, as that document stands, suggest that any law other than English law was ever for one moment contemplated as the law governing that charter-party. So much for the charter-party, and one passes then to the freight note. The freight note is headed "Alexandria, Egypt," and the plaintiffs—Mitchell and Polnauer—unquestionably are a firm carrying on business in Egypt. It transpired that Mr. Mitchell is by birth a Scotsman and Mr. Polnauer is by birth a Hungarian. There is no doubt whatever that this engagement was entered into in Egypt, and, indeed, the defendants' firm, Behrend and Co. Limited, have a branch in Egypt. So that Mr. Raeburn was on strong ground when he said that the *lex loci contractus*, in this case—if you take the freight engagement note as the governing document—is Egypt, but I am not certain, again, that the freight engagement note is in any sense, the dominating document. After all, as I think Mr. Davies pointed out, there is not a word in the freight engagement note about distance freight. There is no suggestion in the freight engagement note of any nationality of any particular ship, and in order to get the actual contract of carriage—which must be the document upon which the plaintiffs depend—we have to look at the bill of lading. Now the bill of lading, from many points of view, is what I may call a non-committal document. It might support a good many points of view standing alone. It is in the form of the General Produce Black Sea, Azoff, and Danube Steamer bill of lading 1890. It is couched entirely in the English language. It contains all the well-known English bill of lading exceptions, and it even has in the margin a reference to war risks, in which His Majesty's Government is named. Against that it is on the form of J. P. Mitchell and Polnauer, who state on the bill of lading that their head office is in Alexandria, and that their branches are respectively in Port Said, Port Sudan, and Khartoum. Finally, the bill of lading states that the delivery is to be in London, and that freight is to be paid on delivery. No one, I think, looking at that bill of lading, could say it was not a perfectly good English bill of lading in the ordinary English form, such as would be employed between two English parties, if they desired to contract for an ordinary carriage of goods by sea. The steamer named in the bill of lading is the *Adriatic*, and Mr. Bucknill took a point as to that that that might also be an English ship. However, I am not much impressed by that, because the name is no doubt an equally good Swedish name, and I cannot think that there is any particular nationality in a proper name.

Now those are the three documents, and it is upon the transaction which those three documents evidence that I have to determine what the law is which should apply to the question in issue. Mr. Bucknill cited a case as being the nearest case on the facts to the present case, which was decided by Greer, L.J., then a judge of first instance. The case is the *A/B Freuchen* v. *Hansen* (1919) 1 Ll. L. L. Rep. 393). I think Mr. Bucknill was right in saying that it is perhaps the nearest in the facts to the present case of any of those which have been cited at the Bar. But admitting that it certainly is very near, the facts quite shortly were that the steamer, which was a Norwegian steamer, had been delayed—to use a neutral term—in sailing from an English port during the war, and the judge was asked to determine, as a matter of law, what law in that case applied. The charter was not the matter in issue—it was the Baltic and White Sea Conference Coal Charter—and therefore there were none of the complications of the present case, of a bill of lading and a freight engagement note. I need scarcely say that I should not differ, except with the greatest possible diffidence, from any pronouncement of Greer, L.J. in any matter of law, still more so in a matter of this class in which he is an acknowledged master. But his judgment in this case seems to proceed largely upon what has been called, as a compendious form of expression, the argument of uniformity. He takes this charter—the Black Sea charter—and he says that he finds there all the old familiar friends of the English charter, and because the charter is in what we may call the old English form, he says that the parties must have intended to apply English law for the determination of their disputes. Now Greer, L.J. is not lacking in high authority for that argument. He is not the first person who has seen the force of those contentions and he only restates them with his usual lucidity and force. But even sanctified as it is by high authority, I must say that, for my own part, I have some doubts as to the value of this argument based upon uniformity. I cannot shut my eyes to my own personal experience in the formation of some of these agreed documents, and I think that if I were to take the Hague Rules, for example—in the formation of which I had some personal part—if two Italians were told that because they agreed that the Hague Rules should be framed in English and French they therefore agreed that either the English or the French law should apply to the determination of any disputes between them, they would not only be surprised, but they would express their disgust with their usual vehemence and vigour. Therefore, although I see the great advantages of interpreting documents in the English language by English law, I am not to be taken as following this case upon that ground alone. Another basis upon which the Lord Justice proceeds is that in the particular case which he was deciding the question which arose for decision was a question of the behaviour of the

parties at the port of loading. I see some inconveniences in allocating the law to the particular branch or portion of the voyage which happens to be in question. It seems difficult to imagine that there could be one law applicable if the point in dispute concerned a question arising at the port of loading, another law applicable if the matter concerned the conduct of the master during the voyage, and a third law applicable if it concerned a question at the port of delivery. It only needs, I think, an examination of just one case to show into what ramifications these arguments can extend and how difficult the matter becomes if one attempts to solve it along one line only. I think it is necessary and right in this class of case to take the broadest possible view and although, as I say, I am not personally impressed with the argument of uniformity, I am impressed with the argument of convenience. It is, perhaps, unwise to attempt to generalise at all upon the actions of any class of the community, particularly that hard-headed person, the business man, but I think one cannot be going very far wrong when one says that if you want to define the intentions of two business men you may take it that they intended to do what was most convenient.

Now I will try to review this case for a moment in the light of that consideration. One cannot, I think, shut one's eyes to the fact that the British position in Egypt has been, for many years, a predominant position. I think it would be idle and foolish to attempt to shut one's eyes to that known fact. We find, therefore, in this case a British firm, Behrend and Co. Limited, arranging for the shipment of a consignment of goods from Egypt. They do their business in English with, it is true, an Egyptian firm, but an Egyptian firm with no particularly Egyptian stamp about them. One could hardly say that the names of Mitchell and Polnauer would convey to any Englishman that he was doing business with people who were distinctly Egyptian, and, in fact, as we know they were in reality, a Scot and a Hungarian. At the moment when they did this business it is not suggested or it is not a condition of the contract, that the goods should be shipped by any ship of any particular nationality. The matter is left completely open, and the British firm merely stipulate for the bill of lading in a certain form that is well known to that British firm—a bill of lading in which they will know the full extent of their liability and will have knowledge which will enable them to cover their operations by appropriate insurance. If one views the matter in that broad and general light it seems to me that the most convenient thing for all parties would be that the law of England should apply. The shipment is made to England; the bill of lading will, to the knowledge of both parties, provide that the delivery shall be in England and the payment of freight shall be in England; and if there is any dispute at the end of the journey everybody knows that the courts of England will be open and ready to deal with that dispute, and will be equipped to deal with that dispute, in that all the documents concerned in the case are documents in the English language. I am not sure that it is a relevant consideration, but I think it is worth mentioning, that the plaintiffs did seek the British court and not any other court. If their case had first been launched in Alexandria, I think there would be a good deal more to be said for the point that somebody thought that Egyptian law applied. But no, they come and bring their case in an English court. Again, I hope I am not doing the plaintiffs an injustice when I say that even now they cannot tell me with any certainty which law they say the parties intended to apply. They have put themselves upon the alternative of the law of the flag, the law of the Swedish ships, or the law of the place of the contract—Egypt.

Now it seems to me again a weakness in their case that they should come and say to me "we cannot tell what law is intended to apply, but we can say that it was one or other of two laws." The defendants speak with no uncertain voice. They say: "There is no question of alternative laws, the law which we say the parties intended to apply was our law—the defendant's law. Wé were shipping on an English form of bill of lading; we were dealing with parties who knew we were English; we were shipping to England where we should have to pay the freight: and we say that the law you have to infer from that is the English law."

As I say, I deal with this matter with considerable diffidence because I am not at all insensible to the powerful arguments which have been addressed to me as to the difficulty of rebutting the presumptions which Sir Robert Aske and Mr. Raeburn so clearly stated. But I think there is no doubt that those presumptions can be rebutted, and, in many cases they have been rebutted, by the evidence. An amusing instance of the difficulty of getting precise authorities in this class of case was afforded to me by the citation, on the one hand by Mr. Bucknill, of a case called *The Wilhelm Schmidt* (1 Asp. Mar. Law Cas. 82; 1871, 25 L. T. Rep. 34)—a decision of Sir Robert Phillimore—which was immediately countered by the citation by Mr. Raeburn of a case called *The Express* (1 Asp. Mar. Law Cas. 355; 1872, 26 L. T. Rep. 956) a year afterwards which on almost identical facts, presented an almost reverse result. Therefore, it seems to me that the only possible way on which one can proceed is to try to take a fair and broad view of all the circumstances of the contract.

At the back of my mind I have always kept the fact of this charter-party because that, after all, is the document upon which the real beneficiary—the plaintiff shipowner—depends. But I think I should have come to the same conclusion if the charter-party had not entered into the matter at all.

I think, as I say, that one has to concentrate one's mind upon what could fairly be said to

be the convenient thing to the plaintiff and the defendant at the moment when they made this contract, and for the reasons I have given I am impressed with the fact that the convenient thing would, I think, be to consider that the dispute should be regulated by the English law. Lord Halsbury in the case of *Re Missouri Steamship Company Limited Monroe's Claim* (6 Asp. Mar. Law Cas. 423; 1889, 61 L. T. Rep. 316; 42 Ch. Div. 321) in the course of the argument (42 Ch. Div. at p. 333) makes this observation: "All the cases go on the footing that what law is to govern depends on a variety of circumstances. Among these we must consider the place which the parties must be supposed to have regarded as the place where a remedy for a breach of contract would be sought." The first part of that dictum is the foundation really for the judgment in all these cases. The second part is, perhaps, some small authority for saying that it is not altogether irrelevant to look at the place where the parties did seek a remedy in the particular instance. The only other passage in the authorities which I think it is useful to cite in support of the view I have taken, is the judgment of Lord Esher in *The Industrie* (7 Asp. Mar. Law Cas. 457, at pp. 460, 461; 70 L. T. Rep. 791, at p. 794; (1894) P. 58, at p. 73): "What is the true inference? In order to see that, you must make up your mind what must have been the intention of the parties. You cannot look into the minds of these people; but when you have two men of business dealing in that way, under such circumstances, with a contract made in London, between English brokers and an English firm, who are not supposed to know German law, but who are supposed to know English mercantile law; with a contract made upon an English form, and on a printed form in common use; with a contract made with nothing but English phrases in it, and with a contract made with phrases peculiar to English contracts, what inference can be drawn but that these two people must have meant that this contract was to be construed according to English law? All the circumstances together show that the intention was to make an English contract, and that is all we want." That is a complete authority, if any authority were needed, for the proposition that you have to look at all the circumstances and that if they do show, to the mind of the court, that the English law was intended, the presumptions of the law of the flag or the *lex loci contractus*, are displaced. Whilst accepting, therefore, to the full the statement of the presumption which has been made on behalf of the plaintiffs, I think that the evidence here is sufficient to show that the parties intended that the English law should apply.

Solicitors for the plaintiffs, *Ince, Roscoe, Wilson*, and *Glover*.

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

Monday, Oct. 12, 1931.

(Before Lord Merrivale, P. and Langton, J.)

The Aldington Court. (*a*)

Discharge of grain cargo—Wheat in bags—Bag "starting" to bulk before discharge—Discharge by bucket grain elevator—Rate applicable—Schedule of rates of Stevedores' Association of Bristol, Avonmouth, and Portishead, 1927.

The schedule of rates of charges for discharge of grain cargoes at Avonmouth provides a higher rate payable in respect of bag cargoes than that payable in respect of bulk cargoes. The appellants' steamship carried a cargo of wheat in bags to Avonmouth, where the receivers, in order to discharge part of it by means of their bucket grain elevator, "started" the bags, i.e., *slit open the tops, so that the wheat could be discharged as bulk. By the terms of the charter-party and the custom of the port the receivers were entitled to discharge the vessel as stevedores at the shipowners' expense (in so far as the shipowners were liable for such charges), and they accordingly deducted from the freight the shipowners' proportion of such costs, calculated at the rate payable for bag cargoes. The shipowners claimed that the rates payable in respect of bulk cargoes applied.*

Held, affirming the decision of the county court judge by whom the case was tried, that the cargo was a bag cargo and not a bulk cargo, and that the rates applicable to bag cargoes applied.

Appeal from a decision of His Honour Judge Parsons, K.C. at the Bristol County Court.

The plaintiffs (appellants) were the United British Steamship Company Limited, owners of the steamship *Aldington Court*, and the defendants (respondents) were the Co-operative Wholesale Society Limited, who were the receivers of a part cargo of wheat carried to Avonmouth by the *Aldington Court*.

By the terms of the charter-party it was provided (*inter alia*) that the *Aldington Court* should proceed to one or two ports in South Australia and there load a cargo of wheat in bags, and should proceed to (*inter alia*) a port in Great Britain and there deliver in accordance with the custom of the port for steamships.

The *Aldington Court* was ordered to Avonmouth, where by the custom of the port the defendants, as receivers, became entitled to discharge their part of her cargo as stevedores using their own apparatus, and to charge the shipowners with the expenses of so doing, in so far as they were liable for such expenses. The defendants in fact discharged their cargo by means of their bucket grain elevator into their flour mill at the Royal Edward Dock. Before discharging, and in order to enable them to make use of their bucket elevator, the defendants "started" the bags to bulk, *i.e.*, they slit open the tops of the bags, so that the contents could be discharged as bulk.

A schedule of rates, dated the 1st Aug. 1927, is in operation at Avonmouth by which the

(*a*) Reported by Geoffrey Hutchinson, Esq., Barrister-at-Law.

following rates are provided for discharging grain cargoes :

" *Grain and Seed—Bulk Cargoes.*

Wheat .... 7½*d.* per ton

Bag Starting.

Where shipowner provides all labour ....80*s.* per 1000 bags

Where merchant provides portion ....60*s.* per 1000 bags

....

Bag Cargoes Weighed on Deck.

Wheat .... 1*s* 11*d.* per ton

....

In the event of any of the above bag cargoes being discharged unweighed, the rates will be :

....

Bags weighing more than 145lb. . .1*s.* 9*d.* per ton."

An earlier schedule of rates, dated the 2nd July 1923, under which the defendants had at first calculated the cost of discharge, contained the following note at the foot of the schedule of rates for bulk cargoes : " *Starting to Bulk.*—When the shipowner provides all the labour, 80*s.* per 1000 plus 20 per cent. When the merchant provides portion, 60*s.* per 1000 plus 20 per cent."

The defendants claimed to calculate the costs of discharge at the schedule rates appropriate to bag cargoes, namely, 1*s.* 9*d.* per ton. The plaintiffs claimed that the defendants were only entitled to the costs calculated at the rates for bulk cargoes, namely, 7½*d.* per ton. There was evidence that a small proportion of cargo in bags had necessarily to be stowed with all bulk grain cargoes to ensure stability.

The county court judge held that the cargo was a bag cargo and gave judgment for the defendants. The plaintiffs appealed.

Holman for the appellants.

Trapnell, K.C. for the respondents.

Lord Merrivale, P.—This is an interesting point and has been well argued by counsel on each side. It is a question of the proper application to a cargo of wheat from Australia, shipped in bags, of the schedule of rates at Avonmouth. The wheat in question was 31,000 bags, part of a cargo described in the bill of lading as " 109,465 bags of wheat." The 31,000 bags came to be delivered at Avonmouth to the Co-operative Wholesale Society, under conditions prevailing at Avonmouth whereby the Wholesale Society were entitled to discharge the bags and to debit the plaintiffs—the shipowners —with charges for it as charges incurred by stevedores at the plaintiffs' expense.

When the wheat had been discharged, upon reference to the schedule of rates prevailing at Avonmouth in 1931 (schedules which had been introduced in 1923 and amended in 1927), the parties fell out as to what was to be the allowance against freight which was to be made to the defendants, who had become owners of the cargo. The amount in dispute is not great. On the one side it was said the allowance was to be just under 250*l.* ; on the other side it was said it was to be just over 200*l.* The Wholesale Society seem not to have been aware of the change of rates which had taken place in 1927, and they pleaded, originally, upon the old scale of rates, but when the matter came before the learned judge of the county court it was agreed that he had to apply the current schedule of rates operating since the 1st Aug. 1927. On the part of the appellants, the shipowners, it is said that this cargo was discharged as a bulk cargo ; as between the parties it was a bulk cargo. The bags were split in the hold, and the stevedores brought their bucket apparatus into use and raised the wheat out of the hold by means of their bucket elevator. The appellants contend, therefore, that the appropriate rate is the bulk bucket cargo rate. The receivers, on the other hand, say : " No, this was a bag cargo—everybody who knew anything about it spoke of it as a bag cargo." That perhaps does not go for very much, but for my own part I have some difficulty in deciding now for myself as to when it could be said to have became a bulk cargo. Looking at the matter broadly and applying the schedule of rates as best I can, I think that this cargo comes within the denomination of a bag cargo, and must be dealt with on that footing in the schedule of rates. It is true the schedule of rates had got a little confused. The 1923 schedule, which was in evidence, dealt broadly with bulk cargoes, bag cargoes. general cargo and wood goods, on good broad distinctions. In the amended schedules of rates the draftsman still dealt with bulk cargoes and placed them first, but put a sub-head under bulk cargoes " allowance in respect of bag starting," *i.e.*, an allowance in respect of the splitting of the bags to convert the bag wheat into bulk wheat. Then the schedule goes on to deal with bag cargoes, but it deals with them as " bag cargoes weighed on deck," followed by a proviso as to what the rate should be if they were discharged unweighed. Mr. Holman very properly stressed some conceivable ambiguity which is introduced into the bargain of the parties by reason of the mode in which the draftsman who amended the schedule had dealt with it. But trying to understand what the schedule really means, I have come to the conclusion that this was to be regarded as a bag cargo, and that the rate as to bag cargoes applies. The learned judge was accordingly right in the conclusion at which he arrived and the judgment must be affirmed.

Langton, J.—In this case the argument for the appellants has been based upon two grounds Mr. Holman invited us to look at the matter, first, upon the construction of the schedule and secondly upon the ground of common sense. I will deal with the second contention first. Unfortunately that somewhat abused expression " common sense " is very apt to result in diversity rather than in clarity of opinion. Many a man would shrink from construing a document and say modestly that he felt the matter was beyond him, but I have never yet met a man who was so modest as to say that he had not sufficient common sense to decide any question under the sun. In this case if one were to apply the test of common sense I imagine that one would endeavour to discover what this schedule was intended to mean, upon the assumption that the schedule was made by far-sighted and fair-minded people, and I think that we would be unwise to make assumptions of that sort. What Mr. Holman has asked us to say is that we have here really a bulk cargo. I have sympathy with that line of argument because a discharge of cargo in bulk costs the receivers less than the discharge of cargo in bags. But to say so at the outset seems to me perilously near assuming the point to be decided.

If, on the other hand, one turns to the construction of the schedule—by which I mean to what the schedule actually says—I think, whether we look, as my Lord has said, at the earlier schedule of 1923, or at the earlier schedule of 1927, that the position in which the phrase " bag starting to bulk " is found is highly significant. In the first instance,

in the schedule of 1923, "Starting to bulk" appears as a mere footnote to bulk cargoes. It would be strange, indeed, as a matter of interpretation of words, if it were construed as applying to everything that follows, namely, to the division of bag cargoes, general cargo, and wood goods. It seems to me clear that in that schedule it can only be intended to apply to bulk cargoes. When one turns to the 1927 schedule the division is not quite so clear. "Bag starting" does not appear as a mere footnote to bulk cargoes, but it still appears in exactly the same position, just under "bulk cargoes," before "bag cargoes," and before "timber." Therefore, I think that the meaning of this schedule is that "bag starting" applies to bulk cargoes. To that Mr. Holman answers, "Yes, but do not forget that I say that this was a bulk cargo." Here, again, is the seductive argument that seems so close to a *petitio principii*. There can be no doubt that this cargo commenced the voyage, made the voyage, and arrived as a bag cargo, and it only became a bulk cargo by reason of "bag starting." I cannot see that in this schedule there is any provision in words for a bag cargo which becomes a bulk cargo by "bag starting." I think that the proper interpretation of this schedule as it stands to-day—whether it was so intended or not—is the interpretation which the county court judge placed upon it.

For these reasons I agree with the judgment that my Lord has delivered.

Appeal dismissed.

Solicitors for the appellants, *Holman*, *Fenwick*, and *Willan*.

Solicitors for the respondents, *Middleton*, *Lewis*, and *Clarke*, for *James Inskip* and *Son*, Bristol.

House of Lords.

Oct. 30, *Nov.* 2, *and Dec.* 10, 1931.

(Before Lords BUCKMASTER, WARRINGTON, ATKIN, RUSSELL and MACMILLAN.)

Foscolo Mango and Co. and another v. Stag Line Limited. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Charter-party—Bill of lading—Liberty to call at any ports in any order for "bunkering or other purposes"—"Trial trip"—Whether deviation—"Any reasonable deviation"—Rule that deviation excludes right to rely upon exceptions—Whether still exists, after Act of 1924—Loss of c.i.f. cargo at sea, before property has passed—Measure of damages—Carriage of Goods by Sea Act 1924 (14 *&* 15 *Geo.* 5, *c.* 22) *Schedule, Rules Relating to Bills of Lading, Art. IV., rr.* 2 *and* 4.

The respondents were the owners of a cargo of coal shipped on the appellants' steamship Ixia *for delivery from Swansea to Constantinople. By the bill of lading the coal was to be carried from Swansea to Constantinople "with liberty . . . to call at any ports in any order for bunkering or other purposes or to make trial trips after notice . . ." By the bill of lading all the provisions of the Carriage of Goods by Sea Act* 1924 *were to apply to the contract. By Art IV., r.* 2, *in the schedule to that Act : "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from* (inter alia) *perils of the sea." And by rule* 4 *of the same article : "Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom." The ship was fitted with Wyndham's superheater, and Wyndham's engineer and the superintendent engineer of the shipowners, joined the ship at Swansea to test the superheater, when on the voyage. In the ordinary course the test would have been completed by the time the ship reached Lundy, and the two engineers could then have left the ship with the pilot. In fact, some of the firemen were drunk when the ship left Swansea and so no proper head of steam could be obtained such as was required for the test. The captain therefore arranged to carry on the engineers to conclude the test, and to put them ashore at St. Ives. The ship made a course rather more east than it would have made but for this arrangement, and when off St. Ives, a course more to the east into St. Ives Bay, where the ship lay for one-and-a-half hours about a mile from the shore, before the two engineers were taken off by boat. The ship then, instead of regaining the normal course, coasted, and a little way from St. Ives, the captain left the second officer in charge of the vessel with instructions to keep her a mile and a half off the shore. Shortly afterwards the steamship* Ixia *ran into the Vyneck Rock, and eventually became a total loss. No notice had been given to the cargo-owners of the test, and the property in the cargo had not passed to the purchasers at the time of the loss.*

Held, (1) *that the operation involved in landing two men at a port that was not on any part of the specified route did not come within the liberty "to call at any port or ports in any order for bunkering or other purposes"* ; (2) *that upon the facts the deviation was not a reasonable deviation, and the shipowners, therefore, got no protection from Art. IV., r.* 4.

Decision of the Court of Appeal (ante, *p.* 210 ; 145 *L. T. Rep.* 146 ; (1931) 2 *K. B.* 48) *affirmed.*

APPEAL from the decision of the Court of Appeal (Scrutton, Greer and Slesser, L.JJ.), reported *ante*, p. 210 ; 145 L. T. Rep. 146 ; (1931) 2 K. B. 48.

The facts, which are sufficiently summarized in the headnote, are stated in the opinion of Lord Buckmaster.

The Court of Appeal held, affirming the decision of MacKinnon, J., (1) that the course taken by the ship was not within the liberty "to call at any port or ports in any order for bunkering or other purposes"; (2) that this was a "trial trip" without notice, was not part of the contract voyage, and was therefore a deviation, both in delay, and in route and risk ; (3) that the course taken by the

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

ship was not a "reasonable deviation" within the meaning of Art. IV., r. 4; (4) that the rule of law that a deviating ship lost the benefit of the exceptions in the contract of carriage had not been abrogated by the Carriage of Goods by Sea Act 1924; and (5) that the measure of damages was not 6000*l.*, the contract price, but 8000*l.*, the market price of the cargo at the date when it should have arrived at Constantinople: (see *Finlay and Co.* v. *Kwik Hoo Tong Handel Maatschappij*, 140 L. T. Rep. 389; (1929) 1 K. B. 400). Accordingly, as there had been deviation from the agreed contract voyage which was not a "reasonable deviation" under Art. IV., r. 4, the shipowners were not protected by the exception of "perils of the sea," and the appeal was dismissed. The shipowners appealed.

Dunlop, K.C. and Sir *Robert Aske* for the appellants.

A. T. Miller, K.C., *Le Quesne*, K.C., and *R. F. Hayward* for the respondents.

The House took time for consideration.

Lord Buckmaster.—The appellants are the owners of the steamship *Ixia*, of 4,300 tons dead weight exclusive of bunkers, which they chartered to the respondents, Foscolo Mango and Co., Limited, under a charter-party dated the 14th June 1929, made between the appellants and the second respondents, who acted as agents for the charterers. The vessel was chartered to carry a cargo of coal, sold by the second respondents to the first, not exceeding 4350 tons nor less than 4100 tons, and to proceed from Swansea, where the coal was to be loaded, with all possible despatch to Constantinople. The terms of the charter-party were incorporated in the bill of lading. The charter-party contained a clause (clause 6) giving the vessel liberty "to call at any ports in any order for bunkering or other purposes, or to make trial trips after notice." The usual and customary route for the voyage was from Swansea, south of Lundy, thence in a straight line to a point about five miles off Pendeen, on the north coast of Cornwall, and then with a slight alteration to the east to Finistère, and so on.

The ship had been fitted with a heating apparatus designed to make use of the heat which might otherwise be wasted as steam, and so to diminish the bill for fuel. This apparatus had not been working satisfactorily, and the owners therefore arranged to send representatives of the engineers to make a test when the vessel started on her next voyage. Two engineers accordingly joined the boat, the intention being that they should leave the ship with the pilot somewhere off Lundy.

The firemen on board the ship were not in possession of their full energies when the boat started at 1.45 in the morning on the 31st June 1929, owing to excessive drinking before they joined the ship. The result was that a proper head of steam necessary for making the test was not got up in time to enable the test to be made before the pilot was discharged. Accordingly the engineers proceeded on the voyage until the ship was off St. Ives, when the ship was turned about five miles out of its course to enter the St. Ives Harbour in order that the engineers might be landed. After landing them the ship did not go straight back to the recognised route that she ought to have pursued, but hugged too closely the dangerous coast of Cornwall, and ran on a rock called the Vyneck rock, with the result that the vessel and cargo were totally lost, though fortunately there was no loss of life. The accident took place at about 3.20 p.m., there was a moderate wind from E.N.E., the weather was cloudy, but visibility was moderately good up to six miles.

The respondents sought to recover damages for loss of their cargo upon the ground that there had been an unlawful deviation from the contracted course. The appellants made three answers to this claim; first, they set up the clause of the charter-party to which reference has been made, and, secondly, they said by the Carriage of Goods by Sea Act 1924 the rules in the Schedule must be regarded as incorporated in the contract and, by those rules, they were entitled to make the deviation which led to the disaster.

As is well known, the statute provides that the rules are to have effect in connection with the carriage of goods by sea in ships carrying goods from any port in Great Britain or Northern Ireland to any other port, whether in or outside Great Britain or Northern Ireland. The rules that are relevant are to be found in Art. IV. of the Schedule, clause 2, which provides:

> "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—
>
> "(*a*) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship: . . .
>
> "(*c*) Perils, dangers and accidents of the sea or other navigable waters."

Clause 4 of the same article is in these terms:—

> "Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation, shall not be deemed to be an infringement or breach of these rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom."

The appellants' argument upon the statute is that, firstly, the accident was a peril of the sea, and, secondly, that the deviation in question was a reasonable deviation and consequently was not an infringement of the contract of carriage.

It is well to consider these arguments in the order in which I have stated them. With regard to the clause of the charter-party, the contention is that to land the two engineers at St. Ives was an "other purpose" within the meaning of clause 6 and consequently permitted by the charter-party itself. This argument depends upon the view that it is impossible to get a specified category in which the words "other purposes" may be confined when the illustrative word at the beginning of the sentence consists only of one description. I find it difficult, and I think it is undesirable, to attempt to specify in exact language what are the limitations imposed by the use of such a word prefacing others of general import. To my mind, it is impossible to frame a rule applicable to all the various documents in which such phrases are to be found. General words in a will following a specific instance may require different interpretation from that demanded by similar words in an Act of Parliament or a charter-party. To attempt in these circumstances to say that two or more words are essential before you can define a class does not assist in the present case. The word "bunkering" must have some demonstrative and limiting effect, and the phrase "or other purposes" following it cannot be so construed as to disregard the effect of the first example, and to assume that any purpose is thereby permitted. If that were so, the word "bunkering" might be left out. Nor am I prepared to define what are the limitations within which the phrase "other purposes" must be confined, but I can find

nothing kindred to bunkering or associated with the operation that is involved in landing two men at a port that is not on any part of the specified route.

The passage from the judgment of Lord Herschell in *Glynn* v. *Margetson* (7 Asp. Mar. Law Cas. 366; 69 L. T. Rep. 1, at p. 2; (1893) A. C. 351, at p. 355), is in exact accordance with the view which I have expressed. I agree with Scrutton, L.J.'s judgment upon this point, and I do not think that it demands further discussion.

To turn from the words of the contract itself to the implied clauses introduced by the statute, the first point can, I think, be disregarded. It involves the view that perils and accidents of the sea are not qualified by the provisions as to deviations and that such perils exempt the shipowner from responsibility for damage if they arise from or in the course of deviation, whether such deviation be reasonable or not. In my opinion, clause 4 must be given its full effect without rendering it to a large extent unnecessary by such an interpretation, for it would follow from the arguments that a peril encountered by deviation, wholly unreasonable and wholly unauthorised, would be one for which the shipowner would be exempted from loss. In other words, reasonable deviation would then apply only to questions of demurrage, whatever the deviation might be.

The real difficulty in this case, and it is one by which I have been much oppressed, is whether in the circumstances the deviation was reasonable. It hardly needed the great authority of Lord Herschell in *Hick* v. *Raymond and Reid* (7 Asp. Mar. Law Cas. 233; 68 L. T. Rep. 175; (1893) A. C. 22) to decide that in construing such a word it must be construed in relation to all the circumstances, for it is obvious that what may be reasonable under certain conditions may be wholly unreasonable when the conditions are changed. Every condition and every circumstance must be regarded, and it must be reasonable, too, in relation to both parties to the contract and not merely to one. But if, when full consideration has been given to this fact, two courts have decided that a set of circumstances is reasonable unless it can be shown that the learned judges have misdirected themselves in reaching their conclusion, or have overlooked any important consideration or introduced considerations that did not deserve notice, it would not, I think, be in accordance either with good sense or the comity of the courts to decide that what they thought was reasonable other people did not. In this case three judges have decided that the deviation here could not be so regarded—and Greer, L.J. has agreed for a slightly different reason, because he thought the original deviation was permissible to St. Ives but not afterwards—but I think that all of them have really considered the facts that were necessary for the purpose, and I am not prepared to differ from the conclusions that they have reached. I do not think elaborate definitions, whether contained in dictionaries or in judgments, are of much use in determining the value of a word in common use which means no more in this context than a deviation which, where every circumstance has been duly weighed, commends itself to the common sense and sound understanding of sensible men.

I notice that Scrutton, L.J. also supports his judgment upon the view that the rules in the schedule did no more than incorporate in a codified form the permissible limits of deviation which had previously been stated in *The Teutonia* (1872, 1 Asp. Mar. Law Cas. 214; 26 L. T. Rep. 48, at p. 52; L. Rep. 4 P. C. 171, at p. 179). Upon the view that I take it is unnecessary to consider the soundness of this conclusion, and I express no opinion upon it. Nor again is it necessary to determine whether Greer, L.J. was right in assuming that the deviation became unreasonable after St. Ives, but I think there is much to be said in support of his reasoning. The deviation had not ended at the port. It continued until the contracted line of route was resumed, and to deviate by going along the coast, though it may be regarded as bad seamanship, might none the less be an unreasonable deviation.

For these reasons I think the appeal should be dismissed.

Lord Warrington (read by Lord Tomlin).—The respondents were the owners of a cargo of coal shipped on board the appellants' steamer Ixia for carriage from Swansea to Constantinople. The cargo was lost off the coast of Cornwall as the result of the stranding of the vessel—namely, a peril of the sea—incurred owing to negligence on the part of the persons in charge. The action was brought by the owners of the cargo for damages occasioned by the loss. The shipowners pleaded that under the contract of carriage perils of the sea and loss through negligence of their servants were excluded, and therefore they were not liable. The cargo-owners replied that the shipowners had without justification departed from the contract route and were therefore disentitled to rely on the exceptions in question. MacKinnon, J.—before whom the action was tried—gave judgment for the respondents, and his judgment has been affirmed by the Court of Appeal (Scrutton, Greer, and Slesser, L.JJ.). Hence the present appeal.

The contract of carriage was contained in a bill of lading dated the 29th June 1929, which incorporated the terms of a charter-party dated the 14th June 1929, and which also contained a stipulation that all the terms, provisions, and conditions of the Carriage of Goods by Sea Act 1924, and the schedule thereto, were to apply to the contract contained in the bill of lading, and the owners and the charterers were to be entitled to the benefit of all privileges, rights, and immunities contained in the said Act and the schedule thereto as if the same were therein (namely, in the bill of lading) specifically set out.

There is no dispute that the contract route was from Swansea to Constantinople, and that the accident happened at a time when the ship was not on that route, and the question is whether the deviation was justified by the contract. The deviation resulted from the decision of the master to call at St. Ives for the purpose of dropping there two engineers who had been taken on board at Swansea for the purpose of testing and adjusting certain steam and fuel saving apparatus, a process which could be effected only under sea-going conditions and with a full head of steam. The shipowners attempted to justify the deviation in two ways: First, they said that the contract allowed the ship to call at any ports in any order for bunkering or other purposes, and that under this they were entitled to call at St. Ives for the purpose above mentioned; and, secondly, they relied on Art. IV., r. 4, of the schedule to the Act of 1924, which is in the following terms: "Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation, shall not be deemed to be an infringement or breach of these rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom."

MacKinnon, J. and the members of the Court of Appeal have decided against the appellants on both points.

As to the first point, as a matter of construction the words "or other purposes" cannot, in my opinion, receive the same wide construction as they might have received had bunkering not been specifically mentioned. They must at all events be limited by reference to the nature and purpose of the contract voyage, and I agree with the learned judges in the courts below that the purpose of landing the two engineers was not a purpose which could be brought within the liberty relied upon. I may add, however, that I do not base my conclusion upon the particular circumstances—namely, the drunkenness of the stokers and the consequent delay in raising a full head of steam—which induced the master to decide to land the two engineers at St. Ives rather than at Lundy as originally proposed; I think the calling at St. Ives would not have been justified, whatever had been the cause of the delay in concluding the work of the engineers.

But there remains the further question whether the deviation to St. Ives and thence to the contract route was a reasonable deviation and therefore justified by the provisions above mentioned contained in the schedule to the Act of 1924.

I confess I do not feel the difficulty experienced in the courts below, and particularly by MacKinnon, J. in giving a meaning to the word "reasonable."

It is quite usual for a tribunal—it may be a jury or it may be a judge sitting alone—to decide whether or not a course of action or a particular transaction is reasonable. This is a question of fact and has to be answered after giving due consideration to all the relevant circumstances and not on any dictionary meaning of the word. In the present case we find a contract under which the ship is *primâ facie* bound to pursue a certain course. It did not in fact do so, but pursued a course which brought it into a much closer proximity to the Cornish coast. This deviation was in the interest of the ship alone. In my opinion, this fact did not by itself make it unreasonable. It may well be that the interests of the cargo owners were affected in so slight a degree that the master, acting as a reasonable man and responsible for both ship and cargo, was entitled to regard the proposed course as one that he was free to take. If he had decided, after leaving St. Ives, to stand away from the coast and thus regain the contract course, I should have felt some difficulty in saying that the deviation was not reasonable and should have preferred the view of Greer, L.J., but, even so, it would not follow that we should be justified in saying that the conclusions of the other judges in the courts below were wrong, and unless we could say so we ought not to reverse their decision, which, as I have said, is a finding of fact. But, in my judgment, all difficulty in the way of agreeing with their view is removed by one element in the course selected by the master—namely, his decision that after leaving St. Ives the course should be at one-and-a-half to two miles from the coast. I think it is clear that this course placed the ship and cargo in a position of peril to which they would not have been exposed if after leaving St. Ives the master had at once made for the open sea on his way to rejoin the contract route, and I fail to see any good reason for his not doing so. Nor can I agree that his decision amounted to mere negligent navigation. I think the course pursued from St. Ives southwards was as much a part of the deviation as that from Lundy to St. Ives, and the deviation would be justified only if the whole of it could be said to be reasonable. On the whole, I come to the conclusion that on this point also the appeal fails, and that it should be dismissed, with costs.

Lord Atkin.—This case assumes importance because it involves a question of the construction of the Carriage of Goods by Sea Act 1924 and has evoked a construction of that Act from at least one judge of great authority on such matters which I venture to think is based on a wrong method of approach to that Act. The *Ixia*, a ship of 1828 tons net register, sailed from Swansea to Constantinople with a full and complete cargo of coal under a charter-party in the terms of the Chamber of Shipping Welsh Coal Charter 1896, as amended on various dates, the last of which was the 21st Dec. 1924. A bill of lading was taken by the charterers, making the cargo deliverable to named consignees, Messrs. Foscolo Mango and Co. Limited, "with liberty to call at any ports in any order for bunkering or other purposes . . . all as part of the contract voyage; all the terms, conditions, and exceptions contained in the charter-party are herewith incorporated." The liberties given in the bill of lading are the same liberties as those given in the charter-party, and it appears to me with respect that whether the plaintiff be the charterer or the consignee the document to be construed is the charter-party.

I do not propose to set out the facts but to discuss the points of law raised. The position in law seems to be that the plaintiffs are *primâ facie* entitled to say that the goods were not carried safely; the defendants are then *primâ facie* entitled to rely on the exception of loss by perils of the sea; and the plaintiffs are *primâ facie* entitled in reply to rely upon a deviation. For unless authorised by the charter-party or the Act the departure to St. Ives from the direct course to Constantinople was admittedly a deviation. I pause here to say that I find no substance in the contention faintly made by the defendants that an unauthorised deviation would not displace the statutory exceptions contained in the Carriage of Goods by Sea Act 1924. I am satisfied that the general principles of English law are still applicable to the carriage of goods by sea except as modified by the Act; and I can find in the Act nothing which makes its statutory exceptions apply to a voyage which is not the voyage the subject of "the contract of carriage of goods by sea" to which the Act applies. It remains therefore for the shipowners to show that the suggested deviation was authorised by the contract including the terms incorporated by the Act. They first rely upon the express liberty given by the charter-party "to call at any ports in any order for bunkering or other purposes . . . all as part of the contract voyage." What exactly the Chamber of Shipping and the Documentary Council of the Baltic and White Sea Conference (who we are told in the document adopted this form of charter-party) meant by these words I wish they could be asked. We have to struggle to find a meaning. They cannot be unlimited in scope, or they would authorise the shipowner to direct the ship to any part of the globe for any purpose that he thought fit. Even if limited to any port or ports on the geographical course of the voyage, as I think on authority they clearly must be, the purpose of the call must receive some limitation. The liberty could not reasonably be intended to give the right to call at an intermediate port to land or take on board friends of the shipowner for the purposes of a pleasure trip. On the other hand, I find it very difficult to adopt the view which has found favour with one of your Lordships that they involve some limitation which is kindred to or associated with bunkering. Even if the purpose be extended beyond taking in motor fuel or supplies, necessary for the navigation of the ship, to supplies for the

maintenance or comfort of passengers, I find it difficult to put such a restricted meaning on the words in view of the collocation "any ports in any order" which seems to point to some purposes other than the restricted ones suggested. Logically I find a difficulty in excluding a suggested purpose from a class until I have formed some more or less definite conception of the nature of the class. I think myself that the purposes intended are business purposes which would be contemplated by the parties as arising in carrying out the contemplated voyage of the ship. This might include in a contract other than a contract to carry a full and complete cargo a right to call at a port or ports on the geographical course to load and discharge cargo for other shippers. It would probably include a right to call for orders. But I cannot think that it would include a right such as was sought to be exercised in the present case to land servants of the shipowners or others who were on board at the start to adjust machinery and were landed for their own and the owners' convenience because they could not be transferred to any ingoing vessel. I think, therefore, the shipowners are not excused by this clause.

There remains the provision of Art. IV., r. 4, of the schedule to the Carriage of Goods by Sea Act 1924, which with the other rules in the schedule is incorporated expressly in the bill of lading pursuant to sect. 3 of the Act: "Any deviation in saving or attempting to save life at sea, or any reasonable deviation, shall not be deemed to be an infringement or breach of these rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom." In approaching the construction of these rules it appears to me important to bear in mind that one has to give the words as used their plain meaning, and not to colour one's interpretation by considering whether a meaning otherwise plain should be avoided if it alters the previous law. If the Act merely purported to codify the law, this caution would be well founded. I will repeat the well-known words of Lord Herschell in the *Bank of England* v. *Vagliano Brothers* (64 L. T. Rep. 353, at p. 365; (1891) A. C. 107, at p. 144). Dealing with the Bills of Exchange Act as a code he says: "I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. . . . The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was." He then proceeds to say that of course it would be legitimate to refer to the previous law where the provision of the code was of doubtful import or where words had previously acquired a technical meaning or been used in a sense other than their ordinary one. But if this is the canon of construction in regard to a codifying Act, still more does it apply to an Act like the present, which is not intended to codify the English law, but is the result (as expressed in the Act) of an international conference intended to unify certain rules relating to bills of lading. It will be remembered that the Act applies only to contracts of carriage of goods outwards from ports of the United Kingdom: and the rules will often have to be interpreted in the courts of the foreign consignees. For the purpose of uniformity it is therefore important that the courts should apply themselves to the consideration only of the words used without any predilection for the former law, always preserving the right to say that words used in the English language which have already in the particular context received judicial interpretation may be presumed to be used in the sense already judicially imputed to them.

Having regard to the method of construction suggested above, I cannot think that it is correct to conclude, as Scrutton, L.J. does, that rule 4 was not intended to extend the permissible limits of deviation as stated in *The Teutonia* (*sup.*). This would have the effect of confining reasonable deviation to deviation to avoid some imminent peril. Nor do I see any justification for confining reasonable deviation to a deviation in the joint interest of cargo-owner and ship as MacKinnon, J. appears to hold, or even to such a deviation as would be contemplated reasonably by both cargo-owner and shipowner as has been suggested by Wright, J. in *Foreman and Ellams Limited* v. *Federal Steam Navigation Company Limited* (17 Asp. Mar. Law Cas. 447; 138 L. T. Rep. 582, at p. 584; (1928) 2 K. B. 424, at p. 431), approved by Slesser, L.J. in the present case. A deviation may, and often will, be caused by fortuitous circumstances never contemplated by the original parties to the contract, and may be reasonable though it is made solely in the interests of the ship or solely in the interests of the cargo or indeed in the direct interest of neither; as, for instance, where the presence of a passenger or of a member of the ship or crew was urgently required after the voyage had begun on a matter of national importance, or where some person on board was a fugitive from justice, and there were urgent reasons for his immediate appearance. The true test seems to be what departure from the contract voyage might a prudent person controlling the voyage at the time make and maintain, having in mind all the relevant circumstances existing at the time, including the terms of the contract and the interests of all parties concerned, but without obligation to consider the interests of any one as conclusive. I think this view conforms to that of Greer, L.J., the only criticism of whose test I would make is that it appears unnecessary to introduce the reasonable cargo-owner into the discussion. The decision has to be that of the master or occasionally of the shipowner; and I conceive that a cargo-owner might well be deemed not to be unreasonable if he attached much more weight to his own interests than a prudent master, having regard to all the circumstances, might think it wise to do.

On applying, then, this test, was this deviation reasonable? I do not discuss the facts except to say that I see no ground for suggesting that the deviation was due to some default of the shipowners in respect of the firemen. In the absence of evidence directed to that issue it does not seem right to impute blame to the owners in that respect. I desire to refrain from expressing an opinion on whether the question whether a deviation is reasonable is a question of law or of fact. In the present case we are judges both of law and of fact; and if the question is of fact the concurrence of the learned judges below seems to me to lose some of its value when regard is had to the meaning which they attributed to the issue that they were determining. I think that Greer, L.J. is plainly right in applying the test of reasonableness to the deviation as a whole. It could not, however, be laid down that as soon as the place was reached

to which deviation was justified there was an obligation to join the original course as directly as possible. A justified deviation to a port of refuge might involve thereafter a shorter and more direct route to the port of destination compared with a route which took the shortest cut to the original course. On the other hand, though the port of refuge was justifiably reached, the subsequent voyage might be so conducted as to amount to an unreasonable deviation. Taking all the facts into account, I am pressed with the evidence which the learned judge accepted, that after St. Ives the coasting course directed by the master was not the correct course which would ordinarily be set in those circumstances. It is obvious that the small extra risk to ship and cargo caused by deviation to St. Ives was vastly increased by the subsequent course. It seems to me not a mere error of navigation, but a failure to pursue the true course from St. Ives to Constantinople which in itself made the deviation cease to be reasonable. For these reasons I agree that this appeal should be dismissed.

Lord Russell (read by Lord Thankerton).—The provisions of the contract in the present case which are relevant to the decision of this appeal are three in number. 1. There was an exception of perils of the seas. 2. There was liberty "to call at any ports in any order for bunkering or other purposes . . . as part of the contract voyage." 3. The appellants in all matters arising under the contract were to be entitled to the rights and immunities contained in Art. IV. of the schedule to the Carriage of Goods by Sea Act 1924. I need not repeat the other facts of the case; they have already been stated.

That there was a departure from the direct route between Swansea and Constantinople is conceded, but it was said that the exception of perils of the seas still operated in favour of the appellants because the call at St. Ives fell within the liberty above mentioned, and was accordingly either part of the contract voyage or a permitted deviation therefrom.

While I appreciate the difficulty of applying what is called the *ejusdem generis* rule where only one species is available out of which to construct the genus, nevertheless it seems clear that some limitation must be placed upon the words "other purposes." If they are to be read as free from any limitation, then it was unnecessary to specify the bunkering purpose. Some restriction must therefore exist; and for myself I am in agreement with the view that the *Ixia's* call at St. Ives, not being a call for the purposes of the contract venture, was not a call for other purposes within the meaning of the liberty.

The appellants next prayed in aid the provisions of par. 4 of Art. IV. in the schedule to the Act of 1924. The schedule is a schedule of rules relating to bills of lading which (by sect. 1 of the Act) are to have effect in relation to and in connection with the carriage of goods by sea in ships from any port in Great Britain or Northern Ireland to any other port whether in or outside Great Britain or Northern Ireland. Par. 4 of Art. IV. provides that "any deviation in saving or attempting to save life or property at sea, or any reasonable deviation, shall not be deemed to be an infringement or breach of these rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom."

It was said that the call at St. Ives was a reasonable deviation within this rule, with the result that the exception of perils of the seas still operated in exoneration of the appellants.

Whether the deviation was or was not reasonable appears to me to be a question of fact to be determined in each case upon the facts of each case. The trial judge here came to the conclusion that the reasonableness of the deviation had not been established; in other words, he held that upon the facts proved the deviation was not a reasonable deviation. With this view, Scrutton, L.J. agreed, and, as I read his judgment, Slesser, L.J. also. Greer, L.J. took a somewhat different view. He thought that the whole deviation was unreasonable, by reason of the course which was set after leaving St. Ives.

For myself I am not prepared to differ from the view upon this question of fact, which was adopted by the trial judge and concurred in by the majority of the Lords Justices, namely, that upon the facts of the present case the deviation here was not a reasonable deviation. It follows accordingly that the appellants get no protection from par. 4 of Art. IV.

The appellants advanced one further argument which in no way depended for its decision upon fact, and which, if successful, would have far-reaching consequences. They contended that the Act of 1924 freed them from responsibility for loss arising from perils of the sea, notwithstanding any deviation, reasonable or unreasonable; in other words, that the Act had effected an alteration in the law which had hitherto prevailed. It was said that the obligation not to deviate only arose under par. 2 of Art. III., under which the carrier must "properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried," and that inasmuch as that paragraph was expressed to be subject to the provisions of Art. IV., the obligations imposed by par. 2 of Art. III. (including the obligation not to deviate) were expressly made subject to the provisions of par. 2 of Art. IV., which provided that neither the carrier nor the ship should be responsible for loss or damage arising or resulting from (amongst other things) "perils, dangers, and accidents of the sea or other navigable waters." That was, as I understood it, the line of reasoning.

In my opinion, the argument is unsound. It was well settled before the Act that an unjustifiable deviation deprived a ship of the protection of exceptions. They only applied to the contract voyage. If it had been the intention of the Legislature to make so drastic a change in the law relating to contracts of carriage of goods by sea, the change should and would have been enacted in clear terms.

For these reasons I agree that the appeal should be dismissed.

Lord Macmillan.—On the 30th June 1929 the steamship *Ixia* ran on a rock off the coast of Cornwall and the ship and her cargo of coal were totally lost. The owners of the cargo now seek to recover from the shipowners a sum representing the damage which they have sustained by reason of the casualty. The shipowners reply that the cargo was lost by a peril of the sea, as it undoubtedly was, and that consequently they are relieved from liability by virtue of the exception of such perils contained in the charter-party and incorporated in the bills of lading and also under Art. IV., 2 (*c*), of the Schedule to the Carriage of Goods by Sea Act 1924, which provides that "neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from . . . perils, dangers, and accidents of the sea. . . ." The bills of lading, as required by sect. 3 of the Act of 1924

contain an express statement that the shipowners are to be entitled to the privileges, rights, and immunities contained in (*inter alia*) Art. IV. of the Schedule to the Act.

To this plea the cargo-owners rejoin that the shipowners have forfeited the benefit of the immunity because of their having acted in breach of the contract of affreightment by deviating from the contractual course of the voyage.

This, in turn, is countered by the shipowners, who maintain (1) that the immunity from liability conferred by Art. IV., 2 (*c*), of the Schedule to the Act of 1924 is absolute and is not affected by any breach of contract on their part; (2) that they committed no breach of contract because under the charter-party and bills of lading they had liberty "to call at any ports in any order for bunkering or other purposes," and their alleged deviation in calling at St. Ives was in the exercise of that liberty; (3) that if there was a deviation it was a reasonable deviation within Art. IV., par. 4, of the Schedule to the Act of 1924, which provides that "any reasonable deviation shall not be deemed to be an infringement or breach . . . of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom." There was also a suggestion that the vessel was making a trial trip within the permission to make such trips contained in the contract documents, but this is so clearly untenable that I need do no more than mention and reject it.

Turning then to the three contentions of the shipowners which I have set out above, I have no hesitation in negativing the first, which is so extravagant that if it were upheld the shipowners would be exempt from liability for loss resulting from a peril of the sea even if that peril was encountered when the vessel was on a deviation from her contract voyage which was not reasonable under par. 4 of the same article.

As to the second contention, the liberty to call at any ports "for bunkering or other purposes" cannot be read as meaning that the ship was to be at liberty to call at any ports for bunkering purposes or any purposes other than bunkering, for that would be tantamount to saying that she might call at any port for any purpose. I read the words as meaning "for the purpose of bunkering or for any similar purpose." What purposes are similar to the purpose of bunkering I shall not attempt to define. It suffices to say that in my opinion the purpose for which the *Ixia* called at St. Ives was not a purpose in any way resembling so ordinary a maritime incident as bunkering.

There remains the shipowners' third contention, which is the real crux of the case. Was the deviation to St. Ives a "reasonable" one? The statute does not supply any criterion of reasonableness, and I doubt if it would have been possible to formulate a criterion of universal applicability, for the contingencies and emergencies which arise in maritime transport are as infinite in their variety as the vagaries of the sea itself. An undefined standard of reasonableness may sometimes be difficult to apply, but the task is one which judges and juries have had daily to perform from time immemorial. To give a single instance, the Sale of Goods Act 1893 uses the expression "reasonable time" in six of its sections without any definition, though it prescribes in sect. 56 that the question of what is a reasonable time is to be treated as a question of fact, and I am not aware that any serious difficulty has in consequence arisen in the administration of the statute. This at least has been laid down for our guidance that the reasonableness of an act must be judged in relation to the circumstances existing at the time of its commission and not by any abstract standard. The act, too, must be considered as a whole, in the light of all the attendant circumstances. A conclusion so reached that a particular act was reasonable or unreasonable is in general a conclusion of fact; it is an inference of fact from a given set of facts.

Now in the present case there are concurrent judgments of the judge of first instance and the Court of Appeal finding unanimously that the deviation in question was not reasonable. Even if I were disposed to think otherwise—I do not for a moment say that I am—I should be slow indeed to disturb such a finding unless I were satisfied that those who had reached it had in so doing infringed some principle of law. It is no doubt obvious that the learned judges have considered the episode from varying points of view and have, as was natural, each been influenced by the aspect of it which appeared to him most conspicuous. But it cannot be inferred from this difference of emphasis that they have disregarded any circumstance which they ought to have considered or have taken into account any circumstance which they ought not to have considered. Thus I do not think that MacKinnon, J., in giving weight to the circumstance that in his view the deviation was not in the joint interest of cargo and ship, intended to lay down or to apply any absolute rule that no deviation could be reasonable which was not in the joint interest of cargo and ship. The absence of the element of joint interest may well be an important indication of unreasonableness without being conclusive. Nor do I think that Scrutton, L.J. intended to lay down or apply any absolute rule that only a deviation to avoid imminent peril could be regarded as reasonable.

It is important to remember that the Act of 1924 was the outcome of an international conference and that the rules in the Schedule have an international currency. As these rules must come under the consideration of foreign courts it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptation.

As I have heard nothing to satisfy me that the judges below have reached their conclusion on wrong principles, I concur in the motion that the appeal be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Holman*, *Fenwick*, and *Willan*.

Solicitors for the respondents, *Charles Lightbound Jones*, and *Lightbound*, agents for *Ingledew* and *Co.*, Newcastle-upon-Tyne.

Supreme Court of Judicature.

COURT OF APPEAL.

Nov. 16 *and* 17, 1931.

(Before SCRUTTON, GREER and SLESSER, L.JJ.)

Dawson Line Limited v. Aktiengesellschaft Adler für Chemische Industrie of Berlin. (*a*)

Charter-party—Freight—Shipper's weight in—Bill of lading presented by shipper—Shipper agent of charterer—Bill of lading signed by master on loading as required by charter-party—Understatement of weight of cargo—Indemnity by charterer against consequent loss.

By a charter-party freight was to be paid on shippers' weights inserted in the bill of lading, less two per cent. in lieu of weighing, or at the option of the receivers on delivered weight, and the master was required to sign the bill of lading as presented to him by the charterer within twenty-four hours after the steamer was loaded. The charterer presented a bill of lading in which the weight of the cargo was substantially understated.

Held, that the charterer was bound to present a bill of lading which was accurate as to the weight of cargo shipped. If that weight was inaccurate, the charterer must make good the loss consequent upon the inaccuracy, i.e., *he must pay freight on the full weight delivered.*

Semble, *per Slesser, L.J.—This indemnity is due to the mere fact of the presentation of the bill of lading by the charterer with the weight of the cargo inaccurately stated therein.*

Elder, Dempster, and Co. *v.* Dunn (11 Asp. Mar. Law Cas. 337; (1909) 101 *L. T. Rep.* 578), *and* Kruger and Co. *v.* Moel Tryvan Ship Company (10 Asp. Mar. Law Cas. 465; 97 *L. T. Rep.* 143; (1907) *A. C.* 272) *followed.*

APPEAL from a decision of Rowlatt, J. on an award stated in the form of a special case.

By a charter-party dated the 9th Oct. 1930 the Dawson Line Limited (hereinafter called the shipowners) chartered the steamship *Lady Brenda* to the Aktiengesellschaft Adler für Chemische Industrie of Berlin (hereinafter called the charterers) to proceed to Berdiansk to load at a usual base or bases as customary a full and complete cargo of coal tar pitch in bulk from such suppliers as charterers may direct, and being so loaded shall therewith proceed with all possible dispatch to Ghent (Belgium). By clause 6 it was provided: "Demurrage not to accrue during any time the steamer is withdrawn from charterers' disposal for loading." By clause 11: "The bills of lading shall be in the form endorsed on the Chamber of Shipping Coal Charter 1920, and the weights shown therein shall be the shippers' weights. Such bills of lading to be signed by the master, agent, or owner of the steamer at the offices of charterers' agents within twenty-four hours after the steamer is loaded. The master may be required to sign separate bills of lading for pitch in different holds or for parcels properly separated by charterers." By clause 14: "The steamer shall deliver her cargo . . . on being paid freight at and after the rate of 12*s.* 6*d.* British sterling per ton of 20cwts., or 1015cwt. on bill of lading weight less 2 per cent. in lieu of weighing, but receivers to have the option (which must be declared in writing before breaking bulk) to pay on delivered weight, in which event cargo to be weighed on board or alongside by official weighers. Consignees paying all expenses, but owner or agent having liberty to provide check clerk at steamer's expense. . . ."

The steamship loaded a full and complete cargo of coal tar pitch at Berdiansk, the total weight of which, according to the shippers, was approximately 4476 English tons. One bill of lading was issued for the whole cargo, and this quantity was inserted in the bill of lading. The master of the *Lady Brenda* was not satisfied that the quantity stated in the bill of lading was accurate, as, according to the draught of the steamer, he calculated that a larger quantity of cargo had been shipped. On the 9th Nov. 1930 the day when the loading was completed, and the bill of lading was dated, the master addressed a letter of protest to the shippers in the following terms: "Referring to the bill of lading I signed to-day I beg to call your attention to the fact that by the steamer's draught the quantity of cargo shipped must exceed the quantity stated on the bill of lading. If, at the port of discharge, this is found to be the case, the receivers are to be held responsible for the freight on the total quantity discharged. I am reporting this matter to my owners." The master added at the foot of the bill of lading the words, "Weight, quality, and quantity unknown to me." Before the arrival of the *Lady Brenda* at Ghent the charterers, who were also the receivers, gave notice to the shipowners that they would pay freight on the bill of lading quantity less 2 per cent. The shipowners were not prepared to accept freight upon the quantity stated in the bill of lading in view of the information received from the master. The charterers advised the shipowners' agents that if it should be ascertained that the quantity stated on the bill of lading was a mistake they would pay freight on the ascertained quantity less 2 per cent. The shipowners, therefore, made arrangements to have the cargo officially weighed, and this having been done, the outturn was 4608 English tons—132 tons more than shown by the shippers' weight. Thereupon the charterers admitted that the bill of lading weight was inaccurate, and without any admission of liability, and without prejudice, paid to the shipowners the cost of the weighing and also freight calculated upon the official outturn weight, but they deducted therefrom 2 per cent., namely, 57*l.* 12*s.* 6*d.*, which was the amount in dispute between the parties.

The arbitrator found as a fact that the bill of lading quantity was inaccurate, and that the quantity shipped was 4608 English tons, and not 4476 English tons, but he awarded, subject to the opinion of the court, that the shipowners were not entitled to recover the 2 per cent. deducted—57*l.* 12*s.* 6*d.*—so that nothing was due from the charterers to the shipowners. The question for the opinion of the court was whether, upon the true construction of clause 14 of the charter-party, the shipowners were entitled to be paid freight on the delivered weight of the cargo or on the delivered weight less 2 per cent. Rowlatt, J. upheld the award of the arbitrator.

(*a*) Reported by C. G. MORAN, Esq., Barrister-at-Law.

The shipowners appealed.

Le Quesne, K.C. and *Carpmael* for the appellants.

Sir *Robert Aske* for the respondents.

Scrutton, L.J.—This case has now been fully argued, and matters have been brought to the attention of the court which apparently were not before Rowlatt, J. In the circumstances, I think that he came to a wrong conclusion.

The difficulty that gave rise to this case, arose from the fact that in respect of a cargo of coal tar pitch a wrong weight was inserted in the bill of lading, coupled with this, that in the charter-party there is a clause that freight may be paid on the bill of lading weight, less 2 per cent. in lieu of weighing, with an option to the receiver to pay on delivered weight, in which case he pays the cost of weighing. The question raised is what is the position when the bill of lading states the weight, and on the cargo being weighed it is found that the bill of lading weight is substantially wrong. This clause about paying freight on the bill of lading weight, less 2 per cent. because the cargo is not weighed on delivery, is one that has been in existence for a long time. One of its justifications is that if the shipowner has to weigh the cargo he is obliged to keep the ship longer than he otherwise would, and if he is not required to weigh he allows the receiver to pay freight on the bill of lading weight, less 2 per cent., in order that he may get his ship away earlier. An instance of the operation of the practice may be found in *Dillon* v. *Livingston and Peninsular and Oriental Company* (1895, 11 Times L. Rep. 313). This company received every year in Bombay 50,000 tons of coal. It was no advantage to them to get the coal unloaded quickly, as they always had large stocks. They were quite content to pay freight on the delivered weights; but as the ship wanted to get away as soon as possible, the master asked the Bombay agents of the company to give the ship a speedy discharge by waiving their rights to have the cargo weighed. A question arose whether the master had authority to make that bargain, and the evidence was that the company had always had the alternative offered them of having the cargo weighed, which would involve keeping the ship longer, or only to pay freight on the bill of lading weight less 2 per cent. The evidence about coal was that the average shortage on the outturn was 1 per cent. In this case what the ship complains of is that it has had to weigh the cargo and has not saved time, and the receivers say that they are liable to pay freight less 2 per cent. on cargo less than that actually carried. Rowlatt, J. thought that it looked wrong that the ship should be paid freight on less than the cargo actually delivered.

By the charter-party the charterers have contracted to supply a full cargo of coal tar pitch at Berdiansk from such suppliers as the charterers might direct. The charterers are to get the cargo from the suppliers whom they nominate. The charterers are to put the cargo on board, and the charter-party provides by clause 11 that "the bills of lading shall be in the form endorsed on the Chamber of Shipping Coasting Coal Charter 1920, and the weights shown therein shall be the shippers' weights." The shippers in this case were the agents of the charterers to supply the cargo, and by the charter-party (clause 11) the bills of lading were to be signed "by the master, agent, or owner of the steamer at the offices of charterers' agents within twenty-four hours after the steamer is loaded. The master may be required to sign separate bills of lading for pitch in different holds or for parcels properly separated by charterers."

The steamship *Lady Brenda* having loaded the cargo of coal tar pitch at Berdiansk, the master, owing to the draught of the ship, thought from the start that there was more cargo on board than that shown by the shippers' weight. Accordingly he put on the bill of lading: "weight, quality, and quantity unknown to me." He was, however, there to sign the bill of lading with the shippers' weight stated therein, though he suspected that it was wrong. The shipowners said that they would weigh the cargo on discharge and they did so, the quantity delivered at Ghent being found to be 4608 tons, that is, 132 tons more than the shippers' weight. There is no suggestion of fraud. The charterers recognised that something ought to be done, but what they did, they did without prejudice: they paid not on the bill of lading weight, but on the delivered weight, from which, however, they claimed to make the 2 per cent deduction, because they had not asked the ship to weigh. To that the shipowners objected.

Before Rowlatt, J. it does not appear to have been argued what was the effect of the clause in the charter-party by which the master had to sign the bills of lading with the shippers' weights. That question has been discussed in two cases, both in the House of Lords, which in my view show that the view taken by Rowlatt, J. was erroneous. In the later of the two cases (*Elder, Dempster, and Co.* v. *Dunn*, 11 Asp. Mar. Law Cas. 337; (1909) 101 L. T. Rep. 578), it appears that the charterer presented a bill of lading with wrong marks, in consequence of which the ship got into difficulties, through not delivering the goods according to the marks. The House of Lords held that such a tender of bills of lading by the charterer involved the obligation upon the charterer to indemnify the ship against the damage that had been thereby caused. A somewhat similar point arose in *Kruger and Co.* v. *Moel Tryvan Ship Company* (10 Asp. Mar. Law Cas. 465; 97 L. T. Rep. 143; (1907) A. C. 272). There also the master had to sign bills of lading as presented. The charterers presented a bill of lading which made the shipowners liable for negligence, by which the shipowners were exposed to liability. The shipowners claimed to be indemnified by the charterers in respect of the injurious consequences following upon the presentation of the bill of lading not in accordance with the charter-party. The House of Lords held that the charterers were liable to indemnify the shipowners. In these cases I was counsel for the successful parties, the shipowners; and I remember that considerable discussion took place as to the lines upon which the claim to indemnity should be put. Some of the judges said that the charterers were liable upon two grounds. The first of them was that a right to indemnity followed from the terms of the charter-party because it required the master to sign the bills of lading in a particular form, and consequently that the charterers must be liable if loss followed in consequence of presenting inaccurate bills of lading. The second ground has nothing to do with the charter-party, but turns upon the principle stated in *Sheffield Corporation* v. *Barclay* (93 L. T. Rep. 83; (1905) A. C. 392) and *Birmingham and District Land Company* v. *London and North Western Railway Company* (1886, 55 L. T. Rep. 699; 34 Ch. Div. 261). This is that a mere request from the charterers, involving as it did the shipowners in a liability in which otherwise they would not have been involved, raised the implication of an indemnity against those consequences.

Some judges took the one view ; others, the other ; and some judges based their decision on both views.

In this case it is sufficient to say that as the master was required to sign the bills of lading as presented to him, the charterers were bound to present an accurate bill of lading as to the weight shipped. The shippers were the charterers' agents to supply the cargo and present the bill of lading ; they presented an inaccurate bill of lading with consequent loss. The charterers must make good that loss consequent upon the presentation by their agents of the inaccurate bill of lading.

Counsel for the respondents pointed out that there are clauses in the Schedule to the Carriage of Goods by Sea Act 1924 which affect the question. In my opinion it is unnecessary to consider them, as the Act does not apply to charter-parties, and the liability in this case is a liability arising from the charter-party and the provision therein that the bill of lading is to be signed by the master, as presented by the charterers' agents. The result at which we arrive, I am glad to think, fits in with the commercial aspect of the case. For the charterers to claim the deduction of 2 per cent. from the freight when the ship was not saved weighing is wrong. For the reasons I have given the appeal must be allowed, and the shipowners entitled to recover the sum claimed.

Greer, L.J.—I have come to the same conclusion as my Lord, that this appeal should be allowed, but not without encountering a number of difficulties. My only reason for giving a separate judgment is that I am anxious that nothing should be said which might throw doubt on one of the fundamental principles of our law, namely, that where parties agree upon a written form of words to regulate their contractual obligations, those obligations are to be found in that document, and the court will not lightly weaken its effect by reading in qualifications or implied understandings inconsistent therewith. It seems to me, especially at the present day, most important that there should be certainty with regard to the law. If this case depended solely upon the words used in the charter-party, I should have come to the conclusion that the shipowners by the express terms of the charter-party, have agreed to accept freight measured by the bill of lading weight, and that there is nothing in the charter-party from which there can be implied an exception to that obligation. But I agree that the position may be altered by reason of some collateral contract between the parties, and I regard the decisions in the two cases of *Elder, Dempster, and Co.* v. *Dunn* (*sup.*) and *Kruger and Co.* v. *Moel Tryvan Ship Company* (*sup.*) as meaning this and no more, that if the charterer or some person for whom he is responsible presents a bill of lading to the master, which the latter is bound to sign as part of the terms of the contract, there may be implied from the act of presenting the bill of lading, taken together with the terms of the contract, a warranty of the correctness of the figures, description, or marks stated in the bill of lading.

The only question which is not without difficulty in the case is whether, having regard to the terms of the charter-party, we are entitled or bound to treat the charterers as presenting the bill of lading for signature. At one time in the course of the argument, I was inclined to think that the charterers could not be so treated, but counsel for the appellants has called attention to the language used in several clauses of the charter-party which has led me to the conclusion that it is right in this case to treat the suppliers when they presented the bill of lading for signature as the agents of the charterers By clause 1 the steamship is to "load at a usual berth or berths as customary a full and complete cargo . . . from such suppliers as charterers may direct." That means that the charterers have undertaken that they will direct other people to perform the obligation they themselves have undertaken to load the ship. That view of the contract is confirmed by clause 6, which contains these words : "Demurrage not to accrue during any time the steamer is withdrawn from charterers' disposal for loading"—again indicating that for the purpose of the performance of this charter-party whoever in fact brings the cargo to the ship to be put on board is to do this on behalf of the charterers. Clause 11 contains a reference to the bill of lading being signed by the master, agent, or owner of the steamer at the offices of the charterers' agents, further indicating to my mind that the charterers were the persons who by their agents were loading the vessel and who presented the bill of lading to the master for signature.

In these circumstances it seems to me that this case is covered by the two decisions to which I have referred. It does not seem to me to matter whether the right view is that the freight should first be paid and thus that there should be a counter-claim for breach of contract. That would be an unbusinesslike way of dealing with the question. As I understand the arbitrator was asked to decide the question of principle, namely, whether the loss should be borne by the one party or the other subject to our view. Our view is that it should be borne by the charterers and not by the shipowners.

Slesser, L.J.—I agree that this appeal should be allowed. For myself I am not conscious of any substantial variation of reasoning between my Lords in the judgment they have delivered. But if there be any question whether this decision is to depend upon proceedings collateral to the charter-party, namely, the presentation of the bill of lading, or upon the argument that the decisions in *Kruger and Co.* v. *Moel Tryvan Ship Company Limited* (*sup.*), and the earlier case of *Elder, Dempster, and Co.* v. *Dunn and Co.* (*sup.*) establish that construing clause 11 alone, apart from any other circumstances, the obligation in that clause that the weights shall be the shipper's weights, involves necessarily a right to indemnity from the charterer, I prefer to limit the grounds for decision in this case to those stated by Greer, L.J., and to leave open the wider question, if there be one, as to the effect of clause 11, apart from any other circumstances.

Appeal allowed.

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

Solicitors for the respondents, *W.* and *W. Stoeken.*

Dec. 9, 10, 14, 1931; *and Feb.* 1, 1932.

(Before SCRUTTON, GREER and SLESSER, L.JJ.)

The Edison. (*a*)

ON APPEAL FROM THE ADMIRALTY DIVISION.

Collision — Damages — Loss of use — Dredger totally lost — Dredger engaged at time of loss in connection with the performance by her owners of contract to execute harbour works—Loss and expense incurred by owners owing to their inability through lack of financial resources to replace dredger—Loss of profits and incidental losses on contract—Natural consequence of collision—Measure of damages.

The plaintiffs' dredger was sunk in a collision with the defendants' steamship, for which the defendants admitted liability. At the time of the loss the plaintiffs were performing certain works in the harbour at Patras, under contract with the Harbour Commissioners, and the dredger was employed in certain essential dredging operations connected with the performance of the contract. After the collision the plaintiffs were unable, owing to their lack of financial resources, to purchase another dredger, and in consequence various delays involving loss and expense were incurred. Subsequently the plaintiffs hired another dredger, which they ultimately purchased. The registrar in his report allowed a sum for the value of the dredger, and also sums for the losses and expenses incurred during the delay, including the cost of hire of the substituted dredger, the extra cost of dredging with the substituted dredger as compared with the lost dredger, and loss of profit and incidental losses, such as salaries, rent and interest, incurred during the period when the contract could not be performed owing to the loss of the dredger. Langton, J. affirmed the report.

Held, that Langton, J. and the registrar had adopted the wrong measure of damage. The damages recoverable were those which were the direct and natural consequences of the collision, and did not include losses and expenses which were attributable to the lack of financial resources of the plaintiffs, or profits which were uncertain or speculative. The plaintiffs having been awarded the value of the dredger at the time and place of the loss, together with interest from the date of the loss, which represented the true measure of damage, were not entitled to recover anything further for loss of profits, or the additional costs of obtaining another dredger.

Appeal of the defendants allowed.

APPEAL from judgment of Langton, J., affirming a report of the Admiralty Registrar.

The plaintiffs, owners of the dredger *Liesbosch*, claimed damages for the loss of the *Liesbosch* as the result of a collision with the defendants' steamship *Edison*, which took place in the harbour of Patras on the 26th Nov. 1928. In consequence of the collision the *Liesbosch* was lost. The defendants admitted liability for the collision. At the time of the collision the owners of the *Liesbosch* had entered into a contract with the Harbour Commissioners at Patras for the excavation of the basin of the harbour and for a trench for the laying of foundations of new holes, together with the construction of piers, &c., and other work. The contract was for the sum of 36,540,000 drachmas, and one of the terms of the contract was that the work should be completed within three years. The contract was subsequently enlarged to 68,000,000 drachmas, covering a period of five years. The plaintiffs, owing to lack of financial resources, as appeared from the evidence, were unable to purchase a dredger to take the place of the *Liesbosch*, but they ultimately hired the Italian dredger *Adria*, which arrived at Patras on the 16th June 1929. The *Adria* was on hire to the plaintiffs until the 3rd July 1930, when the plaintiffs purchased her for 3,442,500 drachmas. The plaintiffs divided their claim for damages into five parts. In Part I. they claimed the value of the *Liesbosch*, together with the expense of purchasing the *Adria*, amounting to 3,772,320 drachmas, which the registrar allowed in full. Under Part II. they claimed expenses incurred between the 26th Nov. 1928 and the 16th June 1929, which was the period from the date when the *Liesbosch* was lost until the *Adria* was obtained, during which work was suspended. The amount claimed in respect of these expenses, which represented salaries, wages, rent, insurance, and interest on capital, amounted to 4,626,314.35 drachmas, of which the registrar allowed 4,007,476.45 drachmas. Under Part III. the plaintiffs claimed expenses of hiring the *Adria*, *i.e.*, cost of transporting, travelling expenses, &c., amounting to 7,606,257.30 drachmas, of which the registrar allowed 6,888,790.45 drachmas. Under Part IV. the cost of operating the *Adria* as compared with the *Liesbosch*, amounting to 156,037.50 drachmas, was claimed and allowed in full. Under Part V. the plaintiffs claimed 882,568 drachmas for loss of profit owing to cessation of all work under the contract from the 26th Nov. 1928 to the 16th June 1929. The registrar allowed 294,189.33 drachmas.

On the defendants' motion to set aside the report, the following judgment was given by Langton, J.

July 29, 1931.—**Langton, J.**—I have taken time to consider my judgment in this case, not because I have entertained any considerable doubt as to the correct determination of the matter, but because it has been urgently pressed upon me by Mr. Dickinson on behalf of the defendants that the main question in issue raises a novel and most important point in the law of damages. It was not without regret that I learned from Mr. Raeburn for the plaintiffs that he was unable to accede to this view. The career of a pioneer in almost any field is touched with the glamour of adventure, and possesses a certain attractiveness even in the comparatively humdrum domain of the law. It was accordingly disappointing to hear from Mr. Raeburn that the case presented no opportunity for blazing a trail for the enlightenment of future generations, and was, in truth, confined to a very ordinary question of fact which the registrar had already determined in his favour.

The case comes before me upon motion in objection to the registrar's report in the following circumstances.

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

On the 26th Nov. 1928, a collision occurred in Patras Harbour between the defendants' steamship *Edison* and a dredger called the *Liesbosch* belonging to the plaintiffs. As a result of the collision the *Liesbosch* was sunk and totally lost. On the 5th May 1930 the defendants admitted liability for the collision, and on the 7th May 1931 the registrar made the report to which objection is now taken. Since the main point which was raised and discussed before me was a question of principle, I do not think that it is necessary for me to go into the multifarious items of the plaintiffs' claim or even to recite in detail the somewhat singular consequences of the collision out of which this claim arises.

Stated quite shortly the main chain of events is as follows:

At the time of the collision the *Liesbosch* was the property of some persons acting together as a company or syndicate to perform under contract certain extensive dredging and improvement works to the Harbour at Patras. The contract was for the important sum of 36,540,000 drachmas, and one of the terms imposed by the harbour commissioners upon the contractors was that the work should be completed within three years. The contract was subsequently enlarged to one of 68,000,000 drachmas, covering a period of five years. When one bears in mind the *locus in quo* it is not perhaps startling to find that a time limit for the completion of the work should have been insisted upon, or that the harbour commissioners also retained powers of imposing penalties for delay. The unusual feature of the transaction, which has led in turn to the complication of the claim and to the determined resistance of the defendants to the payment of a large portion thereof, lies in the fact that the contractors appear to have strained to the uttermost their entire resources of cash and credit to obtain the necessary plant which would qualify them to perform the contract. The sudden and untoward disappearance of the main item of that plant, namely, the dredger *Liesbosch*, left them financially beggared, and, from the point of view of further action under their contract, temporarily paralysed. It is not unimportant to notice at this stage that, although the collision took place on the 28th Nov. 1928, there was no admission of liability by the defendants until the month of May 1930.

In this unhappy plight the plaintiffs with a single eye towards the preservation of what was to them a valuable contract upon which they had already staked their all, prosecuted inquiries over a wide field with a view to replacing the lost *Liesbosch* either by purchase or by hire. The introductory statement to the plaintiffs' claim avers tersely that they were "unsuccessful in finding one"; but Mr. Dickinson contended, and Mr. Raeburn did not disagree, that this statement required some amplification. The result of the plaintiffs' efforts would be more accurately expressed by saying that they were unsuccessful in finding any means of paying for a dredger or of inducing any dredger owner to part either permanently or temporarily with his property upon such security as they could offer.

Eventually, after a lengthy delay, a situation which was becoming tense between the commissioners and the contractors was relieved by a contract of hire of a dredger called the *Adria*, together with a tug and hoppers, which the contractors entered into with an Italian firm on the 4th May 1929. The *Adria*, which was in Sardinia, was brought to Patras, and the contractors restarted work on the 16th June 1929. In the following year the contractors, who were feeling the strain of a high rate of hire, approached the commissioners, and on the 30th June 1930 the commissioners purchased the *Adria* from her Italian owners. Subsequently, by a somewhat lenient contract of re-sale, dated the 5th Sept. 1930, the commissioners re-sold the *Adria* to the contractors upon a scheme comprising monthly payments extending over four years. By means of these involved and rather tortuous transactions the plaintiffs were eventually able to carry on this contract upon which their fortunes had been so liberally embarked, but the course adopted was naturally attended by heavy expense.

The plaintiffs presented their claim under five heads: (i.) The actual value of the lost *Liesbosch*, together with certain expenses attendant upon the purchase of the *Adria*; (ii.) expenses incurred during the period the 26th Nov. 1928 to the 16th June 1929, that is, the period during which the plaintiffs were unable to carry on any of the work of dredging, but were obliged to maintain certain members of their staff and minor items of plant; (iii.) the hiring expenses of the *Adria* from the 4th May 1920 to the 30th June 1930; (iv.) extra cost of operating the *Adria* as compared with the *Liesbosch*; and (v.) loss of profit owing to cessation of all work under the contract for the period the 26th Nov. 1928 to the 16th June 1929. The registrar, after hearing evidence, allowed part (i.) of the claim in full. With certain reductions, he also allowed the larger portion of parts of (ii.), (iii.) and (iv.), and about one-third of the amount claimed under part (v.).

Mr. Dickinson had objections to all the allowances under each part, which I will notice more in detail presently; but the real gravamen of his objection, which lay at the root of his argument, was that the defendants were being called upon to pay not only for the replacement of what they had destroyed, but for a chain of remote consequences which sprang from the commercially indecent poverty of the plaintiffs and not from the wrongdoing of the defendants. His proposition of law was that a defendant, either in contract or in tort, is by law obliged to make good the normal and only the normal consequences of his misdeeds. It is not, he said, a normal consequence of a tort that a plaintiff should be so poor as to be unable to carry on his business by reason of the tort, more especially when the business happens to be a very expensive one, involving the expenditure of comparatively large sums even while the work thereof is being held in abeyance. If I may venture to summarise and paraphrase his argument, it was that damages in law are awarded by way of restitution and not in relief of destitution.

In support of this not unattractive proposition, Mr. Dickinson took me through many familiar and one or two unfamiliar cases concerning the remoteness of damage. Amongst others he cited old and well-tried authorities such as *Hadley* v. *Baxendale* (1854, 9 Ex. 341), *Sharp* v. *Powell* (26 L. T. Rep. 436; L. Rep. 7 C. P. 253), and *The Mediana* (8 Asp. Mar. Law Cas. 493; 80 L. T. Rep. 173; (1899) P. 127, 139), and found passages to assist him in the modern cases of *The London* (12 Asp Mar. Law Cas. 405; 109 L. T. Rep. 960; (1914) P. 72), *Weld-Blundell* v. *Stephens* (123 L. T. Rep. 593; (1920) A. C. 956), and *The Valeria* (16 Asp. Mar. Law Cas. 25; 128 L. T. Rep. 97; (1922) 2 A. C. 242). The pronouncement from amongst these which seemed to me to come nearest to his proposition is in the judgment of Lord Collins when sitting as a Lord Justice in *The Mediana* (8 Asp. Mar. Law Cas. at p. 501; 80

L. T. Rep. at p. 180; (1899) P. 127, 139): "In the present case," said the Lord Justice, "there was a standby, but the consequences would be serious if the fact that the board had a standby deprived them of damages as decided in the court below. It would mean that, apart from special damage, the damages to the rich man must be different from the damages to the poor man, if you are to assess them differently where a man has many of some particular kind of chattel, and where he has only one. Why has a millionaire from whom a picture is taken away to recover a smaller sum of money for the loss of that particular chattel, during a particular time, than A., B. and C., who have no claim to be millionaires? There is no principle involved: it is merely a matter of prejudice." From this Mr. Dickinson argued that since a man was to have no less damages because he happened to be rich, so he can have no more if he happened to be poor. In the present case the defendants are being called upon to pay twice as much, or more than twice as much as the value of the article destroyed merely because the plaintiffs happened to be poor. It follows, says Mr. Dickinson, that the damages consequent upon the mere poverty of the plaintiffs are too remote and cannot be recovered in law.

Simple and lucid as this reasoning may appear to be, it seems to me to be based upon a fallacy. Lord Collins does not say, and surely does not mean to say, that the damages for injuring A. must always be the same in amount as the damages for inflicting a like injury upon B. Take the simplest and commonest illustration: A highly skilled and highly successful surgeon and a navvy each suffer the loss of their right hand in the same railway accident. Will the court or even a jury award them the same sum by way of compensation in damages? Is it not rather true to say that the court will direct itself or the jury to assess the damages in each case upon the same principle, namely, what is the worth to each plaintiff of what he has lost? I am of opinion that this is exactly what Lord Collins means; the sum may be very different, but the principle is the same, and the principle is not determinable, and in some cases not assisted by looking to the financial situation of the plaintiff.

To my mind the proper method of approach to this case is not to commence by straining one's imagination after a notional phantom which will be recognisable when intellectually captured as "the normal dredger-owner," and having first determined what he would have suffered by the loss of his dredger, to proceed to rule out all other items of damage as too remote. I think the correct method is first to examine what these plaintiffs actually claim to have lost, and to test each item by the plain criterion whether it was properly and necessarily incurred. It is along this pedestrian path that the learned registrar appears to have proceeded, and it is the path which I propose to follow. In the reasons for his report the registrar enunciates the law applicable to the situation as follows: "The plaintiffs were then entitled to take all reasonable steps in this emergency to carry out their contract with as little delay as possible, having regard to all the existing circumstances, such as the severe terms of their contract in regard to penalties, and their want of liquid resources. They were equally bound to minimise the damages flowing from the sinking of the *Liesbosch* by the defendants' vessel." This appears to me to be a comprehensive and unexceptionable statement, both of the rights and the duties of the plaintiffs in the circumstances. He then proceeds to state his findings of fact in the following succinct terms: "In our opinion in the emergency which had arisen through the act of the defendants the plaintiffs acted reasonably, and from a business point of view no fault can be found with their action. The hiring of the *Adria* to complete an important contract with a public body was clearly a direct and natural result of the collision, and was, as we find, under the existing circumstances, a reasonable step to take. It follows from this finding of fact that the plaintiffs are entitled to recover reasonable expenses from the 26th Nov. to the 16th June, and also those incurred in hiring the *Adria* together with the extra costs of operating the *Adria* as compared with the dredger *Liesbosch*." I hardly think that it is open to me to disturb these findings, and even if I possess the right I do not see my way to exercise it.

It remains to notice in detail the several objections put forward by Mr. Dickinson on behalf of the defendants. As to part (i.) of the claim he criticised only the amount and not the principle upon which it was allowed, but he did not develop his criticism under this head very far in view of the obvious answer that amount must always be a matter for the registrar. As to part (ii.), although from one point of view his criticism might also be said to go to amount, he claimed as matter of principle that in any event the plaintiffs should only be allowed a reasonable time in which to find a new dredger. He suggested that two months rather than eight months was, in the circumstances, a reasonable time. His main objection that the damages claimed were too remote was the basis of this criticism under part (ii.), and extended to the whole of parts (iii.), (iv.), and (v.), and he asked that all of these three latter parts should be disallowed *in toto*. With this main objection I have already attempted to deal.

I have endeavoured to indicate in this judgment that my sympathy with the defendants is very considerable. I can imagine few things more maddeningly provoking than to be called upon, as a consequence of sinking a somewhat elderly dredger, to pay a sum amounting to more than twice her value when generously computed. I cannot, however, extend this sympathy to the point of doing violence to what I think to be the law of damages; and I was appositely reminded by Mr. Raeburn of a dictum of Scrutton, L.J. in *Banco de Portugal* v. *Waterlow and Sons Limited* (145 L. T. Rep. 362; 47 Times L. Rep. 359, at p. 361): "To that must be added the qualification that the plaintiff was not bound to injure himself, his character, his business, or his property to lessen the injury caused by the wrongdoer: (see *James Finlay and Co.* v. *N. V. Kwik Hoo Tong Handel Maatschappij*, 140 L. T. Rep. 389; (1929) 1 K. B. 400)." This seems to me to be particularly apposite in considering the conduct of the plaintiffs in the present case.

If the argument of the case by the respective counsel suffered somewhat from the fact that they were quite unable to agree as to the point to be argued, and therefore dealt each with their own contention rather than with that of the other side, the several arguments at least lacked nothing in incisiveness; but in spite of this it is pleasant to be able to record that an agreement was reached concerning one minor item. In the notice of motion, par. 5, it was claimed that an item in part (i.) of the claim relating to notarial fees had been abandoned before the registrar. Mr. Raeburn, for the plaintiffs, agreed that this was so and that the report should be amended by a deduction of the sum of 30*l*. 1*s*. 11*d*. I am afraid this sum is too

small to carry with it any consequences as to costs, and the motion will therefore be dismissed with costs.

Leave to appeal.

The defendants appealed.

Dickinson, K.C. and *Main Thompson* for the appellants. — The damages which have been awarded are not the natural and reasonable consequences of the collision, but arise solely from the respondents' lack of financial resources. The losses which have been sustained are not therefore the natural consequences of the negligence of the appellants. The registrar and Langton J. misdirected themselves in holding that any damages beyond the value of the vessel together with interest from the date of the loss could be awarded. [They referred to *Hadley* v. *Baxendale* (1854, 9 Ex. 341), *The Notting Hill* (5 Asp. Mar. Law Cas. 241 ; (1884) 51 L. T. Rep. 66 ; 9 Prob. Div. 105), *Polemis* v. *Furness Withy and Co.* (15 Asp. Mar Law Cas. 398 ; 126 L. T. Rep. 154 ; (1921) 3 K. B. 560), *The Philadelphia* (14 Asp. Mar Law Cas. 68 ; 116 L. T. Rep. 794 ; (1917) P. 101), *The Racine* (10 Asp Mar. Law Cas. 300 ; 95 L. T. Rep. 597 ; (1906) P. 273), *The Argentino* (11 Asp. Mar. Law Cas. 280 ; 101 L. T. Rep. 80 ; (1909) P. 236), *The Amerika* (13 Asp. Mar. Law Cas. 558 ; 116 L. T. Rep. 34 ; (1917) A. C. 38), *Gee* v. *Lancashire and Yorkshire Railway Company* (3 L. T. Rep. 328 ; 6 H. & N. 211), *The Mediana* (9 Asp. Mar. Law Cas. 41 ; 82 L. T. Rep. 95 ; (1900) A. C. 113), *Hobbs* v. *London and South-Western Railway Company* (1875, 32 L. T. Rep. 252 ; L. Rep. 10 Q. B. 111), *Speake* v. *Hughes* (89 L. T. Rep. 576 ; (1904) 1 K. B. 138), *H.M.S. London* (12 Asp. Mar. Law Cas. 405 ; 109 L. T. Rep. 960 ; (1914) P. 72), *The Valeria* (16 Asp. Mar. Law Cas. 25 ; 128 L. T. Rep. 97 ; (1922) 2 A. C. 242), *Weld-Blundell* v. *Stephens* (123 L. T. Rep. 593 ; (1920) A. C. 956), *The Empress of Britain* (1913, 29 Times L. Rep. 423), *Banco de Portugal* v. *Waterlow and Sons Limited* (145 L. T. Rep. 362), *James Finlay and Co.* v. *N. V. Kwik Hoo Tong H. M.* (17 Asp. Mar. Law Cas. 566 ; 140 L. T. Rep. 389 ; (1929) 1 K. B. 400), *The Columbus* (1849, 3 W. Rob. 158), *The City of Rome* (8 Asp. Mar. Law Cas. 542*n*), and *The Anselma de Larrinaga* (29 Times L. Rep. 587).

Raeburn, K.C. and *Noad* for the respondents.— The decision of the registrar and of Langton, J. was right. The question is not really a question of remoteness : the real question is whether the plaintiff took reasonable steps to minimise the damage. If such steps were taken the expenses incurred in so doing are recoverable. The respondents have not really been allowed any substantial sum for loss of profit, but they have been allowed expenses, *e.g.*, the hire of the dredger, which they reasonably incurred in order to protect their profit. [They referred to *The Kate* (8 Asp. Mar. Law Cas. 359 ; 80 L. T. Rep. 423 ; (1899) P. 165), *The Harmonides* (9 Asp. Mar. Law Cas. 354 ; 87 L. T. Rep. 448 ; (1903) P. 1), *Thames and Mersey Marine Insurance Company* v. *British and Chilian Steamship Company* (13 Asp. Mar. Law Cas. 221 ; 114 L. T. Rep. 34 ; (1916) 1 K. B. 30), *Société Anonyme de Remorquage à Helice* v. *Bennetts* (1911) 1 K. B. 243), *Davis* v. *Orwell* (1837, 7 Car. & P. 804), *Bodley* v. *Reynolds* (1846, 8 Q. B. 779), and *France* v. *Gaudet* (1871, L. Rep. 6 Q. B. 199).]

Dickinson, K.C. replied.

Cur. adv. vult.

Feb. 1.—**Scrutton, L.J.**—This is an appeal from a decision of Langton, J. (sup. ; (1931) P. 230), affirming the decision of the Admiralty Registrar as to the amount of damages to be paid by an American shipowner for sinking a dredger near the Port of Patras. The dredger was at the time employed by its owner in carrying out part of a contract with the Patras Harbour Authorities to build a large line of quay, quay wall and mole in the harbour of Patras. The dredger was not under any special charter ; no special sum was to be paid for its services ; the owner might have taken it away and substituted another dredger without any breach of contract ; the specification in the harbour contract was mainly concerned with the building construction, but it was essential to the building of the quay walls that the dredger should remove soil to a specified depth so that the foundations might be laid for the quay wall.

This is not a case of partial damage, which can be repaired, and a claim for the loss while the vessel was being repaired. It is a case of total loss, and in such a case the measure of damage laid down in *The Philadelphia* (14 Asp. Mar. Law Cas. 68 ; 116 L. T. Rep. 794 ; (1917) P. 101) is "the value of the vessel at the time of her loss, plus the proper net sum for profits or freights at the end of her existing charter." I discuss later the question whether those sums should not be included in the value of the ship at the time of her loss, instead of being added to it.

The actual figures awarded seem to me to suggest strongly that something has gone wrong in the working out of principles. Langton, J. says in his judgment : "I can imagine few things more maddeningly provocative than to be called upon, as a consequence of sinking a somewhat elderly dredger, to pay a sum amounting to more than twice her value when generously computed." The dredger *Liesbosch* was built in 1924 and purchased by her present owner in Holland in Oct. 1927 for 4000*l.*, 2000*l.* further being spent in getting her out to Patras. She began in Patras in Sept. 1927, and was sunk in Nov. 1928, being at that time insured by her owner for 5250*l.* The registrar has assessed her value at the time of loss—Nov. 1928—at a little over 9000*l.*, and has reached that conclusion by taking the figure for which, in June 1930, nineteen months after the loss, the Patras Harbour Board purchased a much older but larger dredger *Adria*, in order to sell her for the same sum to the contractor, he paying the price in instalments spread over four years. Why this sum is selected as the value of the *Liesbosch* in Nov. 1928 I find it difficult to understand. Instead of giving interest on the value of the *Liesbosch* in Nov. 1928 till the time of payment, which is one measure of damages, the registrar then gives interest on the sums he awards from the 11th May 1929 to time of payment. This date is taken as being the date when the owner signed a contract to hire the *Adria*, he having no money to buy her. Taking this date, the claimant does not get interest on the value of the dredger at the time of the loss from the date of the loss for the six-and-a-half months till he signs the contract for the hire of the *Adria* ; but he does get interest from the 11th May 1929 on a number of sums which he did not pay till long after, for instance, on the hire of the *Adria* from the 11th May 1929 to the 3rd July 1930. The oddities do not stop there, for the registrar then awards, in addition to the 9000*l.* value of the *Liesbosch* at the time of the loss, a sum of 10,000*l.* roughly more, or over 100 per cent. of the value apparently as loss sustained in the working of the construction contract.

The plaintiffs claim is under five heads.

I. is said to be the value of the *Liesbosch* at the time of loss, but is in fact the price of the *Adria* about twenty months later plus the expenses incurred in purchasing her. I have already said

I do not see how this can be the value of the *Liesbosch* at the time of her loss.

II. is the plaintiffs' expenses as contractor from the loss of the *Liesbosch* in Nov. 1928 to the hire of the *Adria* in May 1929. Of those about 400,000 drachmas are allowed, roughly a little over 1000*l.* These damages seem in fact to be that the staff and implements for the construction contract were lying idle during this period. On the evidence work could have been done in preparing the blocks for the quay walls, but the harbour authority would not allow it to be done because it would lock up capital by premature payments for the work done. This seems to me to be too remote a consequence of the loss of the *Liesbosch,* and to make the wrongdoer liable for the loss on a contract not exclusively concerned with the employment of the dredger. I deal with this later.

III. Expenses incurred during the hiring of the *Adria.* It is clear that the plaintiffs hired the *Adria* because they had no money to buy her. In doing so they spent in fourteen months about 5000*l.*, more than half the value assigned to the *Liesbosch,* and then had after all to buy the *Adria* at the end of the fourteen months at a price which must have been larger because its payment was spread over four years.

IV. The extra cost of working the *Adria* over the *Liesbosch.* On this head I do not understand how a claimant who has been given the value of his ship lost can also be given an extra sum because in working the ship which he buys he does not get the value of the old ship. The figure given for him for total loss should have taken into account all the direct loss he suffered by losing his ship and not have added to this part of the loss he claimed to have suffered by working his contract with the substituted ship. This might be relevant in cases of partial loss, but seems to me to have no relevance in cases of total loss.

V. Lastly, plaintiff claimed a proportion of the profit he expected to make under his construction contract lost because he was delayed six months in receiving it. The registrar has very properly cut down this claim substantially by only giving him a sum to compensate him for delay in receipt of profits, and not a sixth share of the profits themselves, arrived at by contrasting six months' delay with three years' contract construction time, but, as appears hereafter, I do not understand how the construction contract, which has no special terms relating to the remuneration for the work done by the *Liesbosch,* comes into this matter at all.

I have repeatedly said that so far as questions of fact are concerned the court should be very slow to interfere with the decision of the very experienced registrar and merchants (*The San Gregorio,* 1922, 12 Ll. L. L. Rep. 249; *The Susquehanna,* 17 Asp. Mar. Law Cas. 81; 135 L. T. Rep. 456; (1926) A. C. 655), but it is also clear that if the registrar purports to act on any principle of which the court disapproves, or if his decision of fact obviously conflicts with some principle of assessment, the court should interfere. It is, unfortunately, also true that until recently, possibly even at the present day, there is no very clear statement of the principles on which damage caused by collision is to be assessed in spite of a number of decisions on the point of the highest tribunal. I am emboldened to make this remark by the fact that as late as 1927 Lord Sumner in *The Chekiang* (17 Asp. Mar. Law Cas. 74; 135 L. T. Rep. 450; (1926) A C. 637) recognises the justice of a similar criticism, and devotes some time to the exposition of the measure of damages in the case of ships owned by the Crown or public bodies, usually not employed commercially. Having read the authorities I agree with Lord Atkin's remark in *The Susquehanna* (17 Asp. Mar. Law Cas. at p. 556; 134 L. T. Rep. at p. 50; (1925) P. at p. 210): "This is one of those cases dealing with damages which, in my experience, I have found to be a branch of the law in which one is less guided by authority laying down definite principles than in almost any other matter that one can consider."

I also note the remark of Lord Sumner in *The Susquehanna* (17 Asp. Mar. Law Cas. at p. 84; 135 L. T. Rep. at p. 459; (1926) A. C. at p. 664) that though in theory one would consider the loss of the shipowner, by inveterate practice which cannot be disturbed the ship is treated as the claimant and an isolated account taken as if the injured ship were the whole business of the shipowner. But generally, however, it is clear on the authorities that the measure of damages is the same in Admiralty and common law; and that it is the same in tort and breach of contract, except that in the latter case damages can be given in respect of circumstances which were in the contemplation of the parties at the making of the contract, which damages would not be given in tort.

The claims for damage to a ship by collision fall into two classes. (1) Where the ship is not lost but damaged so that for a time she cannot be used. (2) Where the ship is totally lost.

In each of these cases there may be a subdivision according as the injured ship is one commercially used for profit or is a ship used by bodies which do not carry on business to earn commercial profits, such as a dredger used by a Harbour Board, and used in their own work (*The Greta Holme,* 8 Asp. Mar. Law Cas. 317; 77 L. T. Rep. 231; (1897) A. C. 596; *The Marpesa,* 10 Asp. Mar. Law Cas. 464; 97 L. T. Rep. 1; (1907) A. C. 241), a lightship (*The Mediana,* 9 Asp. Mar. Law Cas. 41; 82 L. T. Rep. 95; (1900) A. C. 113), or a King's ship (*The Chekiang,* 17 Asp. Mar. Law Cas. 74; 135 L. T. Rep. 450; (1926) A. C. 637; *The Susquehanna,* 17 Asp. Mar. Law Cas. 81; 135 L. T. Rep. 456; (1926) A. C. 655). I refer to Lord Dunedin's and Lord Sumner's judgments for the discussion of these cases, and confine myself to the cases of ships commercially used whether for carriage of goods or for dredging.

Take, first, the case of damage to the ship other than total loss. The claimant is entitled to the cost of repairing the damage. But, besides the actual damage done to the ship, he has been prevented from using the ship to earn profits till the damage is repaired. How is this loss to be measured? This was the question considered by the House of Lords in *The Argentino* (6 Asp. Mar. Law Cas. 433; 1889, 59 L. T. Rep. 914; 14 App. Cas. 519). At the time of the collision the *Argentino* had an oral engagement to go to Messrs. Westcott's berth for a Black Sea round to Batoum, which engagement, owing to the collision, she could not fulfil, but when repaired she was put on Messrs. Westcott's Black Sea berth for Odessa, and a sum was claimed which was arrived at by estimating how much less the *Argentino* had earned by reason of the change of berths. The registrar and Lord Esher thought this damage too remote. The President, and the majority of the Court of Appeal—Bowen and Lindley, L.JJ.—held that it could be considered. Bowen, L.J. stated the principle thus: "The damages recoverable from a wrongdoer in cases of collision at sea must be measured according to the ordinary principles of the common law. Courts of Admiralty have no power to give more, they ought not to award less. Speaking generally as to all wrongful acts whatever arising out of tort

or breach of contract, the English law only adopts the principle of *restitutio in integrum*, subject to the qualification or restriction that the damages must not be too remote, that they must be, in other words, such damages as flow directly and in the usual course of things from the wrongful act. To these the law super-adds in the case of a breach of contract (or, to speak according to the view taken by some jurists, the law includes under the head of these very damages, where the case is one of breach of contract) such damages 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 its breach. With this single modification or exception, which is one that applies only to cases of breach of contract, the English law only permits the recovery of such damages as are produced immediately and naturally by the act complained of.

A collision at sea caused by the negligence of an offending vessel is a mere tort, and we have only therefore to consider what has been in the particular case its direct and natural consequence. This consequence (in the case of an innocent ship which is disabled by an accident) is that its owner loses for a time the use which he otherwise would have had of his vessel. There is no difference in principle between such a loss and the loss which the owner of a serviceable threshing machine suffers from an injury which incapacitates a machine, or the loss which a workman suffers who is prevented from earning money by the wrongful detention of plant which cannot at once be replaced. A ship is a thing by the use of which money may be ordinarily earned, and the only question in case of a collision seems to me to be, what is the use which the shipowner would, but for the accident, have had of his ship, and what (excluding the element of uncertain and speculative and special profits) the shipowner, but for the accident, would have earned by the use of her. It is on this principle alone that it is habitual to allow in ordinary cases damages for the time during which the vessel is laid up under repair in addition to the cost of the repairs themselves. But this is merely an application of the general principle, and is not the measure in all cases of the loss. It might conceivably, upon the one hand, be the fact that the damaged ship would not and could not have earned anything at all while laid up for repairs, though such a case must necessarily be exceptional. In such circumstances nothing ought to be allowed for demurrage. Upon the other hand, the direct consequences of the accident might be that the injured vessel was necessarily thrown out of her employment, not merely during the period of repair, but for a longer period still. In such a case the loss could not properly be measured by the time taken in repairs alone." It will be noticed that Lord Bowen excludes "uncertain and speculative and special profits which are sometimes described as too remote." This is the reason why fishing vessels are not allowed the profits they might have made on the voyage which the collision prevented them from making, and why in *The Philadelphia* (14 Asp. Mar. Law Cas. 68; 116 L. T. Rep. 794; (1917) P. 101), the claimant was not allowed anything for the fact that if the ship had completed the voyage which she was making at the time of the collision, she would have been in a place at a time when her market value was in fact much higher than it was at the time and place of the collision. Rise or fall of market is generally uncertain and speculative. I understand Lord Herschell, in affirming the decision of the majority of the Court of Appeal, to approve Lord Bowen's language, but to point out that the claimants could not have both the profits lost and demurrage for the days under repair, for this would be to give the same amount twice.

In the case of total loss of the ship the case seems to me quite different. The claimant has lost his ship and is entitled to be paid the value of his ship at the time of the loss, plus interest from the time of the loss, till he receives payment. And the value of the ship is not necessarily limited to the market value of the ship, the price at which it could be sold at the time of the loss. This is well illustrated by the judgment of Lord Gorell in *The Harmonides* (9 Asp. Mar. Law Cas. 354; 87 L. T. Rep. 448; (1903) P. 1). That vessel was a liner of peculiar construction profitably employed in a well-known line; but evidence was filed, and was probably accurate, that if put up for sale she would fetch 16,000*l.*; the owners said that to them, with that profitable line, and as a vessel suited to that line, she was worth 31,000*l.* Lord Gorell said: "The real test is what is the value of the vessel to the owners as a going concern at the time the vessel was sunk." I should add "at that place," for if the vessel had to be replaced at Patras expense and time might have been added to the cost of the vessel replaced.

But if this is the value of the ship to which the claimant is entitled, payable at the time of the loss, I do not see any room for the addition of profits on an existing contract which would have been made but for the loss. Suppose the lost ship is under a ten years' charter, is the claimant to have both the value of the ship as a going concern at the time of the loss, and the profits he would have made under the ten years' charter? The value of the ship is an estimate, or rough capitalisation, of the earning power of the ship for its life. You cannot give both the value of the ship and the profits it would probably earn. As Lord Herschell said in *The Argentino* (*sup.*), this would be giving the same amount twice. The fact that there is a ten years' charter, of course, must be considered in fixing the value of a going concern. It gives more certainty to the value, but is subject to the possibilities that the ship may be lost or the charterer go bankrupt. As Maule, J. remarks in *Reid* v. *Fairbanks* (1853, 13 C. B. 692): "The value of the ship is 3000*l.*, because she is capable of earning money by carrying goods or freight. When you pay a man for his ship you pay him for what it can or may, or shall do to produce profit."

In the present case the registrar has added to the value of the ship roughly 100 per cent. for loss of profit caused by its loss. Now it is to be noticed that this is not a case of a ship under a definite engagement at a fixed rate. The dredger has no charter and no time rate of remuneration. The owner had a profitable contract to do a large constructional work, some part of which required the use of a dredger, but he was under no obligation to employ this dredger; he could have sent her elsewhere and employed another dredger. A dredger was necessary to excavate a trench in which a wall could be built. Payment will be made according to work done, cubic measurement of earth excavated. There is not any time rate of payment for the dredger. This is very different from a profitable charter of the dredger. It is merely part of the plant, with a diver, a floating crane, and other machinery, employed in the performance of a much larger contract for an unseverable work. It is like the shaft of a mill in *Hadley* v. *Baxendale* (1854, 9 Exch. 341, 354), or in *British Columbia, &c., Saw Mill Company Limited* v. *Nettleship*, (3 Mar. Law Cas. (O.S.) 65; 1868, 18 L. T. Rep. 291; L. Rep. 3 C. P. 499), where loss

of or delay to the shaft was not held to involve liability for the loss of profits to the mill, of whose machinery the shaft formed part.

Another marked point of difference between the present case and the ordinary claim for total loss is that the owners adopted a very unusual and extravagant way of replacing the lost dredger. They at first could not afford, had not sufficient money, to pay for another dredger, and hired one at a very high rate compared with the assessed value of the lost dredger. After paying this high rate of hire for a considerable time they then bought the dredger they had hired at a price higher than the ordinary price, because payment was spread over four years. I am not aware that the poverty of the injured person has ever been allowed to increase damages for loss of property before. In cases of failure to deliver goods the measure of damage is the difference between contract and market price. I have never heard it suggested that if the injured person is too poor to pay the market price he can, therefore, increase his damages.

The learned registrar has found that the owners, in their " lack of liquid resources," took reasonable steps to perform their construction contract, and that such steps, and the attendant expenses, were direct and natural consequences of the collision.

Langton, J. treats the dredger as the main item of the owners' plant for the construction contract. Having carefully read the contract, I cannot understand this finding. The contract work largely consists of construction in which the dredger is not employed at all, once the foundation trench has been excavated. He holds the proper test to be what the plaintiff has lost, and whether the sums he has lost are the result of operations properly incurred. But what the owner has lost is his dredger. If the court gives him the value of his dredger at the time and place of the loss as a profit-earning dredger, and gives him interest on that value from the time of the loss till payment, I do not see any room for a further award of profits he has lost because he cannot effectively replace the dredger by reason of his poverty, or because a contract which requires the use of a dredger becomes less profitable because the owner is too poor to replace the dredger on ordinary market terms. I am of opinion that neither sums due to the existence of such a contract, nor extra expenditure due to the owners' poverty, are direct and natural consequences of the collision. Further, to give such sums, in addition to the value of the dredger as defined above, appears to me to be giving the value of the ship twice over, once in the capitalised value of the earnings of the ship, estimated at its present value, once as the extra expense incurred by the loss of the ship, which, in my view, is cured by giving the ship at the time of the loss its value at the time of the loss. If the owner says : " I have lost the ship, give me *restitutio in integrum*," the answer is : " You cannot have the ship back, it is lost, but you have 'its value to you as a going concern.' This restores you *in integrum*."

What, then, is to be done in this case ? The registrar has given the owner a value of the ship, 9000*l*.—half as much again as her original cost to him at Patras, more than half as much again as her insured value. This seems to me an ample measure of the dredger's value as a going concern. If, in addition, the owner is given interest from the time of the loss till the time of payment of the value, he is, in my opinion, replaced in his original condition ; any further payment arises from circumstances which are too remote to be the direct and natural consequences of the loss ; circumstances and profits which are, in the language of Lord Bowen, " uncertain and speculative and special profits."

As to costs, the defendants made no tender or payment into court, and must pay the costs of the reference. They must pay the assessed value of the *Liesbosch*, together with interest thereon from the time of loss to the time of payment. The defendants must have the costs of this appeal, and of the appeal to Langton, J.

Greer, L.J.—In my judgment this appeal must be allowed, and judgment entered as hereinafter stated. With all respect to the learned registrar and the judge, I think they have misconceived and misapplied the rules of law as to the measure of damages recoverable. Their judgments appear to me to be based on the assumption that a plaintiff who has suffered injury by tort is entitled to recover all the damage he has in fact suffered, diminished only to the extent to which he could by reasonable steps reduce such damage. In my opinion the true rule was as stated in his argument for the appellants by Mr. Dickinson. The damages recoverable in an action based on a tort whereby the owner of a chattel has been wholly deprived of it do not differ from the damages recoverable for breach of contract for non-delivery of a chattel, except that in the latter case they may be increased by the application of the second rule in *Hadley* v. *Baxendale* (1854, 9 Exch. 341, 354). In *Cobb* v. *Great Western Railway Company* (68 L. T. Rep. 483, at p. 485 ; (1893) 1 Q. B. 459, at p. 464) Bowen, L.J. states the law as follows : " The law is that the damages must be the direct and natural consequence of the breach of obligation complained of. The law is the same in this respect with regard both to contracts and to torts, subject to the qualification that in the case of the former the law does not consider too remote damages which may reasonably be supposed to have been in the contemplation of the parties when the contract was made." See also the judgment of the same Lord Justice in *The Argentino* (6 Asp. Mar. Law Cas. 348 ; 59 L. T. Rep. 914 ; 13 Prob. Div. 191). It is also well established that the principles which apply at common law to the measure of damage in cases of negligence apply just as much to the ascertainment of damages for negligence in the Admiralty Court as they do in the King's Bench Division. In *The Argentino* (6 Asp. Mar. Law Cas. at p. 351 ; 59 L. T. Rep. at p. 917 ; 13 Prob. Div. at p. 200) Bowen, L.J. uses these words : " The damages recoverable from a wrongdoer in cases of collision at sea must be measured according to the ordinary principles of the common law. Courts of Admiralty have no power to give more ; they ought not to award less. Speaking generally as to all wrongful acts whether arising out of tort or breach of contract, the English law only adopts the principle of *restitutio in integrum*, subject to the qualification or restriction that the damages must not be too remote, that they must be, in other words, such damages as flow directly and in the usual course of things from the wrongful act." And at p. 202 of 13 Prob. Div. he also says : " The questions, therefore, to be inquired into are two : the first, to what extent, if any, the vessel has been thrown out of employment by the accident ; the second, what would have been the fair earnings of a vessel such as the *Argentino* advertised to sail, as was the *Argentino*, on Messrs. Westcott and Laurence's line to Batoum, excluding, as I have said, everything in the nature of uncertain and speculative profits."

In *The Susquehanna* (17 Asp. Mar. Law Cas. at p. 83; 135 L. T. Rep. at p. 458; (1926) A. C. 655, at p. 661, Lord Dunedin says: "There is no difference in this matter between the position in Admiralty law and that of the common law, and the common law says that the damages due either for breach of contract or for tort are damages which, so far as money can compensate, will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act"; and at p. 669 Lord Blanesburgh refers to the rule of the common law "which must be followed in such matters." See also the speech of Lord Sumner in *The Amerika* (13 Asp. Mar. Law Cas. 558; 116 L. T. Rep. 34; (1917) A. C. 38).

If we apply in the present case, as we must, the rules of the common law applicable to damages occasioned by the plaintiffs being deprived by a breach of contract of the possession or use of a chattel, it seems to me that we must exclude from the computation all the losses which the plaintiffs sustained by reason of the fact that they were using and required their dredger for the purpose of performing a very special contract which they had made with the Port Committee of Patras.

The facts in *Hadley* v. *Baxendale* (*sup.*) are conveniently summarised in the 10th edit. of Mayne on Damages, at p. 10: "The plaintiffs owned a steam mill. The shaft was broken, and they gave it to the defendant, a carrier, to take to an engineer as a model for a new one. On making the contract the defendant's clerk was informed that the mill was stopped, and that the shaft must be sent immediately." The defendant delayed its delivery, and in an action for breach of contract the plaintiffs claimed as specific damages the loss of profits while the mill, as a result of delay, was idle. It was held that the defendant was not so liable, he not having been informed that a loss of profits would result from delay, or that the want of the shaft was the only thing that would keep the mill idle. It is quite clear in this case that the loss occasioned by the delay was the actual result of the delay in the circumstances in which the plaintiff was placed at the time of the breach of contract, and the case involves a decision that a result cannot be treated as a natural and direct result of the breach unless it is of a kind which would so result in the ordinary course of things.

What is known as the rule in *Hadley* v. *Baxendale* (*sup.*) is laid down in these terms: "We think the proper rule in such a case as the present is this: 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 either such as may fairly and reasonably be considered 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." The second portion of the test has, of course, as Bowen, L.J. pointed out in the case already mentioned, no bearing on damages for tort. Applying this rule to the present case, I think it would exclude from consideration all the special damages claimed in respect of the loss occasioned to the plaintiffs by their inability to proceed with their contract, those being damages such as would not arise naturally according to the usual course of things from their being deprived of a dredger. This principle was applied in the case of *Gee* v. *Lancashire and Yorkshire Railway Company* (3 L. T. Rep. 328; 6 H. & N. 211) to a case where a claim was made for damages for delay in the delivery of cotton to a cotton mill, which in the circumstances in which the owner was placed at the time resulted in his mill being idle until the cotton was delivered. It was held that the plaintiff's inability to run his mill, though in fact it was the result of the breach, was not either the natural result in the usual course of things, or such as might reasonably have been supposed to have been in the contemplation of the parties.

The common law case which seems to be nearest to the present case is *Horne* v. *The Midland Railway Company* (28 L. T. Rep. 312; L. Rep. 8 C .P. 131). The facts are sufficiently stated in the headnote in these words: "The plaintiffs, being shoe manufacturers at Kettering, were under a contract to supply a quantity of military shoes to a firm in London for the use of the French army at 4*s.* a pair, an unusually high price. The shoes were to be delivered by the 3rd Feb. 1871, and the plaintiffs accordingly sent them to the defendants' station at Kettering for carriage to London in time to be delivered there in the usual course in the evening of that day, when they would have been accepted and paid for by the consignees. Notice was given to the stationmaster (which for the purpose of the case was assumed to be notice to the company) at the time that the plaintiffs were under a contract to deliver the shoes by the 3rd, and that unless they were so delivered they would be thrown on their hands; but he was not informed that there was anything exceptional in the character of the contract. The shoes were not delivered in London till the 4th Feb., and were consequently not accepted by the consignees, and the plaintiffs were obliged to sell them at 2*s.* 9*d.* a pair, which, in consequence of the cessation of the French war, was, apart from the previously-mentioned contract, the best price that could have been obtained for them, even if they had been delivered on the evening of the 3rd Feb. instead of the morning of the 4th." The defendants paid into court a sum which was sufficient to cover any loss which would occur in the ordinary course of things, but the plaintiffs further claimed the loss they had sustained by their inability to use the goods for the purpose of implementing their contract for shoes to be used for the French army. It was held by the majority of the court that this was not recoverable, as it was not such damage as might reasonably be considered as arising naturally from the defendants' breach of contract. Lord Blackburn (then Blackburn, J.) in the course of his judgment, says: "If a man contracts to carry a chattel and loses it, he must pay the value, though he may discover that it was more valuable than he had supposed. But when the damages sought to be recovered are not those which in the ordinary course of things would naturally arise, but are of an exceptional nature, arising from special and peculiar circumstances, it is clear that in the absence of any notice to the defendant of any such circumstances such damages cannot be recovered."

It is to be observed that in all these cases the damages which were sought to be recovered, and were disallowed, were damages which in fact the plaintiff suffered in the circumstances in which he was in fact placed at the time when the wrongful act was committed which deprived him of the use of his chattel, but it was held that as those damages were of an exceptional nature arising from special and peculiar circumstances, they were not recoverable.

It seems to me that all the damages claimed by the plaintiffs arising out of the hindrance occasioned to them by the loss of their dredger in performing

their contract with the Patras Port Committee were, to use the words of Lord Blackburn, of an exceptional nature arising from special and peculiar circumstances and they are irrecoverable in an action of tort, and would only be recoverable in an action for breach of contract if the party breaking the contract had notice at the time of the constract that such damages would be the probable result of a breach.

So far I have dealt only with the case at common law. I do not think there is anything in the decisions in the Admiralty Court inconsistent with the rule in *Hadley* v. *Baxendale* (*sup.*). If a shipowner be deprived of a ship which has a special value to him because he has got the benefit of a charter at a good rate of freight, and is not entitled to substitute another vessel to perform that charter, the damage which he suffers by losing his ship, and therefore losing his charter-party freight, is damage which arises naturally in the usual course of things, because it is the usual course of things for vessels to be chartered. The vessel's engagements at the time of the loss are part of the value of that vessel to the owner. In the strict sense of the words a vessel like a dredger has not got a market value. You cannot go into the market on any day and buy an exact substitute for it, especially if you lose it when it is in the middle of the Mediterranean Sea. If a seller of goods which cannot be obtained in the market fails to perform his contract, the buyer may use a sub-contract of sale which he has made at an enhanced price as evidence of the value to him of the article which by the seller's breach of contract he has been deprived of: (see *Borries* v. *Hutchinson*, 11 L. T. Rep. 771 ; 18 C. B. (N. S.) 445). It is clear that if a vessel which has been destroyed or delayed by the negligence of a defendant is under charter, what it would earn under the charter may be taken into account in estimating the loss occasioned to the owner by the temporary or permanent loss of his vessel : (see *The Philadelphia*, 14 Asp. Mar. Law Cas. 68 ; 116 L. T. Rep. 794 ; (1917) P. 101 ; *The Argentino*, 6 Asp. Mar. Law Cas. 433 ; (1889) 59 L. T. Rep. 914 ; 14 App. Cas. 519).

It seems to me that the right method of estimating the damages in this case is that the tribunal should ascertain the value to the owner of his vessel at the date of the loss, taking into account that it is a tool of his trade ordinarily used for the purposes of profit, and taking into account if such be the fact, the existing engagements of the owner with respect to the particular vessel, but excluding, to use the words of Bowen, L.J. everything in the nature of uncertain and speculative profits. The above method of estimating damages was the one which I think was used by Gorell Barnes, J. in *The Harmonides* (9 Asp. Mar. Law Cas. 354 ; 87 L. T. Rep. 448 ; (1903) P. 1), and by Sir Francis Jeune in *The Kate* (8 Asp. Mar. Law Cas. 539 ; 80 L. T. Rep. 423 ; (1899) P. 165), and the one which ought to have been adopted in the case under appeal. I do not think there is anything in the case of *Polemis* v. *Furness Withy and Co.* (15 Asp. Mar. Law Cas. 398 ; 126 L. T. Rep. 154 ; (1921) 3 K. B. 560) inconsistent with the above view. That case was concerned with the direct consequences of the wrongful act which occurred immediately after the act of negligence complained of. It was not concerned with consequences arising out of contracts made by a shipowner of a special nature giving rise to uncertain and speculative profits.

In my judgment the plaintiffs will be adequately compensated in accordance with the rules of law applicable to his claim for damages if he receives the sum of 9000*l*. as the value to him of the dredger at the date of its loss, together with interest at 5 per cent. to the date of judgment. I think the appeal should be allowed, the judgment set aside, and judgment entered for the sum arrived at by adding to the 9000*l*. 5 per cent. interest up to the date of this judgment, and that the appellants should be allowed their costs of the appeal to the judge, and of the appeal from the judge to this court.

Where I think the learned judge missed his true course in his very breezy judgment was that he paid no attention to the two principles which I have stated in the early part of this judgment, and seems to have thought that in questions relating to the measure of damage the Admiralty Court might pursue a course of its own.

Slesser, L.J. — I have read the judgments of Scrutton, L.J. and Greer, L.J. in this case. I agree with their conclusions and the reasons for those conclusions by them stated, which I do not repeat.

In my opinion it is impossible to say, in the circumstances of this case, that more should be taken into account as the direct, natural, and unexceptional consequences of the defendants' wrongful acts than the actual value to the plaintiffs of the dredger as such at the date of its loss, together with interest as stated by Scrutton, L.J. The appeal, consequently, must be allowed on the terms stated.

Appeal allowed.

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

Solicitors for the respondents, *Wm. A. Crump* and *Son.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

December 10, 11, 14 *and* 15, 1931.

(Before WRIGHT, J.)

C. Wilh. Svenssons Travaruaktiebolag v. Cliffe Steamship Company. (*a*)

Charter-party — Exception clause including "accident to hull" — Deck-load of timber "at charterer's risk"—Loss of deck cargo while loading—Negligence of master—Seaworthiness—Accident to hull—Whether shipowners protected—Claim for short delivery.

Under a charter-party the defendants' steamship was to proceed to specified ports and load pit props for delivery at one port of the East Coast of England as ordered by the charterers. Under the charter-party a full deck-load of props was to be carried "at charterers' risk," not exceeding what could be reasonably stowed or carried. The exception clause in the charter-party included "accidents to hull" even when occasioned by the negligence of the master or other persons employed by the shipowner, or for whose acts he was responsible. The steamship having loaded part of her cargo at one port proceeded to another port to complete loading. Some three slings remained to be placed on deck but owing to the vessel having a list to port the master, in spite of misgivings,

(*a*) Reported by R. A. YULE, Esq., Barrister-at-Law.

allowed them to be put aboard. The vessel then took a list to starboard when the deck cargo shifted, broke the bulwarks, and, then the vessel listing to port, the same thing happened on the port side, whereby a considerable part of the deck cargo was lost by falling overboard and being carried out to sea. The plaintiffs claimed damages for short delivery and alleged that the vessel was not seaworthy at the moment of the accident.

Held on the evidence, that the loss was due to the negligence of the master.

Held, however, that the ship was seaworthy to receive the cargo, and as the process of loading had not been completed there was no breach of warranty of seaworthiness.

Held, further, that, though the words in the charter-party "at charterer's risk" did not cover negligence on the part of the defendants or their servants, the words must be read in conjunction with the exception clause, and the defendants were protected by reason of an "accident to the hull" due to negligence, and there must be judgment for the defendants.

Action tried in the Commercial List without a jury.

The defendants were the owners of the steamship *Headcliffe.* Under a charter-party dated the 3rd Aug. 1929 the plaintiffs chartered the vessel, which was described as being of a carrying capacity 1550 cub. fathoms, 10 per cent. more or less, to "proceed to one or two places in the Skelleftea district as ordered by the charterers," and there load a cargo of pit props and deliver the same at one port on the East Coast of England, as ordered. By the terms of the charter-party the vessel was to be "provided with a deck-load, at full freight, at charterers' risk not exceeding what she can reasonably show or carry." The exception clause, clause (11), provided: "The act of God, enemies, restraints of princes and rulers, and perils of the sea excepted. Also fire, barratry of the master and crew, pirates, collisions, strandings and accidents of navigation, or latent defects in, or accidents to, hull and (or) machinery, and (or) boilers, always excepted, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other persons employed by the shipowner, or for whose acts he is responsible, not resulting, however, in any case from want of due diligence by the owner of the ship, or by the ship's husband or manager." The vessel loaded part of her cargo at Bjornsholmen and proceeded to Burea to ship the balance of the cargo. It was at Burea that the accident happened whereby a substantial part of the cargo was lost overboard and being carried out to sea could not be recovered. At the time of the accident the vessel had an under-deck cargo of 987 cubic fathoms and a deck-load of 514 cubic fathoms. The captain came aboard when the loading was nearly finished, on the 2nd Sept. 1929. At that time the vessel had a slight list to port—2 or 3 degrees—and the captain was doubtful whether he ought to take in more cargo. There were, however, some props lying alongside which had been rafted down in the ordinary course, amounting to three or four slings of about 1 ton each which the stevedore asked should be taken aboard and put on the starboard side. The captain acceded to the request and went into his cabin, and, while he was in his cabin, where he had been joined by the chief officer, the ship took a list to starboard and they heard the sound of timber falling overboard. What had happened was that the ship had taken a list to starboard, possibly hung for an appreciable time, and then the bulwarks in the forward part of the ship, where the loading was being completed, carried away on the starboard side and a large quantity of cargo was shot overboard. The ship then listed to port and the same thing happened on that side, the bulwarks on the port side carried away and cargo shot overboard. The cargo shot overboard was carried out to sea and lost. The charterers claimed for the value of the cargo so lost, and the questions were whether the cargo was lost by the unseaworthiness of the vessel, or, in the alternative, by the negligence of the master in the conduct of the loading; and, in either event, what was the position under the charter-party and the charter-party exceptions.

Van den Berg, K.C. and *H. Atkins* for the plaintiffs.

Le Quesne, K.C. and Sir *Robert Aske* for the defendants.

Wright, J., after stating the facts and reviewing the evidence, held that the accident was due to the negligence of the captain in the conduct of the loading of the deck cargo, and that the ship was unseaworthy, owing to the deck cargo being excessive. His Lordship continued:

What, then, are the consequences? In this charter-party there is no exception of unseaworthiness and, therefore, if my finding that the ship was unseaworthy in the sense that she was at the moment in question unfit safely to load and to carry the cargo which was put on board amounts to a finding that there was a breach of warranty of seaworthiness, the plaintiffs are entitled to recover. But the warranty of seaworthiness is not a continuing warranty. There is no suggestion here that at the beginning of the loading at Burea the ship was not. The trouble which arose followed from acts done in the course of loading at Burea, and those acts in no way affected the fulfilment of the initial warranty when the loading began. It is, however, contended by Mr. Van den Berg that at the moment of the casualty a new stage had begun—namely, the stage which comes on completion of loading—and that the vessel, having entered upon that stage, for this purpose was unseaworthy, because the conditions which I have found constituted unseaworthiness were in existence at the beginning of that stage and, therefore, that the plaintiffs must recover. That there are stages of unseaworthiness on a voyage is well established. In particular, it has been held that when a vessel is loading in port the first stage is on the beginning of the operation of loading, and the vessel must be at that stage fit to receive and hold the cargo in the conditions existing at the place of loading. When the loading is completed a new stage begins. Whether the next stage is one which involves the fitness of the vessel with the cargo on board to proceed on her voyage, or whether before that stage begins there is an intermediate stage at the beginning of which the vessel, though not fit to proceed on her voyage in the open sea, is still fit either to lie in the port or to proceed down some sheltered waters before she enters on the open sea must, I think, depend on the circumstances of the case. If it were necessary here to decide the question, having regard to the fact that this vessel was loading in an open roadstead, which, at least in certain winds, might be very dangerous, and would proceed to sea at once when the loading was

completed, it seems to me that the intermediate stage of waiting, or of proceeding in sheltered waters ought not to be held to exist, because it appears to me undesirable to multiply unduly stages of unseaworthiness unless the circumstances of the case require it. But there can be no doubt that there is, in a case like this, for the purpose of the warranty of seaworthiness, the stage which begins at the commencement of the loading and ends on the completion of loading, whereupon a new stage for the warranty of seaworthiness will begin.

The latest case on that point is *Reed and Co.* v. *Page, Son, and East Limited* (17 Asp. Mar. Law Cas. 231; 137 L. T. Rep. 77; (1927) 1 K. B. 743), and an earlier case is *Wade* v. *Cockerline* (1904, 10 Com. Cas. 47; affirmed (1905) Com. Cas. (C. A.) 115). In *Wade* v. *Cockerline*, Vaughan Williams, L.J. states the proposition, perhaps tentatively, in this way (10 Com. Cas. at 120): "It may be that there is a warranty of fitness of the ship to receive the cargo, and it may be that, after the goods have been received and have been stowed, before the ship sails away, there is a warranty that the ship is in such a condition as to be fitted safely to hold and keep the goods which have been stowed." Vaughan Williams, L.J. did not consider it necessary to express a definite conclusion on that point, because, as he went on to say, "in my opinion it is perfectly plain (in fact it is admitted) that this ship was in a condition which made her perfectly fitted for the reception of this cargo, and in my judgment, the accident which occurred, and which resulted in the loss of part of the timber which was being loaded, was an accident that occurred in this stage of the transaction—that is to say, in the course of the reception of the goods; and it matters not for the purposes of this decision what may be the warranty at the next stage, that is, at the stage when the stowed goods have to be held and taken care of after they have been stowed." He goes on to say: "In my judgment it is perfectly plain that she was fitted to receive this cargo. And it is equally plain that the operation of reception had not come to an end, and that we need not, therefore, trouble ourselves as to what warranties would arise at subsequent stages in the transaction." In *Reed and Co.* v. *Page, Son, and East Limited* (*sup.*), the principles which are stated tentatively in *Wade* v. *Cockerline* (*sup.*), are stated clearly and affirmatively by the Court of Appeal, where it was held, in the words of Scrutton, L.J. (17 Asp. Mar. Law Cas. at p. 240; 137 L. T. Rep. at p. 86; (1927) 1 K. B. at p. 743) "that the barge was unseaworthy as a barge from the time loading finished, unfit to lie in the river, and still more unfit to be towed."

The question here is whether the case falls within *Wade* v. *Cockerline* or *Reed and Co.* v. *Page, Son, and East*. That depends on the question whether the stage had been reached when the loading was completed. It has been contended very strenuously by Mr. Van den Berg for the plaintiffs, that that stage had been reached because, in his submission, loading for this purpose means simply the reception of the goods on board, and the moment the last parcel of cargo which it is intended to load is placed on the vessel the loading is completed notwithstanding the fact that some stowage may be necessary and may commonly be done. I do not think that that is the law. I think that in a case like this, and indeed in most cases, the mere reception or dumping down of the cargo on the ship does not involve the completion of loading, because I think the operation of loading involves all that is required to put the cargo in a condition in which it can be carried. In this case the operation of stowing the cargo was comparatively simple. The pit-props came up from the water in the ship's slings and were slung on to the deck. Then the sling was released, but before it was released, the sling was put in such a position that the props would fall in the proper direction—that is, lying fore and aft—and would more or less fall into their places. Some operation of stowing, however, was necessary in respect of each such sling—some props would not fall in the right position and would have to be straightened out, and the props generally would have to be arranged so that they would lie as closely as possible together with their round sides as neatly in contact as could be achieved. That was a small operation, no doubt, but it was done sling by sling before the next sling could come on board, and it had to be done in respect of the last load. It might only take one, two, three, or four minutes in respect of each sling load, but it was, in my judgment, a necessary part of the operation of loading. There has been some debate in and on the evidence whether that operation had actually been completed. On the whole, I am convinced that the operation of stowing the last sling load had not been performed, and, therefore, that the loading was not completed at the moment the accident happened. Indeed, it would be extremely artificial to hold that this accident occurred after the warranty that the ship was fit to receive and load the cargo had expired because, in my judgment, what caused the accident and all the trouble was the putting of these extra sling loads on board, and, in particular, the last sling load. It was the last straw, and it caused the ship, unstable as she was, to adopt the change of motion which led to the casualty. It seems to me that that happened, and must have happened, while the operation of loading was still *in fieri*. If it were necessary to decide the matter, but it is not, I should also hold that on the facts of this case the lashing was a necessary part of the operation of loading. The ship, as I have said, was lying in an open roadstead. Though the lashing is done by the crew, it is done immediately after the stevedores have finished their work—the crew were actually engaged in lashing the after-deck cargo when this accident occurred—and I think that it is an integral part of the operation of loading in the case of a vessel situated like this and lying with her deck cargo in an exposed roadstead. But it is not necessary to decide this point because I am satisfied that the operation of loading had not been completed, and that the second stage for the purpose of the warranty of seaworthiness had not been reached. I hold, therefore, that there was no breach of the warranty of seaworthiness, and the plaintiffs are not entitled to recover on that ground.

I have now, therefore, to consider the alternative claim based on the negligence of the officers of the ship. I have found that there was such negligence, and I must decide what effect is to be given to the exceptions in the charter-party. There are two exceptions to be considered. There is the exception "a deck-load at charterer's risk," and there is the series of exceptions contained in clause 11. Mr. Le Quesne (for the defendants) has contended that he is entitled to a wider protection by the former of these exceptions, and has submitted a very careful argument on that point. He relies on certain authorities, in particular on the language used by Bowen, L.J. in *Burton and Co.* v. *English and Co.* (5 Asp. Mar. Law Cas. at p. 189; (1883) 49 L. T. Rep. 768, at p. 769; 12 Q. B. Div. 218, at p. 222), who there says: "Now the words we have to construe are these: after providing in the earlier part of the charter-party that

the 'ship is to load from the factors of the merchant a full and complete cargo,' &c., &c., it states that 'the steamer shall be provided with a deck load if required at full freight, but at merchant's risk.' Now that is clearly a stipulation in favour of the shipowners, and *primâ facie* it seems to me meant to relieve them from the responsibility of some act of their servants by which they would otherwise be bound, and from the incidents of some risk which otherwise would fall upon them as carriers and under their contract of carriage. It would, I think, clearly cover improper jettison, also it would cover negligence of the captain or crew, occasioning stranding or collision, and any other acts, if any there be, of the servants of the shipowners for which they would otherwise be responsible." That is a dictum, because it was not necessary for the decision. The claim in that case was a claim by the charterers against the shipowners for a general average contribution, and it was held by the Court of Appeal that that right of contribution was not affected by those words of exception. But the dictum was, I think, accepted as giving the construction of these words in *Wade* v. *Cockerline* (*sup.*), by Kennedy, J., who says: "The true meaning of clauses of this kind in charter-parties is always so far open to question that I hesitate to use any expression of strong confidence with regard to my own view, but it seems to me, as at present advised, that if it were necessary, to decide the point there is no reason why I should not hold that the words 'at charterers' risk' cover the loss." Kennedy, J., however, goes on to say: "I am content to rest my judgment upon clause 7"—which is, substantially, if not entirely, identical with clause 11 in this case. He adds: "It seems to me that this clause, apart from any other provision of the charter-party, affords a complete defence for the defendants." When the case went to the Court of Appeal (10 Com. Cas. 115) there was an elaborate argument of this clause by Mr. Hamilton, as he then was, who contended that clause 7 did not apply to the deck cargo at all, and that the words "at charterers' risk" had to be construed as subject to a proviso that they were meant only to apply if the ship was not a cause of damage by negligence, especially as negligence was expressly dealt with in clause 7 of the charter-party. The Court of Appeal do not seem to have given any opinion on this argument but, like the trial judge, they decided the case on the express terms of clause 7, which they held applied. The learned reporter in his headnote says: "*Semble*, the owners were also protected by the words 'at charterer's risk,'" but I think it difficult to find that in the judgments. The argument of Mr. Le Quesne was based, apart from arguments of principle, on these authorities, where, in no instance, was the opinion expressed necessary to the decision of the case. Before I can accede to the argument I must take into account various authorities in the main, if not entirely, subsequent to these decisions relied on by Mr. Le Quesne. It is quite clear, in my judgment, on the authorities as they now stand, that the words "at charterer's risk," standing alone and apart from any other exception in the charter-party, do not excuse the shipowner in the case of a loss due to the breach of warranty of seaworthiness. That, if it needed authority, is clearly laid down by the Court of Appeal in *The Galileo* (12 Asp. Mar. Law Cas. 461, 464; 110 L. T. Rep. 614; (1914) P. 9), and I do not find any reason to qualify that conclusion by anything that I find in the decision of the same case in the House of Lords (12 Asp. Mar. Law Cas. 461; 111 L. T. Rep. 656; (1915) A. C. 199). The words "at charterer's risk" would clearly also not apply to damage occurring after a deviation. These limitations on the apparent generality of the words are, I think, too clear to need further discussion, and I think that the words, standing by themselves, have also to be read as limited to losses and damage where there has been no negligence on the part of the shipowner or his servants. That is clearly stated by Bankes and Scrutton, L.JJ., sitting as a Divisional Court in *Mersey Shipping and Transport Company* v. *Rea* (1925, 21 Ll. L. Rep. 375), and is deduced from the principles well established and laid down in the Court of Appeal in *Price and Co.* v. *Union Lighterage Company* (89 L. T. Rep. 731; (1904) 1 K. B. 412), Mr. Le Quesne, however, has argued that, though that is so if the clause stands by itself, yet, if there is an exception clause—such as clause 11 here and clause 7 in *Wade* v. *Cockerline* (*sup.*)—then the principles stated by Bowen, L.J., in *Burton and Co.* v. *English and Co.* (*sup.*) must be applied, and the words must be construed as giving some wider extension to an exception of negligence. For that he cites the authorities to which I have referred, and if those authorities were not simply matters of observation I should feel bound to follow them. But as they are matters of observation, it seems to me, applying the principles which I find in the authorities, I must hold that this argument fails and that the words "at charterers' risk," whether they are found alone or whether they are found in conjunction with an exception clause, such as clause 11 here, do not in themselves contain any exception of negligence. If they were to be construed in their isolation as involving an exception of negligence, then that exception would have to be construed along with the other exception clause, clause 11, because the general exceptions of the charter-party apply to a deck-cargo, where, as here, the cargo is carried with authority either express or by custom. If, on that view, the clauses were to be construed, the one as containing a wider exception of negligence and the other as containing a narrower exception of negligence, then, on the principle of *Elderslie Steamship Company* v. *Borthwick* (10 Asp. Mar. Law Cas. 24; 92 L. T. Rep. 274; (1905) A. C. 93), the shipowner would be only able to avail himself of the exception which was less beneficial to himself. On the other hand, if the words "at charterers' risk" are to be construed as subject, among other things, to a limitation of negligence, then I see no difficulty in reading those two clauses together, because the narrower clause is not a cutting down a positive provision, it can be read in connection with the words "at charterers' risk," and they can both be read so that the later clause (clause 11) receives full effect. Nor has clause 11 to be cut down by reason of the fact that the general clause "at charterers' risk" contains no exception of negligence, because that is not a matter of express language, but merely a matter of implication and the application of the ordinary rules of construction.

It seems to me, therefore, that the true position here is that the words "at charterers' risk" have to be read along with clause 11, and that the effect of reading the two together is to enable the shipowners to rely on clause 11, but that that is the full extent of the exception available for them. That is exactly the conclusion arrived at in *Wade* v. *Cockerline* (*sup.*) in the actual decision, and, therefore, I arrive at the position in which I simply follow that and apply that notwithstanding the arguments which have been put forward. A similar view has been adopted by Roche, J., in

Herbert Whitworth Limited v. *Pacific Steam Navigation Company* (1926, 25 Ll. L. Rep. 573).

There still remains the question whether clause 11 protects the shipowners in the circumstances of this case against the consequences of the negligence of their servants. The words relied on by Mr. Le Quesne here are primarily " accidents to hull," and I think he is entitled to succeed on those words. What happened here, in my judgment, was that the cargo was lost by reason of the carrying away, first of the starboard, and then of the port bulwarks, as the ship rolled from side to side. The impact of heavy timber carried away these protections, and the cargo shot overboard, and it seems to me that there was an accident to the hull just as there would have been if the cargo had escaped overboard through an aperture made by a collision. In this case the break in the protecting fabric of the hull was made by the cargo itself, and was due to the ship heeling over by reason of the negligent way in which she was being loaded. I hold, therefore, that the shipowner was protected by those words, and although the present case is not precisely covered by the decision of the Court of Appeal in *Wade* v. *Cockerline* (*sup.*), where the same words were held to apply, I think the circumstances are so analogous as to bring this case within the same principle. The defendants, therefore, are protected by those words.

That renders it unnecessary for me to consider further the submission of Mr. Le Quesne, which I merely mention so that, if necessary, it may be open to him, namely, that the words " accidents of navigation " apply. There is a good deal to be said for that argument, but, in my judgment, the word " navigation " in this connection ought to be limited to matters done in the handling of the ship, in what is naturally called navigation, that is to say when she is under weigh.

For the reasons I have stated, I think that the plaintiffs are met by the exception clause. The defendants are entitled to succeed on it, and there will be judgment for them with costs.

Judgment for defendants.

Solicitors for plaintiffs, *Denton, Hall,* and *Bergin* ; for the defendants, *Botterell* and *Roche,* for *Botterell, Roche,* and *Temperley,* Newcastle-on-Tyne.

Supreme Court of Judicature.

COURT OF APPEAL.

Jan. 12, 13, 14, 15, 18 ; *March* 17, 18 ; and *April* 11, 1932.

(Before SCRUTTON, LAWRENCE and SLESSER, L.JJ.)

China Navigation Company Limited v. Attorney-General. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Crown—Piracy in Chinese waters—Protection for British ships—Armed guards supplied by Government—Payment claimed by Crown—Liability of shipowners.

There is no legally enforceable duty on the Crown to protect British subjects from danger in foreign parts and to provide armed guards for British ships. Shipowners who require those services must pay for them if the Crown requires them to pay. The payment, when made, is sanctioned and controlled by Parliament in the Appropriation Act under the system of appropriations in aid under the Public Accounts and Charges Act 1891.

APPEAL by the plaintiffs from the decision of Rowlatt, J. dated the 19th May 1931.

The statement of claim set out that the plaintiffs were a British company incorporated and registered under the Companies Acts carrying on a shipping business in Far Eastern waters and conveying on their ships a large quantity of valuable cargo and large numbers of Chinese passengers. For many years there had been a great deal of piracy in the China seas, and the Crown had recognised that protection was necessary for these ships, and armed guards had been put on board by the Crown. By a letter written by the Admiralty on the 18th March 1930 the plaintiffs were informed that regular guards would only be supplied if paid for by the shipping companies in full. In reply the shipowners said they must under the circumstances accept guards from His Majesty's forces to be paid for in full, but did so under protest. The plaintiffs then brought an action against the Attorney-General claiming a declaration that the stipulations for the provision of protection against, and for the prevention of, piracy, sought to be imposed upon them by the letter of the 18th March 1930, were illegal and unenforceable against the plaintiffs and void ; further, that the plaintiffs were under no obligation to make any of the payments to or for the use of the Crown for which the stipulations provided ; and further, that so long as and whenever in the view of the Crown such protection was required, the plaintiffs were entitled to enjoy the same without making any specific payments therefor. By his defence the Attorney-General informed the court that His Majesty was not under any duty to provide armed guards or to use his naval or military forces for the purpose of preventing the outbreak of internal piracy on British ships ; and that certain armed guards had been from time to time provided on the request of shipping companies upon the terms that the whole cost thereof should be paid by the shipping companies, including the plaintiffs.

Rowlatt, J. held that the action was misconceived, and gave judgment in favour of the Crown.

The plaintiffs appealed.

Sir *Leslie Scott,* K.C. and *Valentine Holmes* for the appellants.

Sir *Thomas Inskip,* K.C. (A.-G.), Sir *William Jowitt,* K.C. ; Hon. *S. O. Henn Collins,* K.C., and *Wilfrid Lewis* for the respondent.

Cur. adv. vult.

Scrutton, L.J.—An English shipping company carrying passengers and goods on the coast of China desires protection from the British military forces against what may be called " internal piracy." It receives for payment large numbers of Chinese passengers. Some of them coming on board under pretence of being passengers, but with the intent of robbery, during the voyage attack and overpower the ship's officers and rob the ship. Various means have been suggested for meeting this danger. For some time under Hong Kong Ordinances the local police supplied Indian guards for which the shipowners paid ; but the shipowners

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

came to the conclusion that such guards were inefficient. The British authorities suggested convoy by naval forces, but the owners of fast ships objected that their operations were handicapped by the slow pace of the convoy of inefficient ships. The local authorities favoured a grille system, which might enable armed officers to defend themselves in a kind of fortress till assistance arrived; but the shipowners argued that the grille, if strictly worked, interfered with the working of the ship, and, if worked with less rigid precautions, was of no use. The system then tried was to put a small military guard of British soldiers in each ship; but the British forces in the locality were not numerous enough to supply a guard for each ship. Some 200 British ships were concerned, and the appellants calculated that they alone wanted 200 men. At first the British authorities provided free such soldiers as they did provide, though in some cases the shipowners furnished the food. Ultimately, after the highest authorities had been consulted, by a letter of the 18th March 1930, the shipowners were informed at first that regular guards would only be supplied if paid for by the shipping companies in full. By a letter of the 26th March 1930, the shipowners said they must, under the circumstances, accept guards from His Majesty's forces to be paid for in full, but did so under protest. The Government required the companies, before guards were supplied, to give a written assurance of agreement to the conditions as to cost and liability on the terms of a document of the 28th March 1930, and payments were made accompanied by letters similar to that of the 19th June 1930.

The shipowners now bring, not a petition of right to recover the money paid, as paid under illegal duress, but an action against the Attorney-General for four declarations alleging in substance that the Crown has no authority to demand money for providing protection against piracy, the shipowners being entitled to require the Crown to provide the necessary protection without payment. Rowlatt, J. decided in favour of the Crown, and the shipowners appeal.

The argument before this court took rather a different course from that before the judge below. As I understand, the argument below was mainly that the Crown was under a duty to supply protection and could not demand money payments for performing their duty. The argument begins with the very general statement in *Calvin's* case (4 Co. Rep., p. 8): "For as the subject oweth to the King his true and faithful ligeance and obedience, so the sovereign is to govern and protect his subjects," which in turn is founded on a passage in Glanville as to the relation between the landlord and his tenant by homage. Henry II. would, I think, have been surprised to hear that, if his tenant went to China, the King was bound to follow and protect him. The argument then relied on the authorities cited by Atkin, L.J. in his dissentient judgment in *Glamorgan County Council* v. *Glasbrook Brothers* (131 L. T. Rep. 322; (1924) 1 K. B. 879), such as *Dew* v. *Parsons* (2 B. & Ald. 562), *Morgan* v. *Palmer* (2 B. & C. 729), and *Steele* v. *Williams* (8 Ex. 625), where public officials demanded fees not authorised by Parliament for performing their duty. The argument also relied on the post-War cases in which controllers, who had the duty to grant licences, affixed to them conditions of payment not authorised in the statutes appointing them; see *Attorney-General* v. *Wilts United Dairies Limited* (127 L. T. Rep. 822) as to the Food Controller; the case of the Shipping Controller, *Brocklebank (T. and J.) Limited* v. *The King* (16 Asp. Mar. Law Cas. 415; 132 L. T. Rep. 166; (1925) 1 K. B. 52); and also *Southwark Borough Council* v. *Partington Advertising Company* (3 L. G. R. 505). Rowlatt, J. distinguished these cases as relating to persons who had a duty legally enforceable, whereas there was no duty legally enforceable against the Crown to afford protection, especially in foreign countries. Indeed, counsel for the shipowners agreed that the courts could not control or review the discretion of the executive as to the method in which the Crown should afford protection, if any, but argued that, if the Crown did afford protection, it must be because it was necessary, and for necessary protection no payment could be required.

I entirely agree with the view of Rowlatt, J. that there is no legal duty on the Crown to afford by its military forces protection in foreign parts of British subjects. A missionary, in self-sacrificing devotion to his religious views, goes without the consent of the Crown into savage countries inhabited by tribes who strongly object to the missionary denouncing their religion. Has the Crown any duty to follow and protect the missionary and send armed forces to rescue him from his self-imposed danger? A shipowner without the assent of the Crown trades for purposes of his own profit in neighbourhoods inefficiently policed by foreign governments; for his profit he takes on board large numbers of foreign passengers going on the high seas, or up a navigable river, to a foreign port. He is unable to control these foreign passengers or guarantee their peaceful intentions. Has the Crown a legal duty to protect the shipowner against the criminal action of the passengers whom the shipowner himself has invited aboard? It is said, on the one hand, that a British ship on the high seas, or on the Yangtse, is British territory, and that the Crown must protect British subjects in British territory; on the other hand, that the protection asked is against anticipated danger which may never occur and which results from the act of the shipowner himself in taking evilly disposed passengers on board, and not against actual danger in existence.

Counsel for the shipowners used the same dilemma which Atkin, L.J. unsuccessfully used in *Glasbrook's* case (*sup.*). He says (131 L. T. Rep. at p. 329; (1924) 1 K. B. at p. 899): "If the request [for special protection] is one which is improper, they should not comply with it. If they do comply with it, they accept it as a proper means, though possibly not the best means of performing their duty." The majority of the House of Lords objected to being impaled on this dilemma. Lord Cave, L.C. said (132 L. T. Rep. at p. 613; (1925) A. C. at p. 279), after reading the dilemma: "With great respect to the learned Lord Justice I am disposed to think that this reasoning rests on an ambiguous use of the word 'duty.' There may be services rendered by the police which, although not within the scope of their absolute obligations to the public, may yet fall within their powers, and in such cases public policy does not forbid their performance." Lord Finlay, after again citing the passage of Atkin, L.J., says (132 L. T. Rep. at p. 616; (1925) A. C. at p. 287): "I think that this argument, like most arguments put in the form of a dilemma, fails to cover the whole ground. There was no duty on the police to give the special protection asked for, but it does not follow that it was their duty not to give it." In the same way the King, as head of the Army, may think this a way of affording protection which, in view of other calls on the Army, he is not able to afford except on the terms that those who ask for this special and

extravagant form of protection for enterprises which they themselves have selected without any authority from the King shall pay for the protection that they want for the dangerous enterprises which they themselves have chosen to enter upon for their private profit. Because every jeweller who leaves valuable jewelry at night protected only by a plate-glass window against smash-and-grab raids is in danger of robbery, are the police bound to keep a policeman outside every jeweller's shop, or can they say: "If you want this kind of individual protection, you, the individual, must pay for it"? Because every owner of a motor car who uses the street as a garage and leaves his car unprotected runs the risk of losing it, are the police under a legal duty to keep a policeman in charge of every car which the owner has left in self-created danger, or may the police authorities say that if this kind of special protection is wanted and can be afforded the individual must pay for it? The House of Lords accepted the second alternative in *Glasbrook's* case (*sup.*).

In my opinion, there is no legally enforceable duty to protect British property from danger in foreign parts. The remedy, if any, is pressure brought by Parliament on Ministers either to take diplomatic action or otherwise to protect British subjects. Britons fortunately are enterprising people accustomed to look after themselves; to suggest a duty on the British Government to follow adventurous Britons all over the world into places where their personal wishes or adventures have taken them and to protect them from the difficulties into which they have got themselves, does not represent a legal duty of any kind.

Before this court, while the question of duty to protect as correlative with allegiance was argued, more stress was laid on the argument that the Crown had no authority to demand payment for the use of its armed forces. Rowlatt, J. did not deal with this argument, but treated what he called "using the forces for reward" as a matter to which no objection could be taken. The important question was thus raised in this court as to the exact powers of the King as head of the Army, whether his Majesty by his prerogative could regulate the Army as he pleased, so far as he was not expressly restrained by the Army Act, or by the financial provisions of the Appropriation Act, or whether the position was not that the King as head of the Army could only incur such expense and take such action as was authorised by statute, and especially could not demand money for protection afforded by his armed forces, which was said to be imposing a charge on the subject without the authority of Parliament. But, if there was no duty to afford anticipatory protection in foreign parts, no charge was imposed on the subject, because he was not bound to accept the protection, and need not pay money unless he asked for protection, which the Crown was under no duty to afford him. I am reluctant to discuss the matter under the head of "Prerogative," because, as Professor Dicey said, the word introduces the political controversies of an earlier age as to whether the Sovereign had some power which could not be superseded, regulated, or abolished by Act of Parliament. Professor Dicey treats the prerogative as "the name for the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the King himself or by his Ministers. Every act which the executive Government can lawfully do without the authority of the Act of Parliament is done by virtue of the prerogative." Now, it is clear that there is a wide margin of executive acts done by the King or his Ministers in relation to the administration of the Army which the courts of law will not interfere with or control. The Statute Law Revision Act of 1863 left unrepealed that part of the preamble of the Act of 1660 (13 Car. 2, c. 6) which recited that "within all his Majesties realmes and dominions the sole supreme government command and disposition of the Militia and of all forces by sea and land and of all forts and places of strength is and by the lawes of England ever was the undoubted right of his Majesty and his Royall predecessors Kings and Queenes of England and that both or either of the Houses of Parliament cannot nor ought to pretend to the same." Lord Haldane, in Halsbury's Laws of England (vol. 25, p. 37, s. 69), cited this preamble as the authority for his statement that "the government of the forces is vested in the Crown, who has power to make regulations as to command and administration." As Lord Kenyon said in *Macdonald* v. *Steele* (Peake 175), where an officer was asking the paymaster-general for his half-pay, "His Majesty's pleasure supersedes all inquiry, as he has the absolute direction and command of the Army." The courts have repeatedly refused to intervene in questions of pay and service, though the Royal Warrants appear to entitle the claimant to what he asks the court to give him. This is so, whether the claimant asks relief from the King or from the executive officer. Colonel Mitchell, in *Reg.* v. *Secretary of State for War* (64 L. T. Rep. 764; (1891) 2 Q. B. 326), demanding half-pay under a warrant, failed against the Secretary of State for War on the ground that there was no obligation on the Secretary except to the Crown, and that "there is no obligation upon the Crown to make this allowance recognised by the law." He also failed in *Mitchell* v. *The Queen*, cited on petition of right against the Crown. Lord Esher said (1896, 1 Q. B. 121): "An officer cannot, as between himself and the Crown, take proceedings in the courts of law in respect of anything which has happened between him and the Crown in consequence of his being a soldier. The courts of law have nothing to do with such a matter." This is because the administration of the Army is in the hands of the King, who unless expressly controlled by an Act of Parliament cannot be controlled by the courts. Similar decisions are found in *Gidley* v. *Lord Palmerston* (3 Br. & B. 275); *Re Petition of Right of T. J. Tufnell* (34 L. T. Rep. 838, at p. 841; 3 Ch. Div. 164, at 176); and *Dunn* v. *The Queen* (73 L. T. Rep. 695; (1896) 1 Q. B. 116), where it was held that a servant of the Crown, though expressly engaged for a fixed term of years, could be dismissed without notice at the pleasure of the Crown; *Kinloch* v. *Secretary of State for India in Council* (47 L. T. Rep. 133; 7 App. Cas. 619); and *Grant* v. *Secretary of State for India* (37 L. T. Rep. 188; 2 C. P. Div. 445).

The constitutional aspect of the financial side of the question was more fully explored in this court than it had been below. The court was anxious to ascertain exactly in what kind of cases the Crown received money for the sale or use of Crown materials, or for the services of members of the national forces, and under what authority and how the sums so received were dealt with in the national accounts. In consequence the hearing was adjourned, and the Attorney-General supplied us with two detailed memoranda as to the Navy and Army respectively. Counsel for the appellants did not discuss in detail the Navy papers, as he appeared to take the view that the prerogative of the Crown in respect of the Navy was much wider than that, if any, in regard to the Army, owing to the historical circumstances connected

with the Revolution of 1689 and the Bill of Rights in connection with a "standing Army."

In the case of the Navy it was obvious that the Admiralty constantly received payments from outsiders, foreign Governments, or British and foreign subjects, for work done or services or materials supplied to those outsiders; and that the Admiralty so acted without any express authority from statutes, though the sums which they received were dealt with in the Appropriation Act as stated hereafter. For instance, the Admiralty charter the Navy oil-tankers to private individuals for reward when they are not required for Navy services, and there is no statute authorising such action. The most interesting question is that of salvage. In *The Mary Ann* (1 Hagg. 158) Lord Stowell had said "although there is an obligation upon King's ships to assist the merchant vessels of this country, yet, when services have been rendered, those who confer them are entitled to an adequate reward." That statement was limited in later years by the statutes requiring that no salvage reward should be claimed without permission of the Admiralty. It was also made more precise by the decision in *The Cargo ex Ulysses* (6 Asp. Mar. Law Cas. 354; 60 L. T. Rep. 111; 13 Prob. Div. 205), where the court said that it would not treat the presence of a King's ship protecting against actual pirates or robbers as salvage service, but did treat the presence of guards and sentinels not on the King's ship but on a wrecked ship to guard against pirates or robbers who might attack, and of members of the Navy salving cargo from maritime perils, as entitling them to salvage reward. This was not the case of a claim for salvage service and remuneration under an agreement made, not when perils were actually endangering the ship, but in anticipation that such perils might arise. The question of King's ship salvage was not exhaustively discussed before us, but will be found so discussed in Kennedy on Civil Salvage, pp. 112 to 118. The Admiralty render services to private persons and companies in time of civil commotion for payment. A similar series of payments to the War Office for the supply of materials and men is set out in the Army Memorandum. None of these payments are required or protected by express statutory authority; all are said to be justified by the uncontrolled discretion of the King as head of the Army. in matters under which he is under no express statutory restriction, such as the requirement that he shall not employ more men or spend more money than Parliament authorises. He need not employ all these men or spend all the money that Parliament authorises. The matter is left to the uncontrolled discretion which he exercises by his Ministers. The courts cannot question it, though Parliament by vote of no confidence, or pressure in Parliament, may influence it.

The financial side of the matter, the question of imposing a charge on subjects without the consent of Parliament, is illuminated by two memoranda from the Treasury produced to us during the second hearing. The first sets out the way in which receipts for services rendered by the Army and Navy have been dealt with during the last 120 years. After much discussion, the system was put on a statutory footing by the Public Accounts and Charges Act 1891. Sect. 2 deals with all such receipts as appropriations in aid, under the direction of the Treasury, of money provided by Parliament for any purpose, and as such they are so applied and audited and dealt with. The suggestion that such receipts are not authorised by Parliament disappears. The second memorandum shows in detail in the case of a payment by the present appellant company, for services similar to those the subject of the present appeal, the progress of the particular payment through the various revenue authorities, till at last it is sanctioned as an appropriation in aid under the head "Miscellaneous Receipts" by the Appropriation Act for the year, and this is devoted to the relief of the sum voted by Parliament.

I am, therefore, of opinion that the appeal fails on the following grounds: (1) That there is no duty enforceable by the courts on the Crown to render the services for which the appellants ask. The matter is one for the uncontrolled discretion of the King as head of the Army, both as to whether he shall afford such protection against such anticipated, not actual, danger, and as to the terms on which he should afford it. (2) There is no compulsion on the appellants to make the payment of which they complain; but if they want the services they must pay for them if the King requires them so to pay. (3) The payment, where made, is sanctioned and controlled by Parliament in the Appropriation Act under the system of appropriations in aid under the Act of 1891.

The appeal must be dismissed with costs.

Lawrence, L.J.—The plaintiff company is an English company incorporated under the Companies Acts and carries on an extensive shipping business in Chinese and neighbouring waters. These waters have for some considerable time past been infested by Chinese pirates, and frequent piratical attacks have been made on ships belonging to the plaintiff company and other owners both from without and within the ships. An important part of the plaintiff company's business consists of carrying Chinese passengers travelling from one port to another along the coast, and the plaintiff company and other owners have found it difficult to prevent pirates from coming on board their ships in the guise of passengers and then overpowering the master and crew and taking forcible possession of the ship and her cargo.

Various expedients for preventing this form of piracy having been tried in vain, the plaintiff company and other owners (being unwilling to give up the Chinese passenger traffic, which constituted a valuable section of their trade) in the autumn of 1928 approached the military authorities in Hong Kong and London and urgently requested them to provide military guards to be carried on their ships. In response to such request the military authorities in the month of Oct. 1928, while maintaining that the defence of ships against internal piracy was essentially a matter for the owners to deal with, eventually agreed as a temporary emergency measure to provide armed guards on as many British ships carrying Chinese passengers as was reasonably practicable in view of the limited number of soldiers at their disposal on the China station. In making this provision the authorities pointed out that these protective measures could not be continued indefinitely and that shipowners should themselves take adequate measures for internal defence. As about 200 British ships were engaged in the China trade, and the plaintiff company alone would have required about 200 soldiers adequately to guard all their ships, it was obviously impracticable for the military authorities to provide armed guards for more than a small proportion of the total number of ships requiring them. At first no charge was made to the shipowners for providing these guards beyond the additional expenditure over and above the normal cost of the guards. Later on, in the month of Dec. 1928, the military authorities notified the

shipowners that the provision of guards would be continued for a period of six months as from the 1st Nov. 1928, on the conditions then in force, but that if military guards were required after that date the full cost of providing them must be met by the shipping interests concerned.

Early in 1930 the military authorities, after informing the shipowners that it had been decided to reduce the strength of the British garrison in the China command by one battalion from Hong Kong at the end of Feb. 1930, and that consequently it would be necessary to reduce considerably the number of military guards available in British ships, notified the shipowners that it was the declared policy of His Majesty's Government that all military guards should be withdrawn on the 1st April 1930, and that consideration must be given by the shipowners to the steps which they were prepared to take for providing guards from other sources.

The plaintiffs and other shipowners protested against this decision and requested the authorities to reconsider it and to continue the supply of military guards after the 31st March 1930. In the month of March 1930, the commander-in-chief on the China station notified the shipowners that, in view of the fact that the shipping companies concerned were then engaged in working out details for the formation of a properly trained force for the prevention of piracy of their vessels, His Majesty's Government had reconsidered its attitude to the extent that it had decided to sanction a further extension of the provision of military guards for a definitely limited period, subject (*inter alia*) to the condition that any guards supplied after the 31st March 1930 must be paid for in full.

The plaintiffs and other shipowners at first protested against the condition of paying for the military guards in full, but ultimately submitted to that condition and agreed to pay, and, in fact, paid in full for all military guards supplied to them after the 31st March 1930. The plaintiff company, after having made that agreement, commenced this action against the Attorney-General, alleging that the agreement was made under compulsion and asking the court to declare that the condition imposed upon the plaintiff company by the Crown of paying for the military guards was illegal and unenforceable, and that the plaintiff company was under no obligation to make any such payment.

The first ground on which the plaintiff company bases its claim is that the Crown has provided the military guards in fulfilment of the common law duty which it owes to its subjects, and that in the absence of express statutory sanction it is not entitled to demand any payment as a condition of fulfilling that duty. Sir Leslie Scott's contention on this branch of the case was that the King, both as liege lord and as defender of the realm, was by the common law under a duty to protect the lives and property of his subjects and to defend his realm and every part of it (including British ships wheresoever they might happen to be) against attacks by enemies.

In support of the proposition that the King owed such a duty as liege lord the following authorities were cited: (1 Blackstone, p. 354): "Allegiance is the tie or ligament which binds the subject to the King in return for that protection which the King affords the subject"; *Calvin's* case (4 Co. Rep. at p. 5*a*), "ligeance is the mutual bond and obligation between the King and his subjects, whereby subjects are called his liege subjects, because they are bound to obey and serve him; and he is called their liege lord, because he should maintain and defend them"; and *Reg.* v. *Keyn* (2 Ex. Div. 63, at p. 236): "According to the doctrine of Lord Coke in *Calvin's* case (*sup.*) protection and allegiance are correlative." Counsel also referred to *Re Johnson* (88 L. T. Rep. 161; (1903) 1 Ch. 821) and *Markwald* v. *Attorney-General* (122 L. T. Rep. 603; (1920) 1 Ch. 348) on this point.

In support of the proposition that by the common law the King owed a duty to the plaintiff company to defend its ships against internal piracy Sir Leslie Scott cited the following authorities: *Attorney-General* v. *Tomline* (42 L. T. Rep. 880, at p. 883; 14 Ch. Div. 58, at p. 66), which was a case dealing with the King's duty to defend the realm from the encroachments of the sea: "It is said by Lord Coke, who is a great authority, in the case of *Isle of Ely* (10 Rep. 141*a*), that by the common law 'the King ought of right to save and defend his realm as well against the sea as against the enemies that it should not be drowned or wasted'—that is to say, there is a duty on the King, by reason of his being King, to defend his realm, and therefore, of course, all his realm and every part of his realm"; *Reg.* v. *James Anderson* (19 L. T. Rep. 400; 1 C. C. R. 161, at p. 163): "It has been decided that a ship, which bears a nation's flag, is to be treated as a part of the territory of that nation. A ship is a kind of floating island"; Hawkins's Pleas of the Crown (vol. 1., cap. 20, p. 251): "A pirate is one who, to enrich himself, either by surprise or open force, sets upon merchants or others trading by sea, to spoil them of their goods or treasure; and he is called *hostis humani generis*"; the Army Act, s. 190, sub-s. (20): "The expression 'enemy' includes all armed mutineers, armed rebels, armed rioters and pirates"; *Attorney-General for Hong Kong* v. *Kwok-a-Sing* (29 L. T. Rep. 114, at p. 117; L. Rep. 5 P. C. 179, at p. 200), where it was held that passengers as well as mariners who violently dispossess the master and carry away the ship or any part of the cargo are pirates. It is contended that these authorities support the proposition that as by the common law it is the duty of the King to defend every part of his realm against enemies, and as every ship belonging to the plaintiff company (being part of the territory of England) is a part of the King's realm, and as all pirates are enemies, so the King ought of right to defend the plaintiff company's ships against piratical attacks by the passengers carried in those ships.

It is admitted by Sir Leslie Scott that the manner in which the King should perform this alleged duty is entirely in his discretion; that it is for the King to say whether any case for its exercise has arisen and in whose favour it ought to be exercised, and that the King could not be compelled by any process of law to perform it: "It is a duty of what is called imperfect obligation. Supposing that the King were to neglect that duty, I know of no legal means—that is, no process of law—common law or statute law—by which the Crown could be forced to perform that duty, but there is that duty of imperfect obligation on the part of the Royal authority": per Brett, L.J. in *Attorney-General* v. *Tomline* (42 L. T. Rep. at p. 883; 14 Ch. Div. at p. 66).

Whatever may be the extent of the duty which the King owes as liege lord or as defender of the realm—and I do not propose to attempt to define the limits of that duty—I am clearly of opinion that it does not extend to the provision of military guards for the plaintiff company's ships in the circumstances of the present case. If the aid of the armed forces of the Crown were available and were required in order to defend a British ship which was actually being attacked by pirates at the time, entirely different considerations would arise. That, however, is not the case here; the plaintiff

company, realising that if it continues the Chinese passenger traffic such continuance will almost certainly lead to further internal piracy, but being unwilling to discontinue that traffic, has asked the Crown to provide military guards in order to assist its officers and crews in controlling the persons whom it intends to invite to become passengers in its ships and in preventing those passengers after they have been taken on board from committing piracy; in other words, has asked the Crown by means of its armed forces to assist it to continue its Chinese passenger traffic with more safety, and thus enable it to earn the resulting profit. In the circumstances I entirely agree with the view expressed by the Crown to the shipowners that the provision of preventive measures against internal piracy is essentially a matter for the owners and forms no part of the duty of the Crown. It would, I think, be stretching the duty of the Crown beyond all reasonable limits to hold that it extended to providing military guards on ships belonging to private traders engaged in the Chinese passenger traffic in view of the fact that such traders are free to continue or discontinue this traffic as they please, and that the Crown has no right to control or interfere with the manner in which that business is conducted. I know of no authority which lends countenance to the suggestion that it is the duty of the King, either as liege lord or as defender of the realm, to provide military guards for the protection of a ship which her owner voluntarily takes into foreign ports with the intention of embarking passengers, some of whom to his knowledge may turn out to be pirates in disguise.

In the result, I have come to the conclusion that there was no common law duty on the Crown to provide the military guards for the plaintiff company's ships, and consequently no question as to the Crown having demanded payment for the performance of a duty which it owed by the common law arises in this case. This conclusion, however, by no means disposes of the case. There remains the important and difficult question whether, assuming the Crown to be under no common law duty to provide the military guards, but having in its discretion decided that it was a proper thing to do under the circumstances, the Crown can legally demand a money payment as a condition of rendering those services. This question has given rise to an interesting discussion on the question occupied by the Crown in relation to the royal forces.

The contention of the plaintiff company, stated shortly, was that all prerogative powers in relation to the Army in time of peace had long since been swept away; that the powers exercised by the Crown in relation to the disposition and use of the Army in time of peace at the present day are purely statutory powers; and that the Crown has a statutory duty to exercise those powers whenever it considers that they ought properly to be exercised, and cannot therefore, in the absence of express statutory authority, legally demand any payment as a condition of such exercise.

In support of the proposition that it is illegal for the Crown or any other body or person invested by statute with discretionary powers to exact money *colore officii*, Sir Leslie Scott relied mainly on the following cases: *Morgan* v. *Palmer* (*sup.*), where it was held that the Mayor of Yarmouth, who in his character of mayor was one of the justices of peace in and for the borough, had no right to demand a sum of money for granting the renewal of the annual licence of a publican; *Attorney-General* v. *Wilts United Dairies* (*sup.*), affirmed by the House of Lords (127 L. T. Rep. 822), where it was held that the Food Controller had no power to impose as a condition of the grant of a licence to purchase milk in a certain area a charge of 2*d.* per gallon payable to him by the purchaser; and *Brocklebank* (*T. and J.*) *Limited* v. *The King* (*sup.*), where it was held that the Shipping Controller had no power to impose as a condition of the grant of a licence to sell a ship to a foreign firm the payment to the Ministry of Shipping of a percentage of the purchase money.

The basis of the decisions in the two last-mentioned cases was that the demand of payment made by the Crown as a condition of granting a licence amounted to the levying of money for the use of the Crown without grant of Parliament contrary to the Bill of Rights and was therefore illegal. Lord Buckmaster, in the *Wilts United Dairies* case (127 L. T. Rep., at p. 823), says: "However the character of this payment may be clothed, by asking your Lordships to consider the necessity for its imposition, in the end it must remain a payment which certain classes of people were called upon to make for the purpose of exercising certain privileges, and the result is that the money so raised can only be described as a tax, the levying of which can never be imposed upon subjects of this country by anything except plain and direct statutory means."

The question whether the principle upon which these cases were decided applies to the facts of the present case depends entirely upon the nature and extent of the discretionary powers admittedly exercisable and exercised by the Crown in relation to the disposal and use of the Army in time of peace. As to the nature of these powers Sir Leslie Scott has been at great pains to demonstrate that they are purely statutory, for which purpose he has placed before the court a short historical survey of the position occupied by the Crown in relation to the royal land forces from the Conquest to the present time, culled from various well-known writers.

An admirable historical account of the Army in a compendious form is to be found in the Manual of Military Law, published by the War Office (particularly in chapter 2, dealing with the history of military law, written by Lord Thring, and in chapter 9, dealing with the history of the military forces of the Crown, written by Sir H. Jenkyns), from which source I have taken most of the historical facts to which I am about to refer.

After the Restoration in 1660 considerable changes took place in the military system of this country, and the foundations for the present standing Army were laid. Among the various Acts which were then passed I need only mention the statute of 13 Car. 2, c. 6, containing the following recital, which still stands unrepealed upon our statute book: "Forasmuch as within all his Majesties realmes and dominions the sole supreme government command and disposition of the militia and of all forces by sea and land and of all forts and places of strength is and by the lawes of England ever was the undoubted right of his Majesty and his Royall predecessors Kings and Queenes of England and that both or either of the Houses of Parliament cannot nor ought to pretend to the same."

One of the causes which led to the Revolution in 1688, no doubt, was the increase in the number of troops raised and maintained by James II., and to prevent trouble arising from such a cause in the future the Convention Parliament, when calling the Prince and Princess of Orange to the throne, inserted in the Declaration of Rights a declaration that "the raising and keeping a standard Army

within the Kingdom in time of peace unless it be with consent of Parliament is against law." This declaration was embodied in the Bill of Rights and in the first Mutiny Act. It has since been repeated in the subsequent Mutiny Acts and in the annual Army Acts down to the present time, and the Army has since the year 1689 continued to exist only by virtue of the annual renewal of the sanction given by Parliament. In addition to the control which Parliament then assumed over the raising and payment of the Army it also secured to itself full control over the discipline requisite for the government of the Army.

The various statutory provisions relating to matters of discipline were finally consolidated in the Army Act, which of itself has no force, but requires (see sect. 2) to be brought into operation every year by the annual Army Act; each of these annual Army Acts contains a preamble reciting (*inter alia*) the illegality of raising or keeping a standing army in time of peace without the consent of Parliament, the necessity of continuing a body of forces for the safety of the United Kingdom and the defences of the possessions of the Crown, the number of such forces required and the necessity of the observance of an exact discipline, and then enacts that the Army Act shall be and remain in force for a period of twelve months.

As regards the payment of the Army, Parliament grants the necessary money on estimates submitted by the Crown, but the expenditure of the money granted is left to the discretion of the Crown, subject only to audit on the part of Parliament. Under the legislation referred to a standing Army has been maintained in England without intermission since the passing of the Bill of Rights. As the raising, government, and payment of the Army has always been expressly sanctioned by Parliament for a period of twelve months at a time, the Army may properly be said to be a statutory and not a prerogative force, and the Crown is under the necessity of asking annually for the consent of Parliament to its maintenance.

Except in so far as Parliament has by statute regulated matters relating to the raising, keeping, and discipline of the Army, however, the Crown has retained and exercises many wide and important powers in relation to the Army. It was by no mere oversight that the preamble to 13 Car. 2, c. 6, has remained unrepealed, as in 1863 the whole of the rest of the Act was repealed, but the declaration as to the King's right to the government, command, and disposition of the forces by sea and land was expressly left standing. It is to be noted that Parliament has never purported expressly to confer upon the Crown any powers of disposing of or using the Army or administering its affairs. When Parliament has given its consent to the raising and keeping of the Army for the year, it leaves the Crown to exercise its prerogative powers as to the manner in which the Army is to be raised and kept and in respect of the disposition and use of the Army and the administration of its affairs. The manner in which these powers are exercised is constitutionally subject, like the exercise of other prerogatives, to the advice of the Ministers of the Crown, of whom the one particularly responsible for the Army was, until recently, the Secretary of State for War. By Letters Patent dated the 6th Feb. 1904, all the prerogative powers of the Crown in relation to the Army, which had theretofore been exercised by the Secretary of State, the Commander-in-Chief, and other officials, were vested in the Army Council, to whom further powers were transferred by the annual Army Act, 1909, but the Secretary of State for War remains responsible to the Crown and Parliament for all the business transacted by the Council. It is unnecessary to specify the various powers relating to the Army which Parliament has thus tacitly left to the unfettered control of the Crown; it is sufficient to state that they undoubtedly include the organisation, armament, maintenance, disposition, and uses of the standing Army in time of peace.

In my opinion, therefore, the powers which the Crown exercises as to the disposition and use of the standing Army in time of peace are powers vested in the Crown by prerogative right at common law, and are not powers conferred upon the Crown by statute.

However, the question whether the Crown was acting under its prerogative powers or under powers conferred upon it by statute, when acceding to the request of the plaintiff company to provide guards for its ships, is, in my opinion, not really the material question to be decided in this case. The extent of the powers exercisable by the Crown in relation to the Army is, in my opinion, the same whether they are technically prerogative powers or statutory powers. If, contrary to my opinion, they are statutory powers, Parliament has not limited them in any way save by the enactments already referred to and, except as so limited, their scope must be measured by the powers which were vested in the Crown by prerogative right at the time of Charles II.

This brings me to the crucial question in the present case, whether the powers of disposition and use of the Royal forces vested in the Crown include a power to hire out troops to a British company at its request for the protection of its property and the lives of its employees. Admittedly, the powers retained by or vested in the Crown, in relation to the Army, are wide and undefined, and unless the plaintiffs can establish that these powers do not include a power to lend troops to a private individual for the protection of himself and his property in consideration of a money payment, or that the Crown by providing the guards in consideration of a money payment has violated some constitutional principle of which the court can take cognisance, I think that the plaintiff company must fail on this appeal. In my judgment, the powers of the Crown are wide enough to include a power to lend troops to a private individual for reward, and the Crown has not violated any constitutional principle in providing the guards in consideration of a money payment. The manner in which the Crown exercises its powers is not a matter which can be inquired into by a court of law. As Lord Kenyon said in *Macdonald* v. *Steele* (Peake, at p. 234): "His Majesty's pleasure supersedes all inquiry, as he has the absolute direction and command of the Army. It is true Parliament has provided a sum of money, but that is to be distributed as the King chooses." The contention that the Crown, by imposing, as a condition of providing the guards, the payment of a sum of money to cover their pay while they are employed on that service, has attempted to levy a tax on the subject without grant of Parliament contrary to the Bill of Rights is, in my opinion, not well founded. The plaintiff company was at liberty to carry on its trade without any licence or interference from the Crown. The Crown was under no duty to provide the guards; the plaintiff company was free to accept or reject the offer made by the Crown. The facts of the present case are quite different from the facts in the cases upon which the plaintiff company has relied, and the principle referred to by Lord Buckmaster in the *Wilts*

United Dairies case (*sup.*) has no application to this case.

Sir Leslie Scott put his case on this point in the form of a dilemma. He contended that either the Crown in its discretion decided that it was necessary to provide the guards for the protection of the plaintiff company, in which case the Crown was performing a duty which it owed to the plaintiff company, or else the Crown was at the request of the plaintiff company making use of the Army in an unauthorised manner, in which case the contract was void as being contrary to public policy. This is the dilemma which, according to the speech of Lord Cave in *Glasbrook Brothers Limited* v. *Glamorgan County Council* (132 L. T. Rep., at p. 613; (1925) A. C. 270, at p. 278), was put by Atkin, L.J. in that case in the Court of Appeal. The answer given by Lord Cave to the dilemma so put applies to the present case. It by no means follows that, because it was not the duty of the Crown to provide guards for the plaintiff company's ships, that therefore the Crown had no power to provide the guards and to demand the payment of a sum of money in consideration for making such provision. I know of no authority which prevents the Crown, if so minded, from employing any available soldiers in time of peace as well as in time of war in rendering services to private individuals, or from demanding and receiving remuneration for any services so rendered. It might form the subject of just criticism in the House of Commons if the Crown were to employ soldiers gratuitously for such purposes, but I see no valid reason for holding that such employment, with or without remuneration, is unconstitutional or against public policy.

The only cases to be found in the reports where the armed forces of the Crown have in time of peace rendered services to private individuals for reward are the salvage cases. These cases are not closely analogous to the present, although in some of them the Admiralty has made a claim for the use of his Majesty's ships and in others the Admiralty has deducted the pay of the officers and crew employed on the salvage operations from the amount recovered by them, but some of the passages in the judgment are not without interest in connection with this case.

In *The Mary Ann* (*sup.*), where a demand was made for the remuneration of salvage services which had been rendered by the commander and crew of one of the King's ships, Lord Stowell said: "Undoubtedly, the parties may fairly claim a remuneration although the ship belongs to the State; and although there is an obligation upon King's ships to assist the merchant vessels of this country, yet, when services have been rendered, those who confer them are entitled to an adequate reward."

The case of *The Lustre* (3 Hagg. 154) was where a Government steamer assisted a merchant vessel on a stipulation to reimburse all expenses arising from damage to the steamer or the stores, and it was held that such a stipulation was no bar to salvage compensation. Sir John Nicholl, in the course of his judgment, said: "It is a mistake to suppose that the public force of the country is to be employed gratuitously in the service of private individuals merely to save them from expense; these Government steam vessels are kept for the public service, and the officers in command cannot employ them in the service of individuals, and thus risk the public property without authority, or an indemnity for all expense and damage."

In the case of *The Ewell Grove* (3 Hagg. 209), where a merchant vessel was salvaged by a Government steamer and 200 men, and the court awarded 1200*l.* and costs to the salvors, Sir John Nicholl said, at p. 224: "It is true that the Rhadamanthus is one of his Majesty's ships, worked by steam, found and paid at the expense of the public, yet that does not give a title to private individuals to employ and be assisted by them without remuneration, any more than by any other vessel in the public service. . . . I have, therefore, no doubt as to the title of his Majesty's steam vessels, in the case of civil salvage, to remuneration."

In the present case we requested the Attorney-General to procure a search to be made for precedents both at the Admiralty and at the War Office in order to see whether there was any and what practice on the part of the Crown in regard to charging for services rendered to private individuals by the naval or military forces. In response to this request we have been furnished with statements on behalf of the Admiralty and of the War Office. The Admiralty statement says that services rendered to private individuals for payment are subject to varying conditions according to the nature of the service, and that in general such services would only be rendered in special circumstances and in response to a definite request, and generally would not be undertaken if alternative private or commercial facilities were available. It also appears from that statement that in 1879 the principle of charging for the services of naval personnel was recognised in the Queen's Regulations (art. 1772), which provided that where divers are lent to effect repairs to merchant ships a charge of 21*s.* a day is to be made for wear and tear of their dresses and apparatus, and in addition a sum that will cover the pay and allowances of the persons engaged for the time they may be actually absent from their ships. It also appears that in times of strike or civil commotion naval ratings have been employed, in the absence of regular workers, on railways in manning pumping and power stations, coal-mine pumping, machinery, lock gates, tugs and lighters conveying petrol, oil, and foodstuffs, and in loading and unloading these commodities, for which services it has been the practice to make a charge on the companies concerned based on the wages which would have been payable at current industrial rates if naval personnel had not been employed, or on the actual naval pay and allowances of the naval personnel employed, whichever was the greater amount.

Sir Leslie Scott contended that the Navy stood on an entirely different footing from that of the Army, and that what the Crown may have done in exercise of its prerogative in the case of the Navy could have no bearing on the question what the Crown is empowered to do as regards the Army. It is true that the Navy was never looked upon as a menace to the country like the Army was considered to be in the seventeenth century, and that it has never been brought under control of Parliament to the same extent as the Army, yet the preamble of 13 Car. 2, c. 6, declares the prerogative rights of the Crown in respect of the forces both by sea and on land in the same terms, and except in so far as there are any statutory restrictions the prerogative powers of the Crown in relation to the Army are the same as those in relation to the Navy.

The statement from the War Office contains many instances of occasions upon which the War Office without statutory authority has received payment in respect of services rendered by the personnel of the Army. From these instances it appears that for very many years it has been the practice of the War Office to demand and receive payments for services rendered to foreign countries,

British Dominions, Colonies, and private individuals. These payments fall under four heads, namely: (1) Payments for services rendered in ordnance factories; (2) payments for services rendered by military forces; (3) payments by Dominions, colonial and mandated territories, and foreign Governments; and (4) payments in respect of foreign missions.

The instances given include under head (1) charges made to many private individuals and firms for goods sold and services rendered; under head (2) charges for military protection afforded to Malta, the Ionian Islands, and Ceylon, for services rendered to private individuals, companies, and firms during the War by the Dock Battalion and the Transport Workers' Battalion, for services rendered by military fire brigades, and for lending troops to reputable British film companies; under head (3) charges for British troops stationed in the territory of Dominions, colonies, and foreign countries; and under head (4) charges in respect of foreign missions, all of which (with the exception of one instance in 1904 when 10 officers were lent to the Turkish Government for services with the gendarmerie in Macedonia) were post-War missions arising out of the War.

In reference to the War Office, it is to be observed that no case has been found where a military guard has been provided for the ship of a trader who for his own profit sets out on a hazardous enterprise. In my opinion, however, the propriety of lending troops for such a purpose and of making a charge for doing so is not a matter which can properly be inquired into in a court of law. If the wide powers which the Crown has and exercises with regard to the disposition and use of the Army are to be restricted in any way, this can only be done by Parliament. In view, however, of what has been said in the course of the argument, I would only add that if a shipowner asks the Crown to provide armed guards to assist him to control the passengers whom he invites on board his ship, and the Crown accedes to his request, it seems only reasonable that he and not the public should pay for that privilege.

Lastly, it has to be remembered that ever since Parliament has sanctioned the raising and keeping of a standing Army in 1689 it has insisted upon a thoroughly open and independent examination of the annual Army estimates and audit of the Army receipts and expenditure. All receipts in respect of the Army have to be applied as an appropriation in aid of the money provided by Parliament for that service under sect. 2 of the Public Accounts and Charges Act, 1891, and have therefore to be brought into the Army estimates. The amount which may be appropriated is definitely limited to the sum authorised by Parliament by the Appropriation Act of the year, and any sum received in excess of that amount is surrendered to the Exchequer as an extra receipt.

In practice the Army Council submit their estimates to the Treasury, which critically examines them both as to the estimated expenditure and as to the estimated receipts. After approval by the Treasury the estimates are submitted to Parliament by the Secretary for War and may be discussed in Parliament before the granting of supply and the passing of the Appropriation Act. After the supply has been granted the administration of the moneys granted is left to the War Office under the direction of an accounting officer, who is responsible to the Treasury and to Parliament for the due administration of those moneys. The accounts are audited annually by the Comptroller and Auditor-General, whose duty it is to report to Parliament any case in which he considers that service has been wrongfully given, or for which inadequate authority existed, or for which inadequate or improper payment was made. The accounts are then placed before the Public Accounts Committee of the House of Commons.

The sums paid by the plaintiff company for the provision of armed guards on its ships were included in the estimates for the years in which they were received as an appropriation in aid, and were duly granted by Parliament as part of the supply for the Army for that year; they were subsequently passed as proper receipts by the Comptroller and Auditor-General. In the face of these facts it is difficult to see how the contention that the Crown has levied money for its use without grant of Parliament contrary to the Bill of Rights can successfully be maintained. Moreover, if, contrary to my opinion, the sanction of Parliament were wanted for the Crown hiring out troops to the plaintiff company and other shipowners trading in Chinese waters, such sanction is, in my opinion, necessarily implied from the grant by Parliament of the amount received by the Crown for such hire as part of the supply for the Army.

In the result, for the reasons stated, I have come to the conclusion that the decision of Rowlatt, J. was right and that this appeal should be dismissed with costs.

Slesser, L.J. — In this case declarations are sought against the Crown to the effect, in substance, that the Crown is not entitled to charge the appellant company for the use of troops employed to protect the property of the company and the lives of their employees in circumstances stated by my Lords, which I do not repeat.

The appellant company seek to support their case on three grounds. First, they say that the powers of the Crown with regard to the Army are by law limited, and that in particular the common law and statutes which authorise or require the Crown to employ the Army do not authorise it to make charges for the use of the Army. Secondly, they argue that, in any event, even if the Crown has a discretion how it will protect the subject, yet that discretion should not be influenced by any consideration of the giving of money by the subject or the denial of such money. Thirdly, it is said that the Crown has a duty to protect the subject and that its officers cannot properly demand money from the subject, *colore officii*, as a term of the performance of that duty.

These three arguments I propose to consider in the order in which I have stated them. (*a*) As regards the alleged limitation of the prerogative of the Crown in its disposition of the Army. By statute 13 Car. 2, c. 6, it is declared that "the sole supreme government command and disposition of the Militia and of all forces by sea and land is, and by the lawes of England ever was the undoubted right of His Majesty and his Royall predecessors Kings and Queenes of England." This declaratory Act is still law, and, as late as the year 1863, by schedule to the Statute Law Revision Act of that year, the words in the preamble of the Act of Charles II. which I have quoted, are expressly preserved. "His Majesty's pleasure supersedes all inquiry, as he has the absolute direction and command of the army"; per Lord Kenyon in *Macdonald* v. *Steele* (Peake 233, at p. 234).

The government of the forces is vested in the Crown, which has power to make regulations as to command and administration: (Halsbury's Laws of England, vol. 25, p. 37) "The supreme government and command of all forces by sea and land and of all forts and places of strength is vested in

the Crown by prerogative right at common law and by statute": (Halsbury's Laws of England, vol. 6, p. 481). This last quotation cites Comyns's Digest to the like effect, and although Sir John Comyns appears to limit his statement, that "the government and command of the Militia and of all the forces by sea and by land belong only to the King" (Prerogative—Command of the Forces, 4th edit., vol. 6, p. 33), to prerogative in respect of the King's own subjects in time of war, apart from the legalisation of the Army by the Army Acts, his submission would appear to be equally true as regards time of peace. It is by virtue of his prerogative that the King by Letters Patent in 1904 constituted the first Army Council, and it is there stated that the Army Council has been constituted "for the administration of matters pertaining to our military forces and the defence of our Dominions, that such power and authority for the purpose as has hitherto been exercised under our prerogative" by various officers. . . . Although by sect. 7, sub-sect. (1), of the Army Act express provision is made for removing doubts as to the powers of command vested or to be vested in officers, by sub-sect. (2) of that section it is expressly provided that nothing in the section shall be deemed to be in derogation of any other power otherwise vested in his Majesty.

Sir Leslie Scott, confronted with the declaratory words of the Act of Charles II., sought to confine them to forces by sea and land existing at the time of the passing of that Act. He argued that in effect there were at that time no forces by sea and land other than the Militia itself. It is true that an Act of the previous year (12 Car. 2, c. 15) had provided for the speedy disbanding of the Army, but it appears that this disbanding had not been completed at the time when the Act 13 Car. 2, c. 6, was passed, for there are several later statutes of the reign of Charles II. dealing with the remnants of the then Army: (see Clode, Military Forces of the Crown, Appendix 1). But, in any event, whether there were or were not at that time any forces by sea or land on which the statute could operate, other than the Militia, it is clear from the language of the statute, which is a declaration of the existing prerogative, that the prerogative of command of the forces by sea or land has always been vested in the Crown, that it would equally apply in the absence of express statutory provision to any forces thereafter lawfully to be raised.

The language of the statute which I next consider is the first Mutiny Act (1 Will. & M., c. 5). That Act, which contained provision for punishing officers and soldiers who should mutiny or desert their Majesties' service, was to continue until Nov. 1689, and it is significant that that Act contains no provision for amending or repealing the Act of Charles II. which had declared the prerogative.

In 1689 was passed the Act generally known as the Bill of Rights (1 Will. & M., sess. 2, c. 2), which recites that the late King James II. "did endeavour to subvert and extirpate the Protestant religion, and the laws and liberty of this Kingdom by raising and keeping a standing army within this Kingdom in time of peace without consent of Parliament," and declares, among other matters, that the raising or keeping of a standing army within the kingdom in time of peace, unless it be with consent of Parliament, is against law. This was by chapter 2. By chapter 4 of the same session was enacted the second Mutiny Act. The position, therefore, in 1689 was this: A standing army was illegal without the consent of Parliament, but, when once Parliament had given its consent, the standing army became legal; there is no indication in the statutes that the prerogative of the King with regard to the government or command of such a legalised standing army was in any way impaired.

It is not necessary, in my opinion, to consider in detail the subsequent Acts which continued annually to legalise the Army. The earlier Acts did not specify the number of troops to be raised. This was not done until the Mutiny Act of 1714, and in 1715 power was given to the Crown to draw up articles of war for the discipline of troops in the United Kingdom. But such articles of war which continue to have statutory authority (see the Army Act, s. 69) are to be distinguished from the King's Regulations, which, with certain exceptions, continue to have force apart from the authority of statute. Articles of War are said by sect. 69 of the Army Act to be for the better government of officers and soldiers, and statutory power is given by sect. 71 of the same Act to make regulations as to persons to be invested as officers. These regulations now appear among the King's Regulations, but the remainder of the regulations have no statutory authority and are made by virtue of the prerogative.

It is also worthy of note that the responsibility, both to the Crown and to Parliament, of all the business of the Army Council borne by the Secretary of State is conferred upon him by Order in Council and not by statutory provision (see the Order in Council dated the 10th Aug. 1904).

In place of the Mutiny Acts there is now passed an annual Army Act which, as a rule, contains amendments of the principal Act, which it continues for one year. It provides in its preamble that the keeping or raising of a standing army within the United Kingdom in time of peace, unless it be with the consent of Parliament, is against law (see the Army and Air Force Annual Act 1931), and provides that the Army Act and the Air Force Act shall be and remain in force during the periods thereafter mentioned and no longer unless provided by Parliament. There follows a period to the 30th April 1932, in Great Britain and Northern Ireland, the Channel Islands, and the Isle of Man, with different provisions elsewhere: see sect. 2, sub-sect. (1) (*a*) and (*b*).

This short investigation of the history of the relations of Parliament and the Army shows clearly that at no time has Parliament derogated from the prerogative with regard to the command of the forces as it was declared in the time of Charles II. It has declared the standing Army illegal in time of peace without the consent of Parliament, but has abstained from interfering with the command by the Crown over a legalised army.

In so far as practice is to be considered in such a connection, the memorandum with which we were furnished by the War Office makes it clear that moneys have from time to time been received by the Crown without statutory authority for military protection. In 1846 from Malta and Ceylon and the Ionian Islands; from the old East India Company; during the late War the service of Dock Battalions and Transport Workers' Battalions were charged for, so also were soldiers released for civil work, and charges have been made for military fire brigades, regimental bands, for the use of troops employed by film companies, and for the guard at the Bank of England.

It is stated that from time to time almost every Colony has in one way or another made payments to the British Exchequer in respect of British troops stationed in its territory. Payments have been made for the extra cost of British forces in Iraq and in Palestine, by the Governments of those countries; by the Egyptian Government, and by

certain foreign commissions and boundary commissions. None of these payments was authorised directly or indirectly by statute. If Sir Leslie Scott's argument is correct, the whole, or most of them, would be contrary to law. Indeed, until the present case, I do not know that it has ever been questioned that the Crown has the right to receive payments for the use of troops used in one way or another by private persons or foreign Governments or Dominions of the Crown. It was at one time suggested in argument that Parliament would lose its financial control if the Crown received these moneys, but it has been made clear to us that the provisions of the Appropriation Acts guard against any such contingency. All the receipts resulting from the use of the Army are brought into the appropriation account, and although the sums so received are not always paid directly into the Exchequer, the Treasury, acting under the authority of the Public Accounts and Charges Act 1891, allows the department, instead of paying such receipts into the Exchequer, to use them to defray the expenditure of the year so far as they suffice to meet it.

Parliament, on being shown that the department requires to spend a certain sum but that receipts from fees, &c., will amount to a smaller sum, grants the difference, together with authority to use the sum received from the fees, and therefore the department is limited to the gross expenditure from the sums granted and the fees, and is financially in exactly the same position as if they had asked Parliament for the whole sum and paid the fees into the Exchequer. The practice has varied from time to time, but the system of appropriation in aid, operating as I have described, removes all chance of the Crown receiving moneys which will not be under the control of Parliament: (see May's Parliamentary Practice, 13th edit., p. 396, *et seq.*

For all these reasons, I am of opinion that, once Parliament has sanctioned the Army for a period of one year, there is no statutory limitation on the right of the Crown, acting under its prerogative of command and disposition of the forces, to make it a condition of the supply of troops for a particular purpose that a charge shall be made for them.

(*b*) In regard to the suggested influence of the Crown's discretion by considerations of the possibility of the receipt or denial of money. On this matter there is little direct authority; the assumption that the Crown is entitled to make a stipulation that when a Government steamer assists a merchantman it shall be reimbursed all expenses arising from damage to the government steamer is to be found in the case of *The Lustre* (*sup.*), in which Sir John Nicholl, in the course of his judgment, said: "It is a mistake to suppose that the public force of the country is to be employed gratuitously in the service of private individuals merely to save them from expense." This was clearly a case where the discretion whether the government steamer would or would not be employed in a particular matter of salvage was decided upon an express stipulation that the owners and underwriters would be answerable for certain payments. So also in *The Ewell Grove* (*sup.*); later authorities and statutes as to salvage, such as the case of *The Cargo ex Ulysses* (*sup.*), do not, in my view, affect the principle.

If the argument of the appellants here were right, such a consideration was improper, for, as was stated by Lord Stowell, in *The Mary Ann* (*sup.*): "There is an obligation upon King's ships to assist the merchant vessels of this country." In that case, salvage remuneration was claimed after service had been rendered, but in *The Lustre* (*sup.*) a stipulation for payment to cover damage was made before the commander exercised his discretion to allow the use of the ship.

In Chitty on Prerogative of the Crown, 1820, p. 6, it is said: "In the exercise of his lawful prerogatives an undoubted discretion is, generally speaking, allowed to the King"; and at p. 44: "The King is at the head of his Army and Navy, is alone entitled to order their movement, to regulate their internal arrangements as may seem to his Majesty most consistent with political propriety." According to Blackstone (8th edit., vol. 1, p. 251): "In the exertion of those prerogatives which the law has given him, the King is irrefutable and absolute, according to the forms of the constitution. And yet, if the consequence of that exertion be manifestly to the grievance and dishonour of the Kingdom, the Parliament will call his advisers to a just and severe account."

"Prerogative is the discretionary power for acting for the public good" (Locke on Government, 2, par. 166), quoted by Blackstone, *ibid.* "The King has the sole power of raising and regulating fleets and armies." "He is first in military command, within the kingdom" (Blackstone, *ibid.*, p. 262). "It is true that the prerogative is created and limited by the common law and that the Sovereign can claim no prerogatives except such as the common law allows" (Comyn's Digest, Prerogative). "But in so far as such prerogative includes the government of the Army, the court cannot consider the propriety of its exercise. Upon any doubtful point of prerogative the Crown and its Ministers must bow to the decision of the legal tribunals": (Halsbury's Laws of England, vol. 6, p. 382). But, in so far as, in my view, the powers here under consideration are within the prerogative, the function of the court is exhausted in so deciding.

I am of opinion that a declaration cannot be made against the Crown if, in its discretion, it refuses the provision of military protection to a subject unless such protection is paid for by the subject.

(*c*) Lastly, I have to consider whether the Crown or its ministers can demand money from the subject *colore officii* as a term of the performance of the duty of protection.

In order to determine this matter it is necessary first to consider whether the Crown has a duty to protect the subject, and, if so, what is the nature of that duty. It is not suggested by Sir Leslie Scott that the duty for which he contends is one directly enforceable by the subject by process of law. It is, he says, a duty of imperfect obligation. The best passage for his purpose is that of Brett, L.J. in *Attorney-General* v. *Tomline* (42 L. T. Rep. at p. 883; 14 Ch. Div. at p. 66), in which he uses the phrase "Duty of imperfect obligation." The duty there under consideration was the duty to protect the realm from the inroads of the sea. He says: "Supposing that the King were to neglect that duty, I know no legal means—that is, no process of law—common law or statute law—by which the Crown could be forced to perform that duty. It is a right which as against the Crown the subject has no means to enforce. Nevertheless, the right exists." In the *Isle of Ely* case (10 Rep. 141*a*) Coke, C.J. said: "The King ought of right to save and defend his realm as well against the sea as against the enemies, *protectio trahit subjectionem et subjectio protectionem*, that it should not be drowned or wasted." A declaratory statute, 23 Henry VIII, chap. 5, says: "By reason of our dignity and prerogative royal, we are bound to provide for the safety and preservation of our Realm of England." The right to protection is

not necessarily limited to the realm. "The protection and government of the King is general over all his dominions. . . . Seeing power and protection draweth ligeance . . . extendeth out of England, that ligeance cannot be local, or confined within the bounds thereof" : *per curiam* in *Calvin's* case (4 Coke 9) (see per Cockburn, C.J. in *Reg.* v. *Keyn* (2 Ex. D. 63, at p. 236) and 1 Blackstone, p. 364). But Cotton, L.J., in *Attorney-General* v. *Tomline* (*sup.*) expressly pointed out that the duty or obligation of the Crown was one which the subject could not enforce (42 L. T. Rep. at p. 884; (14 Ch. Div. at p. 70) "For this reason only, that the Crown is not amenable to the jurisdiction of the court, and any default of duty on the part of the Crown cannot be made the ground of an action."

The question then arises whether the many authorities which decide that money cannot be demanded *colore officii* have any application to a case where there is no enforceable duty, the performance of which can be refused unless payment is made. In the *Attorney-General* v. *Wilts United Dairies* (*sup.*), Lord Buckmaster pointed out that no enactment enabled the Food Controller to levy any sum of money on any of his Majesty's subjects. That was a case where the Food Controller, an official having power under the Defence of the Realm Acts to make orders regulating the supply of milk products, obtained an agreement from the subject that in consideration of the issue of a licence to deal in milk he would pay a certain sum to the Food Controller. In the Court of Appeal Bankes, L.J. said : "It is not disputed for the Crown that the Food Controller could not without Parliamentary authority impose the charge complained of." Atkin, L.J. points out that by the Bill of Rights no money can be levied for or to the use of the Crown except by grant of Parliament. See also *Brocklebank* (*T. and J.*) *Limited* v. *The King* (*sup.*), where the Shipping Controller was similarly held not to be entitled to charge for granting a licence.

Other cases, such as *Wathen* v. *Bandys* (2 Camp. 640) (a case of a sheriff being under a duty to erect hustings not being liable to charge candidates with expenses, being part of a duty upon him in executing a writ to return members to Parliament), *Morgan* v. *Palmer* (*sup.*) (in which a justice of the peace sought a fee for renewing a licence of publicans), *Steele* v. *Williams* (*sup.*) (where a parish clerk sought illegally to make charges for extracts from a register book), *Snowdon* v. *Davis* (1 Taunt. 358), all establish the proposition stated by Baron Martin in *Steele's* case (*sup.*) that a person who illegally takes money under cover of an Act of Parliament is liable to be sued for it. All these cases depended upon a duty existing in some person arising from his office, which duty that person refuses to perform unless he receives payment. In so far as there is here no enforceable duty in the Crown or its officers to use the troops in any particular way or at all, these cases do not appear to me to assist the appellants.

In *Glasbrook Brothers* v. *Glamorgan County Council* it was argued that as there was a duty on the police to provide protection, the discretion as to the way that should be done was not to be bought or sold. Lord Cave (132 L. T. Rep., at p. 613; (1925) A. C., at p. 279) points out that power may exist where there is no absolute duty, that is the present case, and that where there is no absolute duty a demand for payment is not necessarily contrary to public policy. The duty here, being of imperfect obligation, is not so absolute as to preclude a charge. I would add that, in any event, I have grave doubts whether the duty of imperfect obligation to defend the subject from enemies by the use of troops extends to the suppression of piracy on the seas. By 11 & 12 Will. 3, c. 7, s. 11, an Act for the more effectual suppression of piracy, specific power is given to the judge of the High Court of Admiralty and other persons to raise and levy upon the owners of a ship and goods defended by officers, seamen, and mariners against pirates, enemies, or sea rovers, money to be distributed among the defenders, the widows and children. And, although for certain statutory purposes a pirate is to be deemed to be an enemy (Naval Discipline Act, 29 & 30 Vict. c. 109, s. 49), yet the definition of a pirate stated in Hawkins's Pleas of the Crown, chap. 20, at p. 251, still stands, "that a pirate is one who, to enrich himself, either by surprize or open force, sets upon merchants or others trading by sea, to spoil them of their goods or treasure. . . . A pirate, at the common law, is a person who commits any of those acts of robbery and depredation upon the High Seas, which, if committed on land, would have amounted to felony there."

Were there no other obstacle in the way in the argument of the appellants in contending for the duty of the Crown, this consideration would have to be considered; whether the obligation of the Crown, such as it is, to protect the subject extends to a protection against pirates upon the high seas, and, if so, whether it is not a duty cast upon the Navy and not the Army.

The duty of the King to protect his subjects is stated in Chitty on Prerogative thus: "Protection, that is the security and governance of his Dominions according to law, is the duty of the Sovereign." Blackstone, p. 262, indicates that monarchical government has for one of its purposes the protection of weakness of individuals by the united strength of the community. But as regards the duty of protection by sea, I do not know that such a duty can be put higher than is stated by Lord Stowell in *The Mary Ann* (*sup.*), that there is an obligation upon King's ships to assist the merchant vessels of this country; see also the observations of Sir J. Hannen in *The Cargo ex Ulysses* (6 Asp. Mar. Law Cas. 355; 60 L. T. Rep. at p. 112; 13 Prob. Div. at p. 208), which indicate that the Admiralty is the normal protector of the subject against pirates. Piracy is robbery within the jurisdiction of the Admiralty: *Attorney-General for Hong-kong* v. *Kwok-a-Sing* (*sup.*), *Rex* v. *Dawson* (13 State Trials 454).

I can find no obligation upon the Army to protect merchant ships. If there be any such duty in the Crown, it would appear to be imposed not upon the Army but upon the sea forces of the Crown, for the use of which there is no complaint as to charge in the present case. In any event, in such a case it is for the Crown to decide what resources in its armoury, naval or military, it will employ.

For all these reasons I am of opinion that this appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Thompson, Quarrell, and Co.*

Solicitor for the respondent, *Treasury Solicitor.*

April 25 *and* 26, 1932.

(Before SCRUTTON, GREER and SLESSER, L.JJ.)

Leon and others v. Casey. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Insurance (marine)—Practice—Discovery—Risk insured covering sea and land transit—Warehouse to warehouse clause included—Loss by fire on land transit—Whether risk a marine insurance—Order for discovery of ship's papers.

Goods were insured for the voyage from Cairo to Jaffa by a named steamer. The policy also contained a warehouse to warehouse clause. On the land transit from Cairo to Alexandria by motor lorry, the goods were burnt. An order for discovery of ship's papers having been made,

Held, that the policy, being substantially a marine policy, the order for discovery of ship's papers had been rightly made.

Harding *v.* Bussell (10 *Asp. M. C.* 50 ; 92 *L. T. Rep.* 531 ; (1905) 2 *K. B.* 83) *followed.*

APPEAL from an order of MacKinnon, J., dated the 11th April, made in Chambers. The plaintiff's claim as endorsed on the writ was "for the loss by fire of goods in transit by lorry from Cairo to Alexandria, on or about the 9th June 1931, insured under a policy of insurance dated the 24th July 1931 and subscribed by the defendant and other underwriters. The plaintiff, Esther Crespin, sues as assignee of her co-plaintiffs." The defendant was an underwriting member of Lloyds. The risk covered in the policy was "from Cairo to Jaffa in the good ship *Lotus*." The policy also incorporated a warehouse to warehouse clause. On the 5th June 1931 a certificate of insurance was issued to the plaintiffs at Alexandria in respect of a cargo of hosiery and cotton goods which was insured for 2257*l.* While the goods were being conveyed between Cairo and Alexandria by motor lorry on the 9th June 1931 the lorry caught fire and the goods were destroyed. On the 11th April 1932 MacKinnon, J. made the usual order for discovery of ship's papers by the plaintiffs.

The plaintiffs appealed.

H. G. Robertson for the appellants.

W. L. McNair for the respondent.

Scrutton, L.J.—This is an appeal from an order of MacKinnon, J. on a writ against Lloyd's underwriters endorsed: "The plaintiffs' claim is for the loss by fire of goods in transit by lorry from Cairo to Alexandria on or about the 9th June 1931, insured under a policy of insurance dated the 24th July, 1931, and subscribed by the defendant and other underwriters. The plaintiff, Esther Crespin, sues as assignee of her co-plaintiffs." On that writ MacKinnon, J. has ordered what is known as an affidavit of ship's papers. The plaintiffs appeal on the ground that this was not a case for an affidavit of ship's papers, but a case in which the ordinary order for discovery ought to be made. I need hardly explain that whereas the ordinary order for discovery is made after pleadings and relates only to documents which are or have been in possession of the plaintiff, an order for ship's papers goes very much farther and requires the plaintiff to produce from all persons who have any interest in the adventure—not in the policy but in the adventure—any material documents which are in their possession or to show that he has endeavoured to get but has not succeeded in getting them. People not accustomed to marine insurance have always felt a difficulty in understanding why this distinction should be made and have tried to restrict it as much as possible; and, in my view, it has always been logically difficult to account for the cases in which the order must be made and the cases in which it need not be made.

The origin of the order for ship's papers goes back to the time of Lord Mansfield. In those days common law courts did not order discovery, and if you wanted to obtain discovery of the papers in possession of the other side you had to apply for a bill in equity and get discovery in equity, and very frequently an action in the King's Bench was delayed while equity proceedings were going on. Partly in consequence of that and partly in consequence of the fact that insurance has always been said to be a transaction involving the utmost good faith, where the assured is bound to communicate everything in his knowledge to the insurance company, both at the inception of the risk and at every subsequent proceeding during the risk—for instance, where he makes a claim—the King's Bench courts have invented the order for ship's papers which is made as soon as the writ is issued in an action on a policy of marine insurance. The particular case which is always referred to, *Goldschmidt* v. *Marryat* (1 Camp. 559), shows what was happening because there the plaintiff desired to get his case advanced so that he might go to trial without the bill of discovery in equity being filed, and there was a discussion there by the judges in which doubts were expressed as to whether this order for ship's papers was one which was usually made and ought to be made. In that case it will be seen that Sir James Mansfield sent Mr. Campbell, who was then a reporter in the Court of King's Bench, to inquire from the court what the practice was upon the subject, and Mr. Campbell having done so came back and reported in these terms: "Campbell, upon his return, certified, that Lord Mansfield had laid it down as a rule, that, although he would not wait for any proceedings in equity, he would on no account take a cause out of its course at *nisi prius* for the purpose of defeating them; and that the same rule had been observed by his two noble and learned successors, Lord Kenyon and Lord Ellenborough." The report then proceeds: "In the course of the discussion it was stated, on the part of the defendants, that they had applied to Mr. Justice Heath for an order upon the plaintiff to produce upon affidavit all the papers in his possession concerning the cause, but that that learned judge had refused to make any order, except for the production of specific papers mentioned by the defendant, or, generally, for all papers without any affidavit. Sir James Mansfield said: "I have great difficulty in believing this statement to be correct. I have made fifty such orders since I became Chief Justice of this court. I was, to be sure, a good deal surprised when they were first applied for, as nothing of the sort was known when I practised in the King's Bench. But I consulted

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

the other judges, and found they had become extremely common. I think they have been very properly introduced, as they often obviate the necessity of going into a court of equity, and save a great deal of delay, expense, and litigation. Without requiring the plaintiff to produce the papers on affidavit, the order would be nugatory. He would only select such as could be of no use to the opposite party. Nor would it answer to limit the order to such papers as are specifically named, since there may be others which the party has not the means of describing, and which may be got at through the medium of a court of equity."

From that time there has been a regular practice in cases concerning policies of marine insurance, or, as one may also express it, in adventures involving marine insurance, to make an order, as soon as the plaintiff has issued his writ, that he shall disclose to the other side all material documents, not only those which he has in his own possession, but those which persons interested in the adventure —not merely interested in the policy but interested in the adventure—must also have in their possession. If he cannot get the other documents he must show on affidavit that he has been unable to get them.

At that time insurance was almost entirely marine. Then the big companies came into existence and Lloyd's confined themselves to marine insurance; and it was not until enterprising underwriters at Lloyd's began insuring all sorts of risks which their predecessors never thought of, such as that a cricket match would not be spoilt by rain, that servants would be faithful and not commit frauds concerning their master's money, excess of bad debts, and so on, that a large volume of insurance grew up which was not marine in any sense, and in which the adventure never involved any marine risk.

When the Judicature Act came in, and rules were made under it, it was held by some of the judges that the order for ship's papers had been superseded by the rules made under that Act, and in the case of *Fraser* v. *Burrows* (2 Q. B. Div. 624), Cleasby, B., having made an order in chambers staying proceedings, was reversed by two judges on the ground that the Judicature Act had swept away the order for ship's papers and superseded it by the procedure under the Judicature Act. But in a case within six months of that order (*West of England Bank* v. *Canton Insurance Company*, 2 Ex. Div. 472), another order in chambers to the same effect came before Kelly, C.B. sitting with Cleasby, B. Kelly, C.B., who had been a party to the previous case, was instructed by Cleasby, B. and changed his mind, saying that the order for ship's papers continued. In the case that has been cited by MacKinnon, J. (*Graham Joint Stock Shipping Company* v. *Motor Union Insurance Company*, 15 Asp. M. C. 445; 126 L. T. Rep. 620; (1922) 1 K. B. 563) this court said again, it being apparently necessary to say it, that *Fraser* v. *Burrows* (*sup.*) was wrongly decided, and that the order for ship's papers continued in its old form. In that particular case the court declined to make any order to produce the ship's papers relating to the ship which was in fact found to have been scuttled.

As the scope of insurance grew at Lloyd's, other questions began to arise. Before I go into that I ought to say perhaps that Brett, L.J. in *China Transpacific Steamship Company* v. *Commercial Union Assurance Company* (45 L. T. Rep. 647; 8 Q. B. Div. 142) gave the reasons for the order for ship's papers and A. L. Smith, L.J. repeated them in the case of *China Traders' Insurance Company Limited* v. *Royal Exchange Assurance Corporation* (8 Asp. M. C. 409; 78 L. T. Rep. 783; (1898) 2 Q. B. 187). The extension of insurance from marine insurance to insurance for semi-marine or other than marine risks soon began to raise the question how far the order for ship's papers extended. Logically it has always seemed to me that if the justification of the order for ship's papers was the duty to disclose on the part of the assured, the order for ship's papers ought to extend to all insurances. But the development has not been logical. The reason given for the order for ship's papers applies equally to many other insurances, but it has not been extended beyond policies of marine insurance. As far as I know, the first case in which the question arose was *Henderson* v. *Underwriting and Agency Association Limited* (64 L. T. Rep. 774; (1891) 1 Q. B. 557), and one of the difficulties in that case, so far as I can recollect, was that no one knew exactly how the papers were conveyed; they were insured by the good ship Post Office Conveyances from Cadiz to Alexandretta on the coast of Syria. Of course, it is obvious that there is no line running from Cadiz to Alexandretta; they are both rather out of the way places, and there is a perfectly good way of transit by sea the whole way, and in my recollection of the case there was no particular evidence as to how the good ship Post Office Conveyances was going to carry the papers which were insured from Cadiz to Alexandretta. But coming before Cave, J. and Jeune, J. (as he then was), a compromise order was made; the order for ship's papers was not made, but an order for discovery before pleadings was made, giving some effect to the duty of the assured to disclose, but not the full effect that would be given by an order for ship's papers.

Henderson's case (*sup.*) was followed by a case before Kennedy, J. (*Village Main Reef Gold Mining Company* v. *Stearns*, 5 Com. Cas. 246), in which goods were insured from the mines in South Africa to London; the loss there occurred on the railway going down to the port of shipment, and Kennedy, J. purported to follow the decision in *Henderson's* case (*sup.*). The next case came before Mathew, L.J. The case which came before him in *Harding* v. *Bussell* (10 Asp. M. C. 50; 92 L. T. Rep. 531; (1905) 2 K. B. 83) concerned goods in transit from various places in England, the farthest being Hull, to various ports, London or Southampton, and thence by sea to South Africa, and it was argued that as the policy was partly for land transit, an order for ship's papers ought not to be made. There is a slight difference in the report of that case as between the Commercial Cases report (10 Com. Cas. 184) and the report in the *Law Reports*. In the report in Commercial Cases, Mathew, L.J. said at p. 188: "As I have said, the rule equally applies where the transit, though partly by land, is covered by a policy such as a policy in this form, which is substantially a policy of marine insurance. I am, therefore, unable to concur in the decision of Kennedy, J. in *Village Main Reef Gold Mining Company* v. *Stearns* (*sup.*), or of the Divisional Court in *Henderson* v. *Underwriting and Agency Association Limited* (*sup.*) if the latter case is to be regarded as a departure from the ordinary practice. I can see no reason why the ordinary practice should not be followed, though part of the transit covered by the policy be by land." That is reported not quite so strongly in the *Law Reports*—whether Mathew, L.J. revised the report I do not know—some judges do, some judges do not—but the passage in the *Law Reports* as to *Henderson's* case (*sup.*), on p. 86, is this: "If I were called on to express an opinion I should doubt whether the

decision was a correct one. It appears to have influenced my brother Kennedy in the case that came before him, and he appears to have treated it as an authority that wherever any portion of the venture is a transit by land there is no right to an affidavit of ship's papers. In that view I cannot concur. As I have said, the reasons for ordering an affidavit of ship's papers apply equally in a case where a part of the transit is by land. The other cases which were cited as authorities for the general rule need not be discussed, and I see no reason why the ordinary practice should be departed from in this case." Very shortly afterwards the same learned judge, Mathew, L.J., had before him the case of *Schloss* v. *Stevens* (10 Com. Cas. 224). In that case there was an insurance upon the goods "at and from on board the import vessel" at her port of discharge "to any place or places in the interior of the Republic of Columbia." It appeared that the transit was by railway, by mule pack and by river steamer and that the delay which had happened which had caused deterioration of the goods was owing to a breakdown of the railway. Mathew, L.J. said that the affidavit for ship's papers was ordered in marine insurance and not in an insurance of risks in inland waters, and as the only trace of "marine" in this case was the inland waters of the inland river the order for ship's papers did not apply. I have always wondered what would have happened if the mode of transit being railway, mule pack and partly river it had been partly up the Amazon where a steamer can go a thoundsa miles up the river and may ground and possibly suffer any amount of water damage. However, it was not, and being by mule pack and railway, Mathew, L.J. said that inland waters were not a matter for ship's papers.

Then in the case of *Tannenbaum and Co. and others* v. *Heath and another* (99 L. T. Rep. 237; (1908) 1 K. B. 1032), in the Court of Appeal, Lord Alverstone, C.J. presiding, sitting with Farwell, L.J., we find four different classes of adventure put into the same policy. Three of them have nothing whatever to do with marine insurance. The first is fire, limited to a place inland. The second is what is always known technically as the in-and-out policy by which the fidelity of servants in taking money in and out of a bank is guaranteed—again having nothing to do with the sea. The third is the risk in transportation of theft of the assured's property shipped to or from any salesman or customer by registered mail, express or messenger—again having nothing to do with marine—and the fourth is risk of transportation by sea. The particular adventure, the subject-matter of that claim, was fire on land, and the two arguments presented were these. On the one hand it was said: Here is a policy which under some circumstances may carry a marine risk, and, therefore, to the whole of the policy, whether it has anything to do with marine adventure or not, the rule of ship's papers ought to be applied. On the other hand it was said: This might have been marine adventure under this policy, but it was not; the thing which was insured had nothing to do with the sea or any marine adventure; and following that line, though giving in my view somewhat inconsistent reasons, the court said that the rule as to ship's papers would not apply to that adventure.

Now I need not go through the judgment in *Graham's* case (*sup.*), which has been cited because there I gave, possibly at not the same length as I am doing now, the history of the procedure, which is set out in great detail in sects. 1271 and 1272 of Arnould on Marine Insurance. But one of my expressions in *Graham's* case (*sup.*) was misunderstood by the counsel who argued the next case, *Teneria Moderna Franco-Española* v. *New Zealand Insurance Company* (16 Asp. Mar. Law Cas. 236; 130 L. T. Rep. 139; (1924) 1 K. B. 79); and an argument was put forward to limit the affidavit of ship's papers to documents in the possession of someone interested in the policy other than someone interested in the adventure, and the Court of Appeal had occasion there, while commenting on the form of the order for ship's papers, to say that it applied, not merely to people interested in the policy but also to people interested in the subject-matter of the adventure, such as the shipowner, though he had no interest in the policy on the goods. The court suggested that the order for ship's papers should be revised; the Lord Chancellor appointed a committee consisting of some counsel and solicitors specially experienced in insurance matters; I was chairman of the committee and we made a report to the Lord Chancellor, in consequence of which the present form of order for ship's papers was sanctioned by the Rule Committee and incorporated in the Rules.

Now, in my view, in order to see whether the matter comes within the order for ship's papers, you must look at the policy and the adventure giving rise to the action. The question is, Is the policy a marine policy?—because that is really what it began with and ended with—that in connection with every marine policy an order for ship's papers should be made. Is the adventure in respect of which a loss is being claimed a marine adventure?—and if you find that the adventure has nothing to do with the sea at all, as, for instance, the in-and-out policy in *Tannenbaum's* case (*sup.*), you will say: "No ship's papers," and if you find that the policy is not in the marine form at all, you will say: "No ship's papers." But if you find the policy in the form of a marine policy involving risk at sea, it does not, as Mathew, L.J. said in *Harding* v. *Bussell* (*sup.*), exclude the order for ship's papers, although you find that in addition to the transit by sea there are preliminary and subsequent transits by land. That does not take the case out of the class of marine adventures, and it becomes very marked when you remember that of recent years—because it is a comparatively recent alteration—every marine policy, every policy for transit by sea, has included the warehouse to warehouse clause involving at the beginning and end of the marine adventure a transit by land; and in the case of transit at the end of the marine adventure it is extremely important that you should have full discovery. When the transit to the warehouse takes place, damage to the goods may be discovered, and there may be a question whether it happened at sea, and, if so, whether the ship was seaworthy, or whether it happened on land by reason of something not in any way connected with the sea. So far as regards the warehouse to warehouse clause at the end of the adventure, the reason is obvious, and, in my view, the practice has always been that the rule as to ship's papers applies though there is a warehouse to warehouse clause in the policy. It is curious that except in *Harding* v. *Bussell* (*sup.*) nothing has been said about it, but I think the explanation is that the limited class of people who deal with marine insurance and with the order for ship's papers have known that the practice is such that nobody has ever dreamt of raising the question; and it is only when very able and ingenious people who are not familiar with marine insurance make an incursion into that sacred sphere that words begin to be used that no

man familiar with marine insurance would ever dream of using.

Now if that is the line to be followed, I look at the policy to see what it is. Obviously we have not got all the documents, because I have no doubt that there is behind this policy an open cover under which declarations will be made by the assured to the underwriter; but owing to the English stamp laws you cannot sue under an open cover; you are not able to fulfil the stamp law requirements of the policy that it should specify the adventure because the open cover is made before the adventures that are going to be declared on it are known. Means have been discovered to get round that system, and this is one of them. In this form of policy every week the adventures that have been declared during the week on the open cover are put into a stamped policy; that can be done at the end of the week because everything has been declared, and you can declare the amount and the adventures. Accordingly, one finds that this policy is a record of the risk covered for the week ended the 5th June 1931. The policy bears on the outside: "Lloyd's, London. Steamers as specified. Voyages as specified. 6028*l.* on interest"—6028*l.* being the amount that has been declared during the week. In the schedule of risks declared appears a particular number, "Advices," so and so, "Insured, Leon"—Leon being the name declared—by the steamship *Lotus*. "Voyage from Cairo to Jaffa," and looking at the policy one finds the warehouse clause. The policy itself is in a marine form, but being drawn up in this form before the declarations were made it is for voyages as specified; and they are specified in the schedule in the policy: "Steamers as specified and (or) steamers and (or) conveyances as specified subject to classification clause as attached for steamers unnamed"—"Interest as specified." It is, therefore, obviously in form a marine policy with land risks before and after the marine risk of the same nature as the warehouse to warehouse clause which is also included.

In my view, such a policy comes clearly within the decision of the Court of Appeal in *Harding* v. *Bussell* (*sup.*), and the order for ship's papers should, therefore, be made. MacKinnon, J. himself, a very experienced judge in marine insurance matters, has come to the conclusion that this policy and the risk insured under it requires an order for ship's papers none the less because the loss is alleged to have occurred on the voyage by land before the shipment by the *Lotus* which is contemplated in the policy. For these reasons I think MacKinnon, J. came to a right conclusion and the appeal must be dismissed.

Greer, L.J.—I have with much regret come to the same conclusion, that is to say, that the authorities which have been cited oblige me to hold that this order of MacKinnon, J. was an order which he was entitled to make and with which we cannot interfere.

Before dealing with the law on the subject and with the facts of this case, I should like to make two general observations. The first is that no more unpleasant duty has to be performed by a judge than the duty of deciding a case in accordance with a previous decision of courts which are binding on him which he thinks, as applied to the facts of the case before him, is both unreasonable and unjust. That is the task which I have before me in the present case.

The facts are these. The plaintiff wanted to get some goods from Cairo to Jaffa. He went to an insurance agent to get his adventure insured, and if he had got a policy in the form of the certificate which was given to him by the insurance broker he would have had on the same document two insurances: (1) an insurance of a land journey from Cairo to Alexandria, or whatever port the *Lotus* was going to sail from. and (2) an insurance of the marine voyage on board the *Lotus*. Those two adventures are kept separate in the certificate. But unfortunately for him the broker did not obtain—in fact, has not yet obtained—a policy in that form; what he obtained was the ordinary marine policy with the warehouse to warehouse clause which in form is a marine policy covering the sea voyage and the ancillary journey by rail from Cairo to the port; and in those circumstances I cannot escape the conclusion that we are bound to regard the policy which has in fact been taken out and which is the only document upon which the action can be brought as a marine policy liable to the legal incidents of a marine policy.

The other general observation I should like to make is this, that nothing blinds the vision so much as custom and habit. There was a time when the criminal law of this country was in a state which would have been a disgrace to a half-civilised community and, notwithstanding that fact, judges in high authority and writers of textbooks who had been brought up to regard the law as it was in their time wrote about it that it was the perfection of human wisdom; and I cannot help thinking that those members of my profession who have been largely engaged both at the Bar and on the Bench in considering questions of marine insurance have been infected with the idea that that which has always been applied in marine insurance is that which ought to be applied, and that the law as it stands is incapable of improvement. I take exactly the opposite view. I think that when the rule as to ship's papers was invented it was a rule which was necessary to do justice to the case of the insurers, but it has in time been so extended by judicial decision that it has become an unfair and unjust weapon in the hands of insuring companies and the insurers of Lloyd's. I have known case after case which came before the judge taking the commercial list where defendants who had no real defence to the claim have been enabled by means of this engine of oppression to keep the plaintiffs out of their insurance money for long periods of time; and I regret that the court has not felt itself justified in holding a tighter hand over the power to order an affidavit of ship's papers than it has done. But it has ultimately been decided that if the case is one of marine insurance and if there is a single document that has not been accounted for by the plaintiff, the defendant can hold up the case until the plaintiff searches all over the world for that document, which is just as available for search by the assured as it is by the insurers. It is possible under the existing powers of the court to give the judge on the hearing of the summons a greater control over the order for ship's papers, so that he might exercise his discretion in each case as to whether it is really being used for the necessary purposes of the litigation or whether it is being used as an engine of oppression on behalf of the insurance company or the defendant Lloyd's insurer. I doubt whether it is possible to do that by rules of court now, but if it is, at any rate, I should think the change would be a welcome one to those who desire that justice shall be done and that there shall be an early end to litigation.

That, of course, is by the way, and it is not possible for me to decide this case on general principles: I have to decide it in accordance

with the previous decisions. In the present case the claim was expressly made as a claim relating to that part of the insured adventure which took place on land; and it was contended that in any case where the claim is confined to that portion of the adventure which takes place on land, then the rule as to the affidavit of ship's papers does not apply—because what is the use, it is said, of having ship's papers when the voyage by ship has nothing whatever to do with the matters in dispute in the action? But, of course, it has been clearly laid down, and frequently acted upon, that the affidavit of ship's papers does apply to a marine adventure with a warehouse to warehouse clause; and it is impossible to say that ship's papers in the literal sense of the word may have nothing to do with the transit which begins on land, a substantial part of which is continued on sea. There may, for example, be such a thing as a through bill of lading and there may be in the course of performing the journey covered by that through bill of lading a deviation either on that part of the journey which takes place on land or on that part of the journey which takes place on sea; and it has, as I think it has, been decided that where the adventure is substantially a marine adventure the rule as to an affidavit of ship's papers applies, then the question has to be determined in each case whether the adventure is or is not substantially a marine adventure; and in deciding that it seems to me that it is not possible to leave out of account the kind of contract which was made with the insurers. It is not possible to leave out the form of the contract made with the insurers because that is an indication as to what the adventure was that the two parties were considering when the policy was entered into.

I think in this case what the parties were considering when the policy was taken out was a marine adventure starting on land, but an adventure which was substantially a marine adventure within the meaning of sect. 2 of the Marine Insurance Act 1906, which provides that "A contract of marine insurance may, by its express terms, or by usage of trade, be extended so as to protect the assured against losses on inland waters or on any land risk which may be incidental to any sea voyage." I think perhaps, without looking at the cases, that those words are wide enough to cover the contract of insurance in this case; and I think the authorities show that in order to determine whether there should or should not be an affidavit of ship's papers you have not to look at what the claim in the action is, but at what the nature of the contract is that is sought to be enforced by the action at law. I think that view is consistent with all the cases, and I doubt whether the case of *Village Main Reef Gold Mining Company* v. *Stearns* (*sup.*) is in the least inconsistent with that, although apparently Mathew, L.J. seemed to think that it was, because in the course of his judgment in that case Kennedy, L.J. (then Kennedy, J.), says this at p. 248: "Of course, if the insurance is substantially one of sea carriage, although the subject-matter is also covered while on shore, it would still be a marine insurance." I think the case upon which my Lord has particularly relied as deciding this matter in the Court of Appeal is *Harding* v. *Bussell* (*sup.*), but I think that is on the same lines; the only question that the court had to determine in each of these cases was whether the contract in question was or was not a contract substantially for a marine risk. In giving his judgment in *Harding* v. *Bussell* (*sup.*), Mathew, L.J. says at p. 187 in the report in 10 Com. Cas.: "Here the policy sued upon is substantially a marine policy, but we are asked to say that because a small portion of the transit covered by the policy is by land, and because the policy covers the goods from warehouse to warehouse and while there, the whole of the established practice should be altered." I do not regard that as in any way conflicting with the decision of Kennedy, J. to which I have referred.

Then came the case in the Court of Appeal which has given me the most trouble; that is the case of *Tannenbaum and Co. and others* v. *Heath and another* (*sup.*), a decision of Lord Alverstone and Farwell, L.J. It is difficult to follow from the words of Lord Alverstone exactly what his view was; he appears to hesitate between two different views, one, that the right to an affidavit of ship's papers is to be determined by the nature of the claim made by the assured, and the other that the right is to be determined by the nature of the contract on which he is making the claim. Lord Alverstone says this (99 L. T. Rep., at p. 239; (1908) 1 K. B. at p. 1036): "There the decision"—he is referring to the decision in *Harding* v. *Bussell* (*sup.*)—"in *Henderson* v. *Underwriting and Agency Association Limited* (1891) 1 Q. B. 557) was questioned, and it was held that, where an insurance was substantially a marine insurance, the fact that part of the transit was by land did not affect the right of the defendant to an affidavit of ship's papers. That case is important, because it shows that for this purpose that which has to be looked at is the substance of the claim in the action." That is not what is to be looked at. What is to be looked at is the substance of the contract upon which the claim is made which is put as a test in the next sentence: "Mathew, L.J., at the beginning of his judgment, called attention to the fact that the policy in that case was in substance a marine policy, although it did cover a short transit by land, from ship to warehouse." Then on the next page the learned Chief Justice says this: "In *Harding* v. *Bussell* (*sup.*), discovery of ship's papers was ordered, where the real claim was on a marine insurance," and lower down, "What is really the nature of the insurance upon which the action is brought? Here it is not disputed that the action is upon a policy of fire insurance on precious stones on land. It is admitted that the claim was not on clause 4 of the policy." That case was concerned with a policy of insurance which was obviously in its substantial incidence a fire policy and a policy against the dishonesty of servants for acts committed on land with incidentally the clause which covered an event which might have happened, namely, that occasionally these goods were travelling by sea. I do not regard the case as a decision to the effect which was relied upon by Mr. Robertson, that you have to look at the nature of the claim and see whether it is a claim for a loss which occurred on land or a claim for a loss which occurred at sea. The true view seems to be that you must look at the contract of insurance and ask yourself is that substantially a contract of marine insurance; and whatever might have been the view I could have taken if a policy had been drawn up in accordance with the certificate which was obtained, I find myself unable to hold that the policy which has been handed over, which is the only one which can be made the subject-matter of action at the present moment, is not substantially a marine policy.

For those reasons, though I do not see how the usual affidavit of ship's papers can be of any real

use to the insurers in this case, I think it is a case in which the learned judge was entitled to make the order, and we cannot interfere with it.

Slesser, L.J.—I agree that this policy must properly be considered to be substantially a policy of marine insurance. Indeed, I doubt if Mr. Robertson really contests that point. As I understand his argument, it is this. He says: "We have to have regard to the claim with reference to the misadventure which here befell." There may be cases where it is doubtful whether the misadventure took place on land or on sea, cases, for example, such as the disappearance of the goods when the ship reaches the point of destination or the final warehouse. Here, however, he says that his claim as appears in the writ is based specifically and only on a loss incurred before the goods were at sea at all; and, having regard to the narrowness of his claim and basing himself upon the original purpose and intention of all discovery, he says there is here nothing further to be inquired into than there would be in the case of a loss insured solely in respect of land risks, and, therefore, that the underwriters are not entitled to those particular privileges which are conferred upon them with regard to marine insurance.

Now I can find no authority at all for Mr. Robertson's proposition, except a passage in the judgment of Lord Alverstone, C.J. in the case of *Tannenbaum and Co. and others* v. *Heath and another* (*sup.*). The authorities which I have read and considered are all concerned with this question: Was the contract one substantially of marine insurance or not?—not with the question, Was the loss actually covered by such part of the policy as did not apply to the marine adventure? The only case, as I say, which does contain some passages which might raise the contrary view are to be found in *Tannenbaum's* case (*sup.*) and, like Greer, L.J., it is that case which has caused me the greatest trouble here.

In *Tannenbaum's* case (*sup.*), it is quite true that there was ample material on which the court could have come to the conclusion, having regard to the nature of the policy and the risks there insured, which were of four kinds, one only of which had any relation to transportation by sea, that the policy was not one of marine insurance taking it as a whole, and, therefore, the case might well have been held to fall within the decision of *Schloss* v. *Stevens* (*sup.*), and cases on that side of the line rather than the cases of which *Harding* v. *Bussell* (*sup.*) is the chief representative.

But Lord Alverstone has not been content in *Tannenbaum's* case (*sup.*) to found himself, as I read the judgment, wholly on the question of the nature of the contract. He discusses the nature of the claim, and he says this (99 L. T. Rep. at p. 240; (1908) 1 K. B. at p. 1037): "If the claim had been under that clause"—that is, clause 4, which is the clause dealing with marine risks—"I do not say that there might not have been an order for discovery of ship's papers. But, when one finds that the only claim in this case is on a fire insurance, that the exceptional privilege given to underwriters of a marine policy has never been extended to other insurances." If that means, as Mr. Robertson contends it means, that even if it be assumed that the policy be substantially one of marine insurance, one has to look at the particular part of the risk covered to see where the loss was—to see whether it was a marine loss or a land loss—I think that what Lord Alverstone is saying is inconsistent with the whole line of authority. But, rather than take that view, I would prefer to think that Lord Alverstone there was treating the policy in that case as really being four separate policies, and when he speaks of the claim there he means the claim on that part of the policy which is dealing with marine matters and not that part of the policy which is dealing with land matters. If he is treating the insurance in *Tannenbaum's* case (*sup.*) as four separate insurances, the inconsistency between that case and the other cases, which therwise leaps to the eye, does not arise. However that may be, it is quite clear, I think, that Farwell, L.J. took the view, because he says: "In this case the claim is not upon such a policy"—he is referring to marine policy. "It is immaterial that, in another clause of the same document, which is not sued upon, there is an insurance against marine risks." I think it is quite clear that Farwell, L.J. is treating the insurance in *Tannenbaum's* case (*sup.*) as one of four separate insurances. He is not speaking of the claim arising out of the particular loss. He is saying that this claim is on the insurance against fire which, although contained in the same document, is a separate contract and severable from the marine insurance. In that way after much hesitation I have gone into that case: and, that being so and the case not in any way throwing any doubt upon the leading case of *Harding* v. *Bussell* (*sup.*), I think that, as far as it is substantially marine insurance, the misadventure has occurred within the limits of that insurance between warehouse and warehouse, and, therefore, the principle laid down in *Harding* v. *Bussell* (*sup.*) would apply.

I would only add one word, and that very reluctantly, on the more general question of policy. My reluctance arises for two reasons—firstly, because I feel myself incompetent to express an opinion, and, secondly, from a natural hesitation to appear to invade the province of the Legislature. For my own part, in the conflicting views which may be expressed on the merits or demerits of these orders for ship's papers, I should be inclined to come to this view. On the one hand it is said they may be used as instruments of oppression and delay; on the other hand it is pointed out that in the form in which underwriters grant their policies they do not get that specific information which is usual when a declarant fills up a paper in any policy on land. Speaking for myself, my natural conservative inclination would lead me to believe that where a practice has developed over many years' dealing with a very difficult matter, the probability is that it is right and not wrong; and if there is to be any alteration in this particular matter it should be done with care and discretion and after long consideration. As I say, the probability is that that which has prevailed on the whole, so far as I can see from the authorities, with the acquiescence both of the insurers and the assured, is probably the most expedient way in which to deal with this difficult matter.

Appeal dismissed.

Solicitors for the appellant, *Montagu's* and *Cox* and *Cardale*.

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

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Tuesday, March 8, 1932.

(Before EVE, J.)

Re Argonaut Marine Insurance Company Limited. (*a*)

Insurance—Transit and marine form—Transit risks with fire risk included by indorsement—Fire excluded from company's business—Loss thereby—Proof in liquidation rejected—Assurance Companies Act 1909 (9 *Edw.* 7, *c.* 49), *s.* 28, *sub-s.* (3).

A consignment of wool in transit to a warehouse, near Hamburg, where it was stored for a month, was insured on a German policy for 150,000 *dollars. The transit covered the distance from the ship to the warehouse. The form of policy was for transit or marine indorsed to cover fire and pilferage risk. It was renewed for two months, during which the wool was seriously damaged in the warehouse by fire. The insurers claimed against the company, but they declined to pay. They then sued in the local court and recovered judgment on which they sued in the King's Bench Division under Order XIV., and recovered judgment for* 2000*l. and upwards. The company had meanwhile gone into liquidation, and proof was tendered for that amount, but rejected on the ground that the policy was a fire policy* ultra vires *the company. This summons was by way of appeal. It appeared that fire, life, and accident business was excluded from the company's objects. By the Assurance Companies Act* 1909, *s.* 28, *sub-s.* (3), *a policy was not to be deemed a policy of fire insurance by reason only that loss by fire was one of the obvious risks covered thereby.*

Held, that the question was whether the policy was mainly transit or marine, to which fire risk was incidental or the reverse. The transit for so short a space was subsidiary, the main risk being that of fire. The above-mentioned section did not, therefore, apply and the summons would be dismissed with costs.

THIS was a summons taken out in the winding-up of this company by the applicants asking that the decision of the liquidator not to admit their proof should be reviewed, and the proof admitted. The facts were as follows: On the 9th June 1928 this company and four German insurance companies, by their agents in Hamburg, insured the applicants in 150,000 dollars with 30 dollars premium in respect of a consignment of raw wool for transit in Harburg–Wilhelmsburg from quay to warehouse for one month, including any stay there, and by a typed indorsement warehousing risks against fire and explosion on the general insurance conditions of the companies were included. By art. 1 of these conditions especially were included partial or complete destruction, risk of fire, theft, and pilferage. The policy was renewed for two more months at the like premium. In August the wool was damaged by fire to the amount of 384,000 dollars. It was then sold by the companies for 133,047 dollars, and this was remitted to the applicants, who subsequently received an amount equal to all their loss except the share of this company—9424.21 dollars, with interest. The applicants took proceedings to recover this in the court at Hamburg, and although the company had before contended that their agents had exceeded their authority in entering into such a contract, not being within their powers, judgment was given by default for the applicants for that sum. The amount not being paid, judgment was obtained in the King's Bench for the amount under Order XIV. This company then went into liquidation. The applicants put in a proof for the amount, but this was rejected by the liquidator as being *ultra vires* the company. Clause 8 of its memorandum of association was "to carry on . . . every kind of transit, insurance business, and generally every kind of insurance and marine insurance business, whether of the like or a different kind . . . except life assurance business, fire insurance business, or accident insurance business within the meaning of the Assurance Companies' Act 1909. Hence this summons.

Lindon for the applicants.—Fire insurance is defined in sect. 1 (*b*) of the Act, but this case comes within the qualification in sect. 28, sub-sect. (3), namely, that a policy is not to be deemed one of fire insurance by reason only that loss by fire is one of the various risks covered. The indorsement of the policy did not alter its nature: (*Royal Exchange Assurance* v. *Hope*), 138 L. T. Rep. 446; (1928) Ch. 179).

G. O. Slade for the liquidator.—The policy was one of fire insurance within sect. 1, sub-sect. (3), of the Act. Its form is immaterial: the transit risk was negligible. Fire was the principal risk: (*Re United London and Scottish Insurance Company*, 13 Asp. Mar. Law Cas. 170; 113 L. T. Rep. 400; (1915) 2 Ch. 12). It is not within the saving of sect. 28, sub-sect. (3).

Lindon replied, and referred to *Simon Israel and Co.* v. *Sedgwick* (7 Asp. Mar. Law Cas. 219, 245; 67 L. T. Rep. 785; (1893) 1 Q. B. 303).

Eve, J.—This is an application on the part of a German firm to review the action of the liquidator in rejecting the proof they have lodged in the winding-up for damages caused by fire to a consignment of raw wool. The claim is based on a policy of insurance dated the 9th June 1928, and the liquidator justifies the course he has taken by asserting that the policy is in substance a fire insurance policy and one into which the company had no power to enter. One cannot help regretting that the applicants should already have been involved in the expense of recovering judgments in Germany and in England, but now that the company is in liquidation the liquidator is bound to protect the assets for those who are legally entitled to participate in their distribution.

His case is that the policy—although purporting to be a transit one—was in substance an insurance against loss or damage by fire, and he relies on clause 8 of par. 3 of the company's memorandum of association as establishing that this class of insurance business is outside the company's powers. The company is thereby empowered to carry on every kind of transit insurance, and generally every kind of insurance business, except life assurance business, fire insurance business, accident insurance business, or employer's liability insurance business

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

within the meaning of the Assurance Companies Act 1909.

What I have to decide, therefore, is whether this is a fire insurance policy or a marine policy, and in considering that question, sect. 28, sub-sect. (3), of the Act, whereby it is provided that the policy shall not be deemed to be a policy of fire insurance by reason only that loss by fire is one of the various risks covered by the policy, must be borne in mind. If the policy is a marine policy, then, although fire was one and only one of the risks insured against, it would not be within sub-sect. (*b*) of sect. 1 of the Act, but if, according to its true construction, it is a policy insuring against loss by or incidental to fire, then it is fire insurance business under the Act, and business which the company had no power to undertake. In the former case the claim of the applicants would be provable in the winding-up; in the latter case their right of proof is limited to the unexpired portion of the premium.

I have come to the conclusion that the liquidator's contention is right. The policy is in form a transit one, but was altered by indorsement so as to cover the wool while in transit or in storage against risk of fire or explosion. The transit part of the risk was of an almost negligible nature, involving only the transit of the wool from the quay to a shed or warehouse in the same place, and when, after the transit was over, the policy was renewed on two occasions, the same premium was charged as had been charged for the first period, which included transit, a clear indication that what was really being insured against were the warehouse risks and not the transit. Moreover, the wording of the policy specially including in the insurance the risk of partial or complete destruction by fire discloses the real nature of the contract, and I feel bound to hold that this was the real risk insured against. I must, therefore, dismiss this summons, with costs.

Solicitors: *Stokes* and *Stokes; Stafford Clark and Co.*

KING'S BENCH DIVISION.

Friday, Nov. 27, 1931.

(Before Bateson, J.)

Dampskibsselskabet Botnia A/S v. C. P. Bell and Co. (*a*)

Charter-party — "Weather working day" — Loading prevented by ice—Claim by owners for dead freight.

A charter-party provided that a cargo of timber should be loaded at the rate of 125 fathoms per weather working day. Under the charter-party the ship proceeded to the port of Mollersvik, Finland, to load timber for carriage to Cardiff. Ice formed at Mollersvik shortly after the ship's arrival, in consequence whereof the timber could not be loaded at the agreed rate. Before the loading was complete the ship was obliged to leave port to avoid being icebound. The owners claimed against the charterers for dead freight. It was not disputed that if the days on which loading was prevented by ice were treated as "weather working days" the ship could have been fully loaded before it was necessary for her to leave port.

Held, that days on which work at the port of loading could not be carried on by reason of the presence of ice were not "weather working days," and consequently that the claim failed.

In this action the plaintiffs, as owners of the steamship *Sydhavet*, claimed a sum for dead freight on a charter-party for the carriage of timber from Baltic ports to Cardiff. The charter-party, which was dated the 27th Oct. 1930, provided that the plaintiff's ship *Sydhavet* should go to one place in Middle Finland as ordered by the charterers and load a cargo of pit props, and being so loaded should proceed to Cardiff and there deliver the cargo on payment of the freight. The defendants were the owners of the pit props and holders of the bill of lading, which incorporated all the material terms of the charter-party.

In pursuance of the charter-party the steamer was ordered to Mollersvik, a Finnish port, which was icebound in winter. She arrived there on the 8th Nov., and loading commenced. Shortly afterwards ice began to form, and from the 21st Nov. loading was impossible. By that date 394 fathoms had been loaded out of 750 required to make a full cargo. On the next day the ship put to sea, as she was compelled to do to avoid being icebound. The part cargo was carried to Cardiff, and was there deposited with the dock authority in pursuance of sects. 492 to 496 of the Merchant Shipping Act 1894, and the master claimed a lien on it for dead freight in respect of cargo which had not been carried.

The question in issue in the action was whether days on which cargo could not be brought to the ship because the harbour was ice-bound were "weather working days" within the meaning of clause 5 of the charter-party. That clause provided as follows: "At loading port the cargo shall be brought alongside the vessel at charterers' risk and expense. The cargo shall be loaded at the rate of 125 fathoms per weather working day on an average during the ordinary working hours of the port, but according to the custom of the port."

Clause 7 (*d*) provided: "If after arrival the master for fear of vessel being frozen in deems it advisable to sail he shall be at liberty to leave without cargo, and to fill up for vessel's benefit at any port or ports whether such ports are in the course of the chartered voyage or not. . . ." The charter-party further provided (by clause 18) that the master or owners should have an absolute lien on the cargo for dead freight.

G. St. C. Pilcher for the plaintiffs.—The obligation on the charterers was to load at a stipulated rate "per weather working day." Days on which loading was prevented by ice were "weather working days." If not, the loading could have been delayed until the following spring. Ice is not "weather" in the sense used in this charter, but is a mere result of weather. Weather suggests something fortuitous, but there is nothing fortuitous about ice in this place at that time of the year, for the formation of ice was something which was bound to occur. If a gale on shore had blocked the road by which the timber was being carried to the port it might have rendered the loading of this cargo impossible, but the day on which the progress by land was so impeded would be none the less a "weather working day."

Willink for the defendants.—There never were sufficient "weather working days" in which to complete this contract. Ice is "weather." It is merely rain in another form, and no one could

(*a*) Reported by V. R. Aronson, Esq., Barrister-at-Law.

suggest that rain was not weather. The charterers only bound themselves to load whilst the weather permitted loading; and if great cold, resulting in the formation of ice, prevented loading, days on which that condition existed were not "weather working days."

Pilcher replied.

Bateson, J.—This is an action by shipowners against cargo-owners to recover dead freight on the steamship *Sydhavet*, which was chartered to carry pitprops from a port in Middle Finland to Cardiff. On the 8th Nov. 1930 the ship arrived at Mollersvik, which is a port in Middle Finland. At Mollersvik the cargo has to be brought down a river to an estuary, and the ship lies at an anchorage one or two, or possibly three, miles out in the bay, and the method of loading is by towing rafts of timber from the mouth of the river out to the ship. Any part of the raft that is not completely loaded in the day is towed back again, because it is not safe to leave it alongside the ship.

The ship arrived at this port in the afternoon, and the following day was a Sunday. From the 10th to the 16th Nov. there was only one day on which the ship could be loaded, namely, the 11th Nov., and she then loaded 136 fathoms. There was some little question as to whether she ought to have loaded a little more on the Saturday, but the tug towing the raft out got ashore owing to a snowstorm. It does not look as if it was a very good day for loading, but that is what was done, and nothing was loaded on that particular day. It was very unfortunate from the point of view of the ship, because if it had been fine weather she would have been loaded and would have got away. On Sunday, the 16th Nov., which was not a working day, ice began to appear. A little cargo was loaded on the 17th and 18th, but the ice set in substantially, and with the exception of some small parcels which were farther outside than the mouth of the river, in places where some small quantities were kept stored, no more loading was done before the 21st. Ice was the cause which prevented any more cargo being brought to the ship from the storage place, and the port was practically shut on the 18th Nov. for the winter. It was obvious that no more cargo could be given than what the shippers had managed to do from the other small place where there was a small store, and it was no good the ship waiting any longer. The master, and his owners, wanted to get a full cargo, and if he did not get a full cargo he wanted dead freight, and in order to protect himself the master would not go without getting a letter from the shippers to say that it was not possible to ship any more cargo. Thereupon the shippers gave him a letter in the following terms: "As we now, on account of weather hindrances (ice), consider ourselves unable to supply any more props in Mollersvik, we are ready to clear your vessel, in accordance with the charter-party, with the approximate 400 fathoms loaded. On account of the reason mentioned above we are now also unable to deliver any props from any other place stipulated in the charter-party."

Of course, if the master had stayed very much longer he would have been frozen in himself. He had to go, and there was no chance of his getting any more cargo.

Those are most of the facts in this case. In fact, 394 fathoms were loaded, leaving 356 fathoms short. The vessel proceeded to Cardiff on the 22nd Nov. and arrived there on the 27th Nov. The claim was made for dead freight and a deposit was made under the Merchant Shipping Act on the 2nd Dec.

The charter-party was made on the 27th Oct., a fortnight before the vessel arrived at the port of loading and was in the "Scanfin" form. It was agreed between Messrs. Galbraith, Pembroke and Co., agents for the owners, and Messrs. Pitwood, the charterers, that the vessel should proceed to one place in Middle Finland and load a full and complete cargo of short pit props and being so loaded should proceed to Cardiff. [His Lordship then read the material clauses of the charter-party, as above set out, and continued:]

The question which I am asked to decide really comes to this: What is the meaning of "weather working day" in clause 5? Mr. Pilcher points out that clause 7 (*d*), the sub-clause in the ice clause, does not apply to this shipper, and that it is only put in for the protection of the owners. Mr. Willink, on the other hand, says that the corresponding protection for the shipper is under clause 5, which regulates his duty to put cargo on board the ship in weather working days only. That is really the dispute between the parties. Mr. Pilcher says that clause 5 merely relates to the rate for loading, and that it does not negative or cut down the obligation to load a full and complete cargo, that the shipper is bound to ship at the fixed rate per weather working day, and he says that ice is not weather; that it may be the result of weather, but that it is not weather, and that on a perfectly fine, bright, cold day ice would not prevent the vessel being loaded. He further says that if they had wanted to except ice from the loading they could have said so in that clause, or they could have made it clear elsewhere in the charter-party, and they have not chosen to do so. He goes on further to say that there is no reported case where it has ever been held that when loading is prevented by ice it is not a weather working day.

Of course, the answer to that is the one so often made where no cases can be found in the books, that nobody ever thought of saying so before. But the question has arisen now, and I have to determine it, and the way I approach it is this. Is a day on which ice prevents loading a weather working day within the meaning of this charter-party? It was a charter-party for a vessel to go to an ice port at a very late period in the season. One of the worst things of an ice port is, I suppose, that ice prevents the loading; and I, myself, think that where, in such a charter as this, for such a place as this, the parties have agreed that the loading is only to take place on weather working days, if the conditions are such that the cargo cannot be got out of the ice in order to be taken to the ship, that day will cease to be a weather working day. I think that the formation of ice by cold which prevents the loading is weather, and that the meaning of the phrase "weather working day" between business men dealing with this kind of charter-party must relate to prevention from loading by ice.

Passages in the correspondence have been referred to where the parties themselves talked about it being the weather that prevented the loading, and such expressions are used as "If the weather turns mild we might get on with the loading." The actual wording of the notice which the master got the shippers to give him says "weather hindrances," and I think, in ordinary English, the meaning of the words in this charter-party are that ice such as prevented the loading in this case, was weather preventing the loading, and that the excuse for not loading more is that there were no more weather working days on which that could be done. Mr. Willink pointed out that

if ice is not weather the waves which are produced by the wind and which prevent lighters or rafts from getting alongside vessels could not be said to be weather. I think that is somewhat analogous. I think the phrase means loading weather, and if you have ice which prevents you from loading you have not got loading weather. In other words, you have not got a " weather working day."

Mr. Pilcher says there is only one case, namely, *Bennetts* v. *Brown* (98 L. T. Rep. 281 ; (1908) 1 K. B. 490), where the words, " weather working day " have ever been interpreted. In that case, Walton, J. said : " I think it has a natural meaning, namely, a day on which the work of discharge—it might be of loading, but in the present case it is of discharge —is not prevented by bad weather " : (98 L. T. Rep. at p. 283).

Mr. Pilcher says that this was not bad weather, that ice is very often beautiful weather ; but I think that in this charter-party it is bad weather when ice prevents you from loading. Scrutton, L.J., in his book on charter-parties, says that " weather working days " means days on which the weather allows working : (Scrutton on Charter-parties, 13th edit., p. 365). Those two definitions are almost identical in meaning, and I am satisfied that in this case the proper interpretation of these words is that which I have put upon them. There will, therefore, be judgment for the defendants.

Solicitors for the plaintiffs, *William A. Crump* and *Son*, for *Gilbert Robertson* and *Co.*, Cardiff.

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

Friday, May 6, 1932.

(Before MacKinnon, J.)

Portvale Steamship Company v. Corporation of the Royal Exchange Assurance. (*a*)

Marine insurance—Institute Time Clauses—Continuity of voyage—Particular average.

The defendant corporation insured the plaintiffs' steamship Portvale *for twelve calendar months from midnight the 30th July* 1930 *to midnight, the 30th July* 1931, *subject to " Institute Time Clauses as attached." Clause* 13 *of the Institute Time Clauses provided " warranted free from particular average under* 3 *per cent." Clause* 16 *provided : " The warranty and conditions as to average under* 3 *per cent. to be applicable to each voyage as if separately insured, and a voyage shall be deemed to commence at one of the following periods to be selected by the assured when making up the claim, namely, at any time at which the vessel* (1) *begins to load cargo, or* (2) *sails in ballast to a loading port. Such voyage shall be deemed to continue during the ensuing period until either she has made one outward and one homeward passage (including an intermediate ballast passage if made) or has carried and discharged two cargoes, whichever may first happen, and, further, in either case, until she begins to load a subsequent cargo or sails in ballast for a loading port." The* Portvale *was chartered to load in the River Plate for Antwerp, and between the* 10*th Jan.* 1931 *and the discharge of her cargo at Antwerp on the* 9*th April* 1931 *she sustained damage on three occasions. She then lay up at Antwerp till the* 27*th Aug.* 1931 *owing to absence of freight. During the period of lying up she sustained damage on two occasions. The question for decision was whether the cost of repairs arising from these two later casualties could be added to the expenses incurred on the three earlier casualties so as to ascertain whether the* 3 *per cent. particular average was exceeded.*

Held, on the clear wording of clause 16 *which defined a " voyage," the voyage which had commenced on the* 10*th Jan., was still continuing during the period of lying up. On any other construction there would be great difficulty in knowing what limit to put on the period of delay. The contention of the plaintiffs was right, and there must be judgment for them.*

Action tried in the Commercial list without a jury.

Under a policy of marine insurance dated the 30th July 1930 the defendant corporation insured the plaintiffs' steamship *Portvale* " for and during the space of twelve calendar months commencing midnight the 30th July 1930 and ending midnight, the 30th July 1931 as employment may offer subject to ' Institute Time Clauses ' as attached." Clause 13 provided " warranted free from particular average under 3 per cent.," and clause 16 defined when a voyage was deemed to begin and end.

The *Portvale* sailed in ballast from Pernambuco on the 10th Jan. 1931, chartered to load in the River Plate for Antwerp. On the 17th Jan. 1931 she encountered heavy weather which caused damage to the hull and machinery, and she put into Montevideo for repairs on the 21st Jan. She later proceeded on the voyage, and on the 7th Feb., when entering the port of Santa Fé to load, she struck the quay wall, sustaining damage to her bows. After loading a complete cargo the vessel proceeded to St. Vincent for bunkers, and while bunkering there on the 18th March 1931 the steamship *Sagres* collided with her, damaging her bulwarks.

The vessel then proceeded to Antwerp, arriving there on the 2nd April 1931, and the discharge of the cargo was completed on the 9th April. The vessel was then shifted to a lay-up berth pending arrangements for further employment. While so lying up, the steamship *Kabinda*, on the 24th June 1931, collided with her. She was dry-docked, and the collision damage was repaired, together with the damage previously suffered. In leaving the dry-dock, on the 9th July 1931, the vessel struck the quay walls on two occasions and sustained further damage. That damage was repaired in due course, and on the 27th Aug. 1931 she sailed in ballast for Hamburg, where she subsequently loaded cargo for the Kara Sea.

The plaintiffs contended that under the provisions of clause 16, the voyage which began at Pernambuco was still continuing while the ship lay-up, and the casualties suffered at Antwerp were covered. The defendants contended that the voyage was not so continuing, and that the cost of repairs, &c., arising from the casualties of the 24th June and the 9th July 1931 could not be added to the expenses incurred in respect of the

(a) Reported by R. A. Yule, Esq., Barrister-at-Law.

earlier casualties, regardless whether the 3 per cent. particular average had been exceeded or not.

Carpmael for the plaintiffs.

Sir *Robert Aske* for the defendants..

MacKinnon, J.—In this case the steamship *Portvale* was insured by the defendant corporation under a policy dated the 30th July 1930, the policy being expressed to be " for and during the space of twelve calendar months commencing midnight the 30th July 1930 and ending midnight the 30th July 1931 as employment may offer," subject " to Institute Time Clauses as attached." In the Institute Time Clauses it was provided, in sect. 13, " warranted free from particular average under 3 per cent.," with a qualification that is of no moment in this case. It was then provided, in clause 16 : " The warranty and conditions as to average under 3 per cent. to be applicable to each voyage as if separately insured." The clause then goes on to give a definition of what is meant by a voyage. As it is upon the wording of that part of the clause 16 that this dispute turns, I need not read it until I come to consider the point in dispute.

It is perhaps not immaterial to observe that clause 23 provides for what is commonly known as laid-up returns, the material one of which would be the return of 13*s.* 6*d.* per cent. if abroad when laid up in port.

The material facts which happened were these. On the 10th Jan. the vessel sailed in ballast from Pernambuco under a charter-party to load cargo for carriage to Antwerp. On the 17th Jan., while she was in ballast, she sustained some damage at sea. That was repaired in January at Montevideo, but on the 7th Feb. she sustained at Santa Fé some further damage by colliding with a quay wall. On the 22nd Feb. she sailed from the Plate with her cargo, but put into St. Vincent for bunkers, and on the 18th March she sustained some further damage from collision there. She then arrived at Antwerp, and on the 9th April had discharged her cargo at Antwerp. Owing to the unhappy condition of the freight market her owners then had no immediate employment for her and she was laid up at Antwerp from the 9th April until the 27th Aug. During that period, on the 24th June, she sustained some further damage through a ship running into her, and on the 9th July she sustained some further damage by bumping into a sea wall. On the 27th Aug. her stay at Antwerp came to an end, and she sailed for Hamburg under charter to load a cargo for the Kara Sea.

The collective cost of the damage which she sustained on these three occasions—the 17th Jan., the 7th Feb., and the 18th March—as I understand, came to more than 3 per cent. under the policy, and was admitted to be a claim. The cost of repairing the two sets of damage at Antwerp, on the 24th June and the 9th July, did not amount to 3 per cent., and the assured can only claim for these if he can assert that these two claims arose during the same " voyage " as that upon which the three earlier claims arose. In other words, he must establish that all five claims arose during the same " voyage."

The defendants say that that claim cannot be made, inasmuch as these five sets of damage were not all sustained during one voyage, but only the first three of them were sustained during the course of the voyage, and the two later ones were during a different voyage, or at any rate, not during the same voyage.

That involves the question what is the effect of the definition of a voyage set out in the words of clause 16. Those words are these : A voyage shall be deemed to commence at one of the following periods to be selected by the assured when making up the claim, namely, at any time at which the vessel (1) begins to load cargo, or (2) sails in ballast to a loading port." There is no dispute in this case when the voyage which we have to consider began. It is obvious, and it is admitted, that the voyage began when the ship sailed in ballast from Pernambuco. That is clearly within the provision that the voyage " shall be deemed to commence at one of the following periods to be selected by the assured when making up his claim." One of those is when the vessel " sails in ballast to a loading port." So the voyage began at Pernambuco. But the clause, having defined when the voyage should be deemed to have commenced, goes on to provide how long such voyage shall be deemed to continue in these words : " Such voyage shall be deemed to continue during the ensuing period until either she has made one outward and one homeward passage (including intermediate ballast passage if made), or has carried and discharged two cargoes, whichever may first happen ; and further, in either case, until she begins to load a subsequent cargo or sails in ballast for a loading port." Clearly the assured are correct in saying that under that provision this voyage had not finished by the 9th July when the fifth of the series of damages and the second of those, when laid up at Antwerp, occurred, because he can say that, the voyage having commenced at Pernambuco, it is to be deemed to continue until the vessel has carried and discharged two cargoes, and further, until she begins to load the subsequent cargo or sails in ballast for the loading port. On the actual words of the clause I think there can be no doubt that the assured is right in saying that the voyage which has been deemed to commence at Pernambuco under this condition must be deemed to be still continuing.

But it is alleged by Sir Robert Aske, on behalf of the defendants, that you ought to bring in some implication that the period when the vessel is actually lying up waiting for further employment to offer ought to be excluded from the period covered by the voyage, and he relies upon the fact that what one is dealing with, and what one is considering, is a voyage, and that the period when the ship is laid up is entirely alien to any notion of the ship being engaged upon a voyage. I should quite agree with that contention on the part of Sir Robert Aske if the question one had to consider was what was the natural construction to be applied to the word " voyage," and what is covered by or implied by it. But in this case we are dealing with a clause or provision which uses the word " deemed," " such voyage shall be deemed to continue " as from a certain date. Whenever you get the words " deemed to be " it means, though obviously the thing is not true, you have to pretend that it is true. Whenever you are dealing with a phrase which provides that something or other shall " be deemed to be " so and so, you have got to avoid and leave out of account any real consideration of the true facts, and you have only to ascertain whether the facts stated in the provision have arisen. If they have arisen, then you have to pretend and to deem that they are something else, though apart from such direction you would not think of doing so. Furthermore, I feel great difficulty in knowing, if I give effect to this contention, what limit I am to put upon the period, and how much is to be excluded from that which would clearly be covered under the clear words of the clause. I put the possible

case that in the circumstances here it might have happened that this ship, after discharging at Antwerp, had been chartered to load cargo in the Baltic, at first open water, and that as a result of waiting until the ice was broken she had to wait three weeks or a month, or even longer perhaps, at Antwerp, instead of hanging about out at sea until the ice allowed her to enter her new loading port. Sir Robert Aske, I think, was inclined to say that the period of waiting at Antwerp then would not be part of the voyage. From that the next stage would be, if she had not actually a new charter, that her owners would have to wait for a certain period before they could find a new charter, which might be a fortnight. As to that, Sir Robert Aske was inclined to say, I think, that it was only a little time, and he could not say that that was not included in the voyage.

The real truth is that the underwriters, not unnaturally, feel that it is hard that so long a period as this, which amounts to five months, should be included in this voyage which started at Pernambuco. But, in my view, upon the clear wording of the clause, though it results in this case in what appears to be a somewhat strange and possibly hard result, I do not see my way to say that as the time when these last two pieces of damage were sustained this ship had ceased to be on the voyage which commenced at Pernambuco, under the artificial definition of a voyage provided by this clause.

The result is that the assured are entitled to recover the claim they make in this case.

As it happens, by an accident we have discovered (because I had brought to me the old edition of Arnould) that this clause has remained unaltered since 1908, and it is perhaps rather a happy illustration of the comparative regularity of the employment of British ships that circumstances have not previously arisen to make this point obviously one of difficulty.

I am not going to suggest that the underwriters of the institute should make still longer what is already a very lengthy "Institute Time Clause," but I imagine, if this sort of point had been previously considered, there would have probably been some sort of addition or qualification to clause 16 providing that any period in respect of which the assured recovered a lying-up premium under clause 23 was not to be deemed to be part of a voyage within the meaning of clause 16. I am not inviting them to introduce that condition, but I do not think that I can imply such a condition as it has not been expressed.

I understand there is no dispute about the amount. The result is there must be judgment for the plaintiff for 17*l.* 4*s.* 10*d.*, and there will, of course, be judgment with costs on the High Court scale.

Judgment for plaintiffs.

Solicitors: *Middleton, Lewis* and *Clarke*, for *Downing* and *Handcock*, Cardiff; *Ince* and *Co.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

May 2 *and* 11, 1932.

(Before LANGTON, J.)

The Mons. (*a*)

Ship — Priorities — Master's disbursements — Master's wages—Crew's wages—Necessaries.

The following claims were made against the proceeds in court of the sale of the steamship M., *which were insufficient to meet all claims in full: (i.) Claim of a former master for disbursements in respect of necessaries made in June* 1931; *(ii.) claim by the master for disbursements in respect of necessaries supplied in Norway in Jan.* 1932; *(iii.) claim by salvors for services rendered in Jan.* 1932 *on the voyage from Norway to the United Kingdom; (iv.) claim by the master for wages and disbursements and by the crew for wages for periods before and subsequent to the salvage services.*

Held, that the lien of the master for disbursements ranks upon precisely the same footing as his lien for wages; that the claims of the respective masters ranked pari passu *and not in the inverse order of attachment of their liens; and that the lien of the master is postponed to that of the crew.*

The Salacia (1862, *Lush.* 545) *followed.*

MOTION to determine priorities. On the 17th Jan. 1932 the Norwegian steamship *Mons*, whilst in the course of a voyage from Norway to the United Kingdom, being short of bunker coal, took the salvage assistance of the steam trawler *Heugh*, which towed her into Aberdeen.

A salvage action (fo. 24) was subsequently started against the *Mons*, her cargo, and freight. No appearance was entered for the ship and freight and the *Mons* was sold by order of the court for the sum of 1464*l.* 14*s.* 5*d.* An award of 650*l.* rateably against the *Mons* and her cargo, valued at 1201*l.* 13*s.* 10*d.*, was made by Langton, J. on the 11th April 1932.

Other claims were made against the *Mons*, and judgment obtained in the following actions:

Fo. 66. An action by Martin Clausen, a former master, for disbursements in respect of bunker coals amounting to 312*l.* 12*s.* 3*d.*, supplied in June 1931, at Kopervik, Norway, for which he had made himself liable.

Fo. 31. An action by Sigmund Thorbjornsen, the master of the *Mons*, for disbursements in respect of bunker coals amounting to 83*l.* 9*s.* 5*d.*, supplied in Jan. 1932, before the *Mons* started on her voyage to the United Kingdom, for which he had made himself liable on a promissory note.

Fo. 43. An action by Thorbjornsen and the crew of the *Mons* in respect of (*a*) disbursements by Thorbjornsen for provisions and travelling expenses amounting to 28*l.* 10*s.*, and (*b*) wages of the master and crew for different periods between Sept. 1931 and Feb. 1932, amounting to 589*l.* 4*s.* 5*d.*

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

R. F. Hayward for the salvers (fo. 24).

K. S. Carpmael for the plaintiffs in fos. 66 and fo. 31.

J. V. Naisby for the plaintiffs in fo. 43.

Cur. adv. vult.

May 11, 1932.—**Langton, J.**—One or two minor problems were raised by this motion, and, as they were matters which I do not think have been dealt with before, I reserved my judgment to consider them.

I will dispose first of a point which was not really in dispute—namely, the question of the value of the master's lien for wages as compared with that of the crew. There is good reason, and, although an old case, good authority (*The Salacia*, 1 Mar. Law Cas. (O. S.) 261 ; 1862, 7 L. T. Rep. 440 ; Lush. 545) why the crew's claim for wages should have priority to the claim of the master, and Mr. Carpmael did not contend to the contrary. The master's lien, therefore, must be postponed to that of the crew.

The next matter was a curious point as to whether the master's lien for disbursements was on the same footing as his lien for wages. In my view there is no substance in this point. When one is considering the ranking of liens regard is had to the position of A.'s lien as against B.'s, but the relative position of A.'s liens are not matter for consideration at all. A master either has a valid claim in respect of wages and (or) disbursements or he has not. If he has a genuine claim for disbursements it will rank on precisely the same footing as his claim for wages.

The third point is more important. It is whether the claims of the respective masters for disbursements should rank *pari passu* or in the inverse order of their attachment ; and as Mr. Carpmael said, the authority on the point is of a somewhat illusory character. In Roscoe's Admiralty Practice, 5th edit., p. 227, it is stated that it may be regarded as settled that "liens *ex contractu* or quasi *ex contractu* rank against the *res* in the inverse order of their attachment on the ground that the last act in respect of which the latest claim arises, being a service to those who have anterior claims, is entitled to rank before such claims. As regards wages earned before a salvage service, this is clearly just, because the salvors have preserved the *res* in which the sailor has a lien." The authorities do not support quite so wide a statement as the one I have just quoted. They really only show that in certain instances liens of a contractual character have been held to rank in the inverse order of attachment, and I have considered them carefully to ascertain whether I can find any reason in law or in natural justice why these particular liens should be held to rank in any other order than the natural one of *pari passu*.

The origin, or idea, of liens ranking in the inverse order of attachment is not far to seek. Where a ship has been salved, as this one was, it accords with one's natural view of justice that the salvor who has preserved the whole of the *res* should have his claim considered in priority to the various creditors of the ship who would have nothing upon which to claim if the exertions of the salvor had not been made. But when one is considering claims, as between two creditors who have supplied necessaries to the ship or claims made in the name of the master for necessaries, it is difficult to see how the same principle could be applied, or indeed why it should be applied at all. A. supplies necessaries in January, and B. supplies them in February. The master pledges his credit for both, and both claims come against the proceeds of the sale of the ship. Why should B.'s claim be preferred to A.'s ? Of course, if A. has been guilty of some form of laches or negligence in putting forward his claim, one could see some ground for preferring B.'s claim to A.'s. No suggestion of that sort is made here, and I can see no ground of authority and no ground of equity or justice upon which one should be preferred to the other. The claims of the necessaries men (suing in the names of the masters) acquired the priorities of those masters, and the two masters' claims, including those of the necessaries men, will rank *pari passu*. Any other claims for disbursements will also rank *pari passu*, and not in the inverse order of attachment.

It is to be noted that it was admitted on behalf of the salvors that wages earned subsequent to the salvage service took priority of the salvage claim. Accordingly, in this particular case, there will be certain wages and disbursements of a later date which will take priority of wages and disbursements of an earlier date. This priority is solely due to the intervention of the salvage services and the admission by the salvors in this case of a priority in respect of wages (and disbursements, I hold, are on the same footing) incurred subsequent to their own services, and does not rest on any principle of inverse order of attachment.

The order of priority will, therefore, be as follows : (i.) The costs of the arrest up to the date of the order for sale ; (ii.) the crew's wages subsequent to salvage ; (iii.) the master's wages and disbursements subsequent to salvage ; (iv.) the salvage award and costs ; (v.) the crew's wages before salvage ; (vi.) the wages and disbursements of the two masters before salvage.

Solicitors, for the salvors in fo. 24, *Botterell* and *Roche*, for *Botterell* and *Roche*, Sunderland.

Solicitors for the plaintiffs in fo. 31 and fo. 66, *Stokes* and *Stokes*, for *Bramwell*, *Clayton*, and *Clayton*, Newcastle-upon-Tyne.

Solicitors for the plaintiffs in fo. 43, *Charles Lightbound*, *Jones*, and *Lightbound*, for *Ingledew* and *Co.*, Newcastle-upon-Tyne.

March 1, 2*; May* 3, 4*; and June* 6, 1932.

(Before Lord MERRIVALE, P., assisted by Elder Brethren.)

The Castor. (*a*)

Shipping—Salvage—Value of salved property—Time charter-party—Appraisement—Whether value of future earnings under charter-party to be included.

In appraising the value of a vessel for the purpose of awarding salvage, the fact that the vessel was at the time of the services under a profitable and unexpired time charter-party can be taken into account, and the present value of future earnings under such charter-party can be included in the appraised value.

The Hohenzollern (10 *Asp. Mar. Law Cas.* 296 ; 95 *L. T. Rep.* 585 ; (1906) *P.* 339) *followed.*

SALVAGE ACTION.

The plaintiffs, owners, masters and crew of the steamship *Ousebridge*, of West Hartlepool, claimed

(*a*) Reported by GEOFFREY HUTCHINSON Esq., Barrister-at-Law.

salvage for services rendered to the Swedish motor vessel *Castor* and her cargo.

The *Ousebridge*, 5601 tons gross, whilst on a voyage from Nicolaieff to Baltimore via Oran, received a wireless message that the *Castor* was on fire in lat. 36° 34′ N. long. 22° 39′ W., and that her master had ordered the vessel to be abandoned. The *Ousebridge* at once proceeded to the *Castor*, and succeeded in making fast at about 4.30 p.m. on the 28th April 1931. The *Castor* was then towed to St. Michaels, Azores, where she was moored in safety at about 9.45 a.m. on the 2nd May 1931. The *Castor*, 8714 tons gross, was loaded with a cargo of oil.

At the time of the services the *Castor* was running under a remunerative charter-party, which still had seven years to run.

The value of the *Castor* was appraised at 72,820*l.*, but it appeared that the valuer in making his appraisement had not taken into consideration the value of the unexpired part of the time charter.

Dunlop, K.C. and *Naisby* for the plaintiffs.—The appraiser ought to have taken into account the value of the unexpired portion of the time charter-party, and he should have added something for the present value of the profits which the vessel will earn under it. The plaintiffs are entitled to an award on the value of the vessel to her owners as a going concern: (*The Hohenzollern*, 10 Asp. Mar. Law Cas. 296; 95 L. T. Rep. 585; (1906) P. 339). The same principle of valuation has been recognised in damage cases: (*The Harmonides*, 9 Asp. Mar. Law Cas. 354; 87 L. T. Rep. 448; (1903) P. 1; see also *The Edison*, 147 L. T. Rep. 141; (1932) P. 52). If the appraiser has proceeded upon a wrong principle the plaintiffs are not bound by the appraisement.

Digby, K.C. and *Carpmael* for the defendants.—The appraisement is conclusive, and ought not in this case to be set aside. In any case the appraiser has not proceeded on any wrong principle. The decisions in *The Harmonides* (9 Asp. Mar. Law Cas. 354; 87 L. T. Rep. 448; (1903) P. 1) and *The Hohenzollern* (10 Asp. Mar. Law Cas. 296; 95 L. T. Rep. 585; (1906) P. 339) must be read subject to the limitations of the decision in *The San Onofre* (14 Asp. Mar. Law Cas. 74; 116 L. T. Rep. 800; (1917) P. 96).

Dunlop K.C. replied. *Cur. adv. vult.*

June 6, 1932.—**Lord Merrivale, P.**—In addition to the controverted questions as to what was done by the *Ousebridge* and what was its effect, there was a stubborn contest at the hearing as to the value of the property salved, and a serious conflict as to the principle on which the value must be determined. Ordinarily an appraisement of the ship, a valuation of her cargo, and a simple adjustment of relevant matters of account will provide the material for arithmetical ascertainment of the values in question. Here, however a question of general importance has been raised, namely, whether in valuing the *res* in salvage cases the court can have regard to a charter-party in force at the time in question. This came about by reason that when the *Castor* was salved she was under time charter, with nearly seven years to run, with the Anglo-Saxon Petroleum Company.

The *Castor* had been built under the terms of a contract made in Dec. 1926, between her owners and the Anglo-Saxon Petroleum Company Limited, which determined the design and structure of the ship to be built and gave the company an interest in her as soon as she should be completed, the principal term being that she should be under hire to the company for a term of years at fixed rates for the carriage of oil at 6*s.* 10½*d.* per ton per month upon a dead weight capacity of 12,500 tons. Hence the charter-party. The *Castor's* gross earnings thereunder for a year were estimated by one of the witnesses at about 46,000*l.* and, after payment of working expenses and allowances for various charges, including charges for depreciation, it was said on the plaintiff's part that there was a net profit accruing to the owners under the charter-party of upwards of 12,000*l.* per annum, and it was contended that, the charter-party having nearly seven years to run, the present value of the prospective earnings of the *Castor* during that period must be taken into account as an element of value additional to her appraised value as a damaged ship of 72,820*l.* Mr. Dunlop also suggested in his final argument that the prospective earnings under the charter-party, if not treated as an element in the value of the vessel, ought to be regarded as freight at risk and part of the property or interest of her owners salved for them by the *Ousebridge*.

For the defendants the figures I have mentioned were not at all admitted. They regarded the net profit as only 4000*l.* It was contended by Mr. Digby that the value to be taken into account was the appraised value and no more.

In view of this conflict I thought it was necessary to ascertain from the valuer by whom the appraisement of the *Castor* had been made whether he had valued upon the footing that the vessel was on hire to the charterers on the terms of the actual charter-party, and I learned, and so informed the parties, that the charter-party had not been before the valuer. The vessel had been valued simply on the footing only of her actual employment. Evidence was given by expert witnesses as to the value of the *Castor* to her owners under the charter-party, and counsel discussed the question of value on this footing in light of a number of well-known legal authorities.

The outstanding cases cited were: *The Five Steel Barges* (6 Asp. Mar. Law Cas. 580; 63 L. T. Rep. 499; 15 Prob. Div. p. 142), *The Harmonides* (9 Asp. Mar. Law Cas. 354; 87 L. T. Rep. 448; (1903) P. 102), and *The Hohenzollern* (10 Asp. Mar. Law Cas. 296; 95 L. T. Rep. 585; (1906) P. 339); and in contrast with these the decision of Sir Samuel Evans, P. in *The San Onofre* (14 Asp. Mar. Law Cas. 74; 116 L. T. Rep. 800; (1917) P. 96). The judgments in the recent case of *The Edison* (147 L. T. Rep. 141; (1932) P. 52) in the Court of Appeal, were also mentioned. The substantial dispute, however, was whether the decision of the court in *The San Onofre* (*sup.*) limits or qualifies the principles applied in the earlier cases. As the question affects everyday practice it has been necessary to examine the cases closely.

Lord Hannen's judgment in the case of *Five Steel Barges* is useful for the reminder it gives that salvage cases are not mechanically uniform in process or in effect. It was a personal action against barge builders to establish a salvage claim in respect of services rendered to five barges, whereof two, though still under the builders' control, had passed to the Government for which they were built. Lord Hannen, in holding that payment for salvage was recoverable in respect of the possessory interest of the builders in these two barges, gave his well-known pronouncement on the principles which in our courts govern every salvage award. "It is," he said, "a legal liability arising out of the fact that property has been saved, that the owner of the property who has had the benefit of it shall make remuneration to those who have conferred the

benefit upon him. . . . I think that proposition applies equally to the man who has had a benefit arising out of the saving of the property. . . . The same moral obligations to which the law has given force in the case of an owner applies equally to those who have an interest in the property." The jurisdiction in salvage cases Lord Hannen also described as one of "a peculiarly equitable character."

As to the test of value in these cases, *The Harmonides* (*sup.*) and *The Hohenzollern* (*sup.*) were accepted by counsel on both sides as authoritative decisions. *The Harmonides*, like *The Edison* (*sup.*), was a case of ascertainment of value of a ship sunk in collision, but the test applicable appears to be the same in case of salvage. That this was Lord Gorell's view appears from the proceedings in the case of *The Hohenzollern* (*sup.*). What Lord Gorell had defined as the test in the damage case of *The Harmonides* (*sup.*) was: "What is the value to the owners as a going concern of the vessel in question at the material time?" and in *The Hohenzollern*, Bargrave Deane, J. after consultation with Lord Gorell, P. assessed salvage upon the footing that "the value is what the ship was worth in the damaged state to her owners."

Substantially the case of the defendants is that the judgment in *The San Onofre* (*sup.*) limits the operation of the earlier decisions by establishing as a legal principle that in determining the value of a salved vessel for salvage purposes contractual arrangements which exist between the owners and charterers of the ship must be excluded from consideration.

The facts as to *The San Onofre* can be shortly stated. She, like the *Castor*, was a vessel built for the purpose of being chartered to an oil company under a time charter. The time charter was in force with fourteen years to run at the date of the salvage. Her owners declared her value in her damaged condition to be not more than 160,000*l.*, that being the sum at which she stood in their books, with due allowance for depreciation and repair of damage. At the instance of the salvors, however, appraisement had been made in the ordinary course, and the value had been thereby fixed at nearly 370,000*l.* as "the market value of the vessel as a going concern at the date of the completion of the salvage services." This larger value was held by the court to be the value upon which the reward for the salvage services must be determined.

Certain passages in the judgment of *The San Onofre* were specially relied upon for the defendants, and these in particular: "In no case, so far as I am aware," the President said, "have the charters of a vessel been taken into account in assessing the value of a salved ship in salvage proceedings." Also this: "The ship is salved and may be arrested as she is, as the salvors are entitled to arrest the *res*. If bail is not given, the ship may be sold. She would not be sold subject to charter-parties, but as she existed to anyone who wanted to buy a ship of her description." And further, this: "The court has nothing to do with the relationship between the shipowners and the charterers; nor, in my opinion, have the salvors anything to do with any such question."

Read by themselves, as if they were statements of principle applicable in all cases, the words cited would perhaps establish the defendants' contention. They must, however, be applied to the facts with which the judgment deals. This is illustrated in respect of the question whether charter-parties may ever be taken into account in assessing value for salvage by a case reported in the same volume of the Law Reports with *The San Onofre* (*sup.*)—that of *The Kaffir Prince* (1917) P. 26). There, in determining a salvage award, the learned President took into account as an element in the value of the salved ship freight which the vessel was, by reason of the salvage, enabled to earn under a charter-party which was in being at the time of the salvage. In a damage case (*The Kate*, 8 Asp Mar. Law Cas. 539; 80 L. T. Rep. 423; (1899) P. 165), Lord St. Helier had treated the charter-party as a material element of value.

So far as I am able to see there is nothing in the case of *The San Onofre* (*sup.*) which in any way infringes or was intended to infringe the principle laid down in the case of *The Hohenzollern* (*sup.*). All parties interested in the *res* were before the court, and were interested in the salvage claim and the amount of the award. Two sets of rights—proprietory and possessory—had been benefited, and an award was made on the footing of the full value of the whole. The actual judgment was nothing exceptional. Upon an appraisement salvage was awarded. In what proportions the sum payable was provided as between the owners and charterers is not reported. Apparently they did not differ about it. As the vessel was not sold by auction, it did not become necessary to determine whether by virtue of the sale the owners had become entitled to the whole balance of the purchase-money on the footing that the charter-party had become discharged by operation of law. Had such a claim been made I cannot doubt that the equitable nature of the Admiralty jurisdiction in cases of salvage would have been vindicated.

As in the case of *The Hohenzollern* (*sup.*), what has to be determined here is what is the value of the *Castor* to her owners as a going concern? What was she worth in her damaged state to her owners?

The view I have expressed seems to me consistent with the judgments of the Court of Appeal in the recent case of *The Edison* (*sup.*) to which both parties referred. There, in the case of a vessel lost by collision damage, Scrutton, L.J. cited the judgment of Lord Gorell in *The Harmonides* (*sup.*), and added the words which directly affect the present inquiry. "The value of the ship," he said, "is an estimate on rough capitalisation of the earning power of the ship for its life"; and he added this: "You cannot give both the value of the ship and the profits it would probably earn."

Bearing authorities in mind, what seems to me fallacious in the contention for the plaintiffs here, is that after an appraisement which was manifestly based on some earning power they assert a right to enhance the appraised value by adding thereto the capitalised value of the ship's whole earning power under a charter-party. On the other hand, it seems to me inconsistent with authority and wrong in principle to exclude from consideration the earning power of the *Castor* under the charter-party, under which so long as it subsists she could alone earn money for her owners. The appraisement, as I have said, proceeds on the footing that the ship is an employed ship likely to be employed. To determine whether the agreed employment enhances the value so arrived at I have made the necessary further inquiries of the valuer. He advises me that the rate of hire is not exceptional so as to call for any adjustment on that ground, but that the agreed duration of the charter-party is an element of value proper for consideration in determining the *Castor's* value to her owners as a going concern. Acting to the best of my judgment upon the valuer's advice, I determine the salved value of the *Castor* at £85,000.

There was no dispute between the parties as to the salved value of the cargo. Taking account of

expenses involved amounting to 3938*l.*, the value of the cargo at Lisbon was 20,828*l.*

Having arrived at the values of the salved ship and cargo, I have to determine what should be the reward for the services rendered in salvage. It must be borne in mind that the salvage service involved loss of the *Ousebridge's* services to her owners for a period of six days, twenty hours, various expenses amounting to 1177*l.*, and 117*l.* expenses incurred by reason of the accident which happened to the seaman Prince. It is also material in respect of the claim of the owners of the *Ousebridge* that for several days their property, worth nearly 70,000*l.*, was exposed to risks involved in the salvage undertaking with no other prospect of compensation than that which depended upon the safe delivery of the *Castor* in port.

As to the master and crew of the *Ousebridge*, they undertook their task in face of some real risks which were inevitable, and of possible risks which might well have been alarming, and for the master the responsibility he took as well as his actual risk and labour, must be taken into consideration.

On the whole, I have come to the conclusion that the sum of 11,500*l.* would not be an excessive award for the salvage. Out of this sum 1000*l.* should go to the master of the *Ousebridge*, and 2300*l.* to her officers and crew, rateably, except that 300*l.* must be paid to the seaman Prince in respect of his injury in addition to his due share of the balance. Deducting from the total award of 11,500*l.* the sum of 3300*l.*, the balance of 8200*l.* will remain for the owners of the *Ousebridge*.

I have been asked to apportion the salvage found payable as between ship and cargo, and I direct that the total sum I have named of 11,500*l.* shall be apportioned between ship and cargo in proportion to their respective salved values of 85,000*l.* and 20,828*l.*

Solicitors for the plaintiffs, *Botterell* and *Roche*, agents for *Botterell*, *Roche*, and *Temperley*, West Hartlepool.

Solicitors for the defendants, *Stokes* and *Stokes*, agents for *Bramwell*, *Clayton*, and *Clayton*, Newcastle-upon-Tyne.

Supreme Court of Judicature.

COURT OF APPEAL.

April 26 *and* 27, 1932.

(Before SCRUTTON, GREER and SLESSER, L JJ.)

The Torni. (*a*)

ON APPEAL FROM THE ADMIRALTY DIVISION.

Carriage of goods—Bill of lading issued in Palestine—Bill of lading illegal by Law of Palestine—Failure to incorporate the "Hague Rules"—Bill of lading "wherever signed to be construed in accordance with English law" Whether "Hague Rules" incorporated—Government of Palestine Carriage of Goods by Sea Ordinance No. 43 *of* 1926.

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

By the Government of Palestine Carriage of Goods by Sea Ordinance No. 43 *of* 1926 *it is provided that any bill of lading or similar document of title issued in Palestine which contains or is evidence of any contract to which certain rules scheduled to the Ordinance (which are identical with the rules in the schedule of the Carriage of Goods by Sea Act* 1924) *apply shall contain an express statement that it is to have effect subject to the provisions of the said rules, and shall be deemed to have effect subject thereto, notwithstanding the omission of such express statement.*

Bills of lading issued in Palestine in respect of a cargo of oranges shipped on board the appellants' steamship at Jaffa did not contain any express statement as required by the above Ordinance, nor were the rules in any way incorporated therein. The bills of lading provided that, wherever signed, they should be construed in accordance with English law.

Held, on an issue as to a preliminary point of law, that the bills of lading sued upon under which the property in the goods was alleged to have passed by indorsement of the bills of lading to the indorsees must be construed subject to the rules scheduled to the Ordinance. The provision contained in such bills of lading that they should be construed in accordance with English law did not mean that the incorporation of the rules should be excluded, but merely meant that the bills of lading with the rules so incorporated should be construed in accordance with English law.

Held, further, that as regards certain plaintiffs who had taken delivery of goods and paid the freight, but as to whom it was not alleged that the property in the goods had passed by indorsement, no order could be made until the facts had been proved.

Order of Langton, J. varied and in part affirmed.

TRIAL of a preliminary point of law in an action for damage to cargo and short delivery.

The plaintiffs were the owners of the cargo of oranges *ex* the Esthonian steamship *Torni*. The defendants were the owners of the *Torni*, which at the time of the matters in question was under time charter to a firm of shipbrokers at Swansea. The cargo of oranges was shipped at Jaffa, where the bills of lading were issued.

By their statement of claim the plaintiffs alleged (par. 3) that Messrs. White and Son Limited and Messrs. William Machin and Co., two of the plaintiffs, were respectively the owners of 749 and 340 cases of the said oranges, to whom the property in the oranges passed upon indorsement of the bills of lading relating thereto. It was further alleged (par. 4) that Messrs. I. H. Goodwin Limited, White and Son (Hull) Limited, Humber Fruit Brokers Limited, Connolly Shaw Limited, T. J. Poupart (Northern) Limited, William Machin and Co., William N. Gibson and Co. (Leith) Limited, T. S. Johnson and Co., Andrew S. Clarke and Co. respectively took delivery of various cases of oranges set forth in the statement of claim under bills of lading held by them and presented to the defendants and paid freight due under such bills of lading respectively.

By their defence the defendants relied upon certain exceptions and other provisions contained in the bills of lading. In their reply the plaintiffs alleged the exceptions and provisions upon which the defendants relied were null and void under Art. III., r. 8, of the Government of Palestine Carriage of Goods by Sea Ordinance No. 43 of 1926, which requires rules similar to those scheduled to the Carriage of Goods by Sea Act 1924, to be incorporated in all bills of lading issued in Palestine. The defendants by their rejoinder denied that the bills of lading were subject to the Ordinance, and relied upon the following further provision in the bills of lading in question: "This bill of lading wherever signed is to be construed in accordance with English law." They further alleged that the *Torni* was at all material times under the flag of Esthonia.

The Government of Palestine Carriage of Goods by Sea Ordinance No. 43 of 1926 provides, so far as material, as follows:

"An Ordinance to amend the law with respect to the carriage of goods by sea.

"Whereas a Convention for the unification of certain Rules relating to bills of lading was adopted by the International Conference on Maritime Law held at Brussels in 1922 and 1923;

"And whereas it is expedient that the Rules of the Convention as set out in the schedule to this Ordinance should, subject to the provisions hereof, be given the force of law in Palestine with a view to establishing the responsibilities, liabilities, rights and immunities attaching to carriers under bills of lading;

"Be it enacted by the High Commissioner for Palestine [Field-Marshal Lord Plumer] with the advice of the Advisory Council thereof: . . .

"2. Subject to the provisions of this Ordinance, the Rules contained in the Schedule hereto shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in Palestine to any other port whether in or outside Palestine. . . .

"4. Every bill of lading or similar document of title issued in Palestine which contains or is evidence of any contract to which the Rules apply shall contain an express statement that it is to have effect subject to the provisions of the said Rules as applied by this Ordinance, and shall be deemed to have effect subject thereto, notwithstanding the omission of such express statement."

Schedule [contains rules similar to those scheduled to the Carriage of Goods by Sea Act 1924.]

The question which the court was asked to determine as a preliminary point was whether the provisions of the Palestine Ordinance applied to the bills of lading in question.

Van den Berg, K.C. and *Cyril Miller* for the plaintiffs.

Raeburn, K.C. and Sir *Robert Aske* for the defendants.

The facts and arguments of counsel fully appear from the judgment of Langton, J.

Dec. 11, 1931.—**Langton, J.** read the following judgment:

This case belongs to a class which I have already referred to in a judgment which I delivered last term as a kind of case which generally presents difficulties to me. It is no exception to that rule. Since I have endured in the present case the refined, but well-merited, torture of listening to almost the whole of my somewhat prolix judgment in the previous case (*The Adriatic*, 145 L. T. Rep. 580; (1931) P. 241) read to me *viva voce*, I will say at once that I have found very little in that pronouncement which has been of any assistance to me in this case.

Although one of the points to be determined now is the same as in *The Adriatic* case, namely, which of alternative systems of law applies in interpreting the several contracts between the parties, the facts are wholly dissimilar. In the present case certain parcels of oranges were shipped from Jaffa and carried to Hull upon the steamship *Torni*. The vessel is owned by the Reval Shipping Company Limited, an Esthonian company, and is an Esthonian ship. At the time in question—Jan. 1930—she was under time charter to Messrs. Stockwood, Rees, and Co., shipbrokers of Swansea, and was employed by them in a service which they advertised to the world in general and Palestine in particular as the Jaffa Union Line. All the bills of lading concerning these oranges were dated in Jaffa and signed in Jaffa by persons purporting to sign as directors of the Jaffa Union Line Limited. It was proved in evidence before me, upon testimony which I accept, that the Jaffa Union Line Limited is a corporation under the law of Palestine, which has been formed by certain gentlemen in that country who act as agents for Messrs. Stockwood, Rees, and Company. Some of the preference shares in the Jaffa Union Line Limited are owned by Messrs. Stockwood, Rees, and Co., and the Palestine Corporation is paid a loading commission by Messrs. Stockwood, Rees, and Company upon all shipments made at Jaffa upon ships which sail in the service known as the Jaffa Union Line. The average number of trips made per season in this service is about sixteen, but in a busy season the number has been as high as twenty-five. There was for a short while some obscurity in my mind as to the precise relationship of the Jaffa Union Line to the corporation known as the Jaffa Union Line Limited. This obscurity was quickly and finally dispelled by Mr. Rees, who explained that the Jaffa Union Line was nothing more than a name for the service, used to advertise and designate the service. There was a house-flag flown by the *Torni* to show that she belonged to the service, and the bills of lading are headed by the words "Jaffa Union Line," but there is no existing separate entity which bears this imposing title, and the words are descriptive only of the service of ships provided by Messrs. Stockwood, Rees, and Co.

Upon the pleadings in the case the plaintiffs were divided into two classes. The first and smaller class contained two firms who sued severally as indorsees to whom the property had passed of two separate and comparatively small parcels of oranges. The second and much larger class comprised nine firms suing in respect of individual parcels of greatly varying size. This second class did not, however, purport to sue as indorsees or owners, but only as parties who had presented the bills of lading and paid the freight due thereunder. Upon this a case was raised of implied contract by the shipowners to deliver the oranges in good order and condition in accordance with the bills of lading. Some of the plaintiffs complained of short delivery and some of damaged goods, and some of both damage and short delivery, and two questions were submitted to me as preliminary points of law. The first of these was as to whether the law of Palestine or the law of England governed the interpretation of the contract, and the second as to

whether the bills of lading were or were not subject to what may be called for brevity's sake, The Hague Rules, under whichever law was found by me to be applicable.

The bills of lading are all identical in form, and contain a large number of provisions protecting the shipowners, some of which are pleaded in the defence. In reply, the plaintiffs set up the Government of Palestine Carriage of Goods by Sea Ordinance, No. 43 of 1926, and claim that under the said ordinance the provisions of the bills of lading relied upon in the defence are null and void and of no effect. By way of rejoinder the defendants deny that the bills of lading are subject to the ordinance, or that the ordinance formed part of or affected the contract between the plaintiffs and the defendants. Alternatively they say that the ship was at all material times under the flag of Esthonia, and in the further alternative rely upon the latter part of clause 14 of the bills of lading, which is in these terms : "This bill of lading wherever signed is to be construed in accordance with English law." There can, of course, be no dispute, and there is no dispute in this case that Palestine is at present mandated territory, and His Majesty the King is the Mandatory for Palestine. In pursuance of the powers under the Foreign Jurisdiction Act 1890, His Majesty made and promulgated the Palestine Order in Council 1922, constituting *inter alia* the office of High Commissioner and defining the powers attaching to this office. In the year 1926, Field Marshal Lord Plumer, as High Commissioner for Palestine, made and published an Ordinance (No. 43 of 1926), entitled the Carriage of Goods by Sea Ordinance 1926. It was not suggested on the part of the defendants that this Ordinance was in any way *ultra vires* or in excess of the powers conferred upon the High Commissioner. Briefly stated, the effect of this Ordinance was to apply to Palestine with certain named and familiar exceptions, the rules relating to bills of lading adopted by the International Conference on Maritime Law held at Brussels in 1922 and 1923. These rules are, of course, The Hague Rules, which are now incorporated in the British Statute 14 & 15 Geo. 5, c. 22, known as the Carriage of Goods by Sea Act 1924. The Ordinance is in fact an obvious adaptation of the statute to conditions in Palestine, and for the present purposes differs from the statute in only one material respect. This difference, which is, in my view, of the greatest importance in this case, lies in a somewhat remarkable addition in the Ordinance to the parallel provision in the statute. Sect. 3 of the statute is in the following terms : "Every bill of lading or similar document of title issued in Great Britain or Northern Ireland which contains or is evidence of any contract to which the rules apply, shall contain an express statement that it is to have effect subject to the provisions of the said rules as applied by this Act." Provision 4 of the Ordinance, reads : "Every bill of lading or similar document of title issued in Palestine which contains or is evidence of any contract to which the rules apply shall contain an express statement that it is to have effect subject to the provisions of the said rules as applied by this Ordinance, and shall be deemed to have effect subject thereto, notwithstanding the omission of such express statement." It is difficult to conceive how a legislative authority could use stronger terms than those employed in the Ordinance to secure that any and every shipment made in the country under a bill of lading should be made subject to the provisions of the rules enjoined. In the present case the bills of lading not only contained no express statement as directed by the Ordinance, but included the provision to which I have called attention at the end of clause 14, that the bill of lading wherever signed was to be construed in accordance with English law. Since the whole argument for the defendant shipowner turned upon this provision in clause 14, it is in my view most material to notice at the outset that this clause occurs in a bill of lading issued and signed in Palestine. By way of introduction, I think, rather than positive argument, Mr. Van den Berg first contended that, since an Ordinance of Palestine had its fount and origin in His Majesty's Order in Council, the law of Palestine was nearly or practically or almost English law. I think that one might agree that it is British made, or even that, in the jargon of the day, it comes under the heading of an "invisible export"; but Mr. Raeburn, for the shipowners, made short work of the contention that it is English law or that there is any such thing as "nearly English" or "quasi English" law. Indeed, if the argument were sound, it would be not a little surprising to find, as one does, that the Palestine Order in Council 1922 invokes the Foreign Jurisdiction Act 1890 (53 & 54 Vict. c. 37) as the source of the Royal Authority. The preamble to this statute states that its object is to consolidate the Acts relating to the exercise of jurisdiction out of Her Majesty's dominions. I think the words of this preamble clearly mark the distinction. English law comprises the law laid down by Parliament for England, Wales, and for such other possessions, territories and dominions as take their law directly from this source in the same form as that laid down for England. All other law, whether of British origin or not, is for the present purpose, at any rate, foreign law.

Another aspect of the matter strongly relied upon by Mr. Van den Berg was that if the shipowners' contention was sound, it would lead the court to a conclusion so paradoxical as to be manifestly absurd. The Hague Rules are clearly incorporated in the Law of Palestine. They are no less clearly incorporated in the Law of England. But since in each case they apply only to outward shipments they would not, if English law were held to apply, cover a shipment such as this from Palestine. The position, therefore, would be produced in which a shipment from a country governed by the Hague Rules, made to a country also governed by the Hague Rules would escape the Hague Rules. I agree that this sounds sufficiently absurd, but I am afraid that it is no part of my duty to strain the law in the laudable desire to produce logical results. In short, this aspect of the matter seems to me to belong to the area of general comment, rather than exact argument.

The strong points for the shipowners were that the bills of lading were in English, that they stated in unequivocal terms that wherever signed they were to be construed in accordance with English law, and they were received by Englishmen in England who might well be totally unaware of any law appertaining to Palestine. As a general principle no one nowadays questions that the test as to what law applies to the construction of a given document or contract is the intention of the parties at the time when the contract was made. Mr. Raeburn pointed to clause 14 of the bills of lading. If, he said, the contract deals expressly with the matter, this is the clearest possible evidence of the intention of the parties. As authority for this proposition, if authority were needed, he cited the judgment of Roche, J. in *Anselme Dewavrin Fils et Cie.* v. *Wilsons and North Eastern Railway Shipping Company Limited* (39 Ll. L. R. 289). He

urged too, that there were excellent reasons in this case, from the business standpoint, why English law should have been intended to apply. Apart from the two cases which concern indorsees, the large bulk of the plaintiffs were mere sellers of oranges in Hull. It was to be presumed that the course of business followed in this case was the usual one, and nothing could be more convenient than that receivers of goods of this class should know exactly where they stood when they came forward to pay the freight and take delivery. Doubtless, he said, it was for the express purpose of achieving this desirable end that the express clause as to construction was inserted in the bills of lading. For these reasons, *inter alia*, he contended strongly that English law, meaning thereby the law of England in England and not any transported or transposed version which might be applied in Palestine governed the present contract. Upon the effect as regards the application of the Hague Rules, which I have called the second point here, he argued that if English law applied the Hague Rules were excluded, since they applied to outward shipments only, and from the English standpoint this was an English inward shipment. If, on the other hand, the law of Palestine applied, he did not contend that as regards the small class of indorsees he could exclude himself from the operation of the Hague Rules, since the indorsee could be in no different position from the original shipper of the goods. As regards the second and large class, however, he claimed that, since they were not claiming under the bills of lading at all, but were relying upon an implied contract arising from the payment of freight, this class could not claim to apply the Hague Rules to their claims. The contract made by the shippers was not their contract, and they were neither affected by it, nor could they claim any benefit thereunder. These contentions constituted a formidable array. Nevertheless, I do not see this matter altogether in the light in which Mr. Raeburn so powerfully presented it.

I have had to ask myself in the first place: What did the parties to the original contract contained in the bills of lading intend as to the law to be applied? These parties were, nominally, Esthonian shipowners and shippers resident in Palestine. In reality, as we know, the Esthonian shippers were in nowise concerned in the transaction. No one has suggested here that the law of the flag should govern the contract. The real parties then were Messrs. Stockwood, Rees, and Co. Limited, of Swansea, and the shippers in Palestine. On this footing there is much to be said for the application of English law, but in my view still more to be said for the application of the law of Palestine. Of the cases in the books the nearest to the present case was by common consent the case of *Re Missouri Company* (6 Asp. Mar. Law Cas. 423; 61 L. T. Rep. 316; 42 Ch. Div. 321) and both sides claimed it as a decision in their favour. It is a very familiar and well-tried authority, and concerned the shipment of cattle from Boston, United States of America, to England upon a British ship by a British company whose domicile was England. The shipowners claimed the benefit of the negligence clause in the bills of lading, and the shipper replied that it could not avail them because such a clause would be invalid according to the law of the State of Massachusetts where the bills of lading were signed, given and accepted. A very strong Court of Appeal consisting of Lord Halsbury, Cotton, L.J. and Fry, L.J., affirmed unanimously a judgment of Chitty, J. in favour of the shipowners. But Lord Halsbury, in the course of his judgment (6 Asp. Mar. Law Cas. at p. 425; 61 L. T. Rep. at p. 318) makes the following express saving: "I put aside, as Sir Walter Phillimore candidly put aside, questions in which the positive law of the country forbids contracts to be made. Where a contract is void on the ground of immorality, or is contrary to such positive law as would prohibit the making of such a contract at all, then the contract would be void all over the world, and no civilized country would be called on to enforce it." Similarly Cotton, L.J. (6 Asp. Mar. Law Cas. at p. 427; 61 L. T. Rep. at p. 319), adopts the same position in the clearest possible terms: "As the Lord Chancellor has said, I do not enter into the question what will be the result where parties have made in America a contract which they intend to be governed by English law, when according to the American law such a contract would be in itself illegal." Fry, L.J. deals with this aspect of the matter in a less precise way, but he, too, draws the clear line between what is merely void and what is actually illegal according to the law of the country where the contract is made.

Re Missouri Company is, therefore, an authority for the proposition that the English courts will not refuse to uphold a stipulation in a contract merely because that stipulation would have been held to be void in a country where the contract was made. It is, however, no authority at all for the proposition that the English courts will enforce a stipulation which is prohibited by the positive law of the *loci contractus*, or which would be illegal according to that law. It might perhaps be argued that Lord Halsbury's dictum which I have cited above was *obiter* to the case in hand, but it is at least not lacking in clarity or incisiveness, and whether *obiter* or not I should be surprised even to hear it challenged.

Now, as I have already pointed out, the legislative authority for Palestine has been at quite extraordinary pains to incorporate the Hague Rules in the positive law of Palestine. Not content with including them in an Ordinance, as they are included in the Carriage of Goods by Sea Act 1924, the Ordinance goes on to provide that even in the absence of the express statement which the Ordinance expressly enjoins, every bill of lading issued in Palestine shall be deemed to have effect subject to the rules contained in the Ordinance.

The bills of lading in the present case were issued in Palestine. The shippers in practically every case bore names eloquent of eastern origin, and it is not suggested that they were not at least residents if not natives of Palestine. Am I to imagine that in the face of the insistent terms of the Ordinance they nevertheless intended and agreed to contract themselves out of the benefit which that Ordinance was designed to confer upon them? Can I infer that they were entitled to do so? And in the face of Lord Halsbury's plain pronouncement, have I any right to enforce such a provision as that contained in clause 14 of the bill of lading, which would be a clear infringement of the law of Palestine if it were to be taken to exclude the Hague Rules, which ought to have been expressly included, and are to be deemed to be included, even in the event of actual omission? In my view it would be both contrary to law and contrary to commonsense so to hold. To my mind the terms of the Ordinance are stronger than the parallel and familiar terms in the Harter Act of the United States of America. The Harter Act (Act of Congress 1893, No. 57) declares that words or clauses contrary to its provisions are to be null and void and of no effect, and the Hague Rules themselves, Art. III. (8), go just as far in this direction. In a word, the Harter Act says that

you must not evade the Act, but the Ordinance seeks to go a step further. It says you cannot evade the Ordinance, however hard you may try. I accordingly decline to believe that these parties in these circumstances either intended to evade or, if they so intended, succeeded in evading the Ordinance. To put it another way, I am not really sure that in the face of an Ordinance of this kind the familiar question as to the intention of the parties really arises at all. I incline rather strongly to the belief that it is taken out of their hands, and, so far as the Hague Rules are concerned, they have no longer any right to an opinion or intention. But, if I am wrong in this view, I hold that, in view of the facts that these goods were shipped by a regular service from Palestine, bearing a name taken from a Palestine port, that the shippers were presumably residents in Palestine, that the bills of lading were issued in Palestine and the law of Palestine has dealt quite recently and quite concisely with this express point concerning bills of lading, the intention of the parties must be taken to be that they contracted upon the footing that the law of Palestine should apply to the contract.

At this stage it becomes material to consider Mr. Raeburn's second point, namely, as to the effect of the decision which I have reached upon the second and larger body of plaintiffs. As regards the first body, only two in number, it is clear and, as I understand, conceded, that they can be in no better or worse position than the original shippers. They succeed, therefore, completely upon the present issue, once I am satisfied that the law of Palestine applies to the bills of lading.

As to the larger body, I confess that I have had, and still have, some doubt. I dislike intensely the conception of a bill of lading as a chameleon amongst contracts, taking its colour from the country in which it happens to be, meaning one thing in Jaffa, and something very different in Hull. But there is undeniable force in the contention that these plaintiffs are not suing on the bills of lading at all, and that their contract with the shipowner is more naturally and more conveniently to be imagined as governed by the English law which they ought to know rather than by the law of Palestine which they would be most unlikely to know. By way of authority against the shipowners Mr. Miller for the plaintiffs put forward *Cox* v. *Bruce* (18 Q. B. Div. 147) and *Frenkel* v. *MacAndrew and Co* (17 Asp. Mar. Law Cas. 582 ; 141 L. T. Rep. 33 ; (1929) A. C. 545). In neither of these cases was the point in issue really comparable to the present case ; in fact, Mr. Miller frankly agreed that in *Frenkel's* case the real question, namely as to whether the vessel had deviated from the agreed voyage differed *toto caelo* from anything in issue here. So far as *Frenkel's* case was concerned he relied upon certain isolated passages in the opinion of Lord Buckmaster and Lord Warrington as assisting his argument. The dictum which seemed to come nearest to his proposition was that which he took from the concluding paragraph of Lord Warrington's opinion, in which he refers to the judgment of Fry, L.J. in *Leduc* v. *Ward* (5 Asp. Mar. Law Cas. 290 ; 58 L. T. Rep. 908 ; 20 Q. B. Div. 475, at p. 483) as establishing that bills of lading are to be construed according to ordinary principles of law. When that case is consulted it will be found that there, as also in *Cox* v. *Bruce* (*sup.*), the court was dealing with the position of indorsees for value of bills of lading. I cannot feel, therefore, that in either of these cases I have any sound foundation upon which to proceed in dealing with a position which *ex concessis* is not ruled and regulated, as in that of indorsees to whom the property has passed, by the Bills of Lading Act 1855.

It seems to me, therefore, that in the absence of any clear authority I must endeavour to deal with this matter upon known facts and ascertained principles. Upon the facts and law as I have found them the original contracts were made in Palestine in the form of bills of lading, and it was intended that the law of Palestine should apply to them. It is for the plaintiffs to prove their case. They come into court with a case, which though not actually founded upon the bills of lading, is evidenced by those bills of lading. Moreover, the freight has been paid by them at the rate agreed in those bills of lading. I do not know all the circumstances of their situation. They may be merely agents for the shippers. They may, though it is not pleaded, be persons to whom the property in the goods has passed. If they were merely agents it would be so strange as to seem absurd if it could be held that their contract with the shipowners was a different one, so far as the bills of lading are concerned, to that of their own principals. If, on the other hand, they are persons to whom the property has passed, one may well ask oneself why they should be in a different position to ordinary indorsees to whom the property has passed under the Bills of Lading Act ? In any case, whether agents or property owners, are they not entitled to say : " We hold the bills of lading, we are content to be bound by their terms, and their terms cannot be different for us to the terms originally agreed between the parties " ? In other words, when once they present the bills of lading and it has been ascertained what was the original contract between the shipowners and the shippers, it is for the shipowners to show that something has occurred to alter that original contract in the hands of the new holder. In the present state of commerce it is not difficult to conceive a case in which the shipowner could show such circumstances. Having arrived at the port of discharge an insolvent consignee or assignee is unable to pay the freight and take delivery of the goods. A new bargain is thereupon entered into by the shipowners with a person who is neither consignee nor assignee. The contract in the bill of lading might then become of no importance, though the goods had been shipped and carried under the contract contained therein. But in the absence of any evidence of circumstances which would or might change the original terms of the bills of lading, I do not think that upon any known principle the shipowner can be heard to say that a contract which meant one thing in its inception meant something else when it had passed into the hands of a fresh holder. It is to be remembered that upon the findings I have made the shipowners must be taken to have known all the original terms so that there can be no business hardship in holding them to their own original terms.

The hesitation which I have felt in this case springs largely from a doubt as to the full extent and the exact meaning of the word " illegal " as used by Lord Justice Cotton in the passage which I have quoted above from his judgment in the *Missouri* case. I have taken it, in conjunction with the words I have cited from Lord Halsbury's judgment in the same case, to mean that, since the law of Palestine at present says positively that you must put the Hague Rules into a bill of lading, you are making a contract contrary to the law of Palestine if you omit them from the bill of lading. Such an omission is accordingly illegal, as I understand the meaning of this term. If I am right in my understanding of this term the contract originally made with the

Hague Rules omitted was illegal and wrong in form and the shipowner cannot be heard to take advantage of his own wrong, nor should any court be asked to enforce it in this form. Moreover, the principle applied in *Dobell* v. *Rosemore* (8 Asp. Mar. Law Cas. at p. 34; 73 L. T. Rep. at p. 75; (1895) 2 Q. B. 408, at pp. 412 and 413) applies here with even greater force, and I ought to take these bills of lading as containing the Hague Rules written into them, as the Master of the Rolls, Lord Esher, says that such provisions should be construed when introduced by a clause paramount, and as the law of Palestine says they must be treated even when not so included.

In the result, therefore, my judgment is for both bodies of plaintiffs upon both the points submitted to me.

Leave to appeal was given.

The defendants appealed.

Raeburn, K.C. and Sir *Robert Aske* for the appellants.

Van den Berg, K.C. and *Cyril Miller* for the respondents.

Reference was made by counsel to the following authorities: *Anselme Dewavrin Fils et Cie.* v. *Wilsons and North-Eastern Railway Shipping Company* (1931, 39 Ll. L. Rep. 289), *Re Missouri Steamship Company* (6 Asp. Mar. Law Cas. 423; 61 L. T. Rep. 316; 42 Ch. Div. 321), *Ralli Bros.* v. *Compania Naviera Sota y Agnar* (15 Asp. Mar. Law Cas. 33; 123 L. T. Rep. 375; (1920) 2 K. B. 287), *McFadden* v. *Blue Star Line* (10 Asp. Mar. Law Cas. 55; 93 L. T. Rep. 52; (1905) 1 K. B. 697), *Dobell* v. *Steamship Rossmore Company* (8 Asp. Mar. Law Cas. 83; 73 L. T. Rep. 74; (1895) 2 Q. B. 408), *The Adriatic* (145 L. T. Rep. 580; (1931) P. 241), *Re Mahmoud and Ispahani* (125 L. T. Rep. 161; (1921) 2 K. B. 716), *Hamlyn* v. *Talisner Distillery* (71 L. T. Rep. 1; (1894) A. C. 202), *Brandt* v. *Liverpool, Brazil and River Plate Steamer Navigation Company* (16 Asp. Mar. Law Cas. 262; 130 L. T. Rep. 392; (1924) 1 K. B. 575), and *Frenkel* v. *MacAndrews and Co.* (17 Asp. Mar. Law Cas. 582; 141 L. T. Rep. 33; (1929) A. C. 545).

Scrutton, L.J.—If I were called upon to decide all the questions that have been argued in this case I should certainly desire to hear Mr. Van den Berg here, and should very likely take time to consider my judgment. But in my view this case can be decided on very short grounds, the part of it that I am going to decide. The owners of a cargo of oranges not specified in the writ, according to the practice of the Admiralty Court, brought an action against the owners of an Esthonian ship, the *Torni*, for damages to certain oranges alleged to be in breach of the bill of lading. And the plaintiffs themselves have alleged that the two plaintiffs whose names are given were owners of oranges to whom the property passed upon the endorsement and certificate on the bill of lading. They had arranged also with the following plaintiffs, nine of whom took delivery of certain cases of oranges specified under bills of lading held by them —which is a perfectly ambiguous remark to make; there are all sorts of cases held by them—"and presented to the defendants and paid the freight due under such bills of lading respectively." Then follow nine names. The bills of lading themselves are in a most ambiguous and embarrassing form, and are dealt with in a way by which the court cannot tell by looking at them what happened. I take the first one as a specimen. The form of the bill of lading is "Shipped . . . by"—blank—"and to proceed to the port of Hull and there deliver unto order"—presumably the order of the person whose name is filled in in the "shipped by." The shipper of the first bill of lading I look at is Ebr Charanni. There is no order by Ebr Charanni on the bill of lading. What there is on the bill of lading is the order by Associated Orange Growers Limited, who have not hitherto appeared in the case at all, to deliver to the order of Connolly Shaw, of Liverpool. There is what would be ordinarily an endorsement in blank above that, "Connolly Shaw, Liverpool," and underneath that a stamp: "This bill of lading has to-day been presented by Connolly Shaw"—not as you would have thought, for Associated Orange Growers Limited, but "For Sivewright Bacon and Co.," whose name does not appear as plaintiffs at all. No human being by the light of that bill of lading can know what has happened or decide what the effect is of Connolly Shaw presenting that bill, taking the freight, and taking the goods. And the other bills of lading are equally embarrassing. I have looked through them. Several of them raise entirely different problems, but none of them make clear what is meant by "held by them." Because so far as the bills of lading show, they are held by someone else, and not "by them" at all; and under those circumstances I decline to decide anything as to the position of the people whose names appear as "the following plaintiffs" in par. 4, and I propose only to decide the question which I understand is directly raised by the order that has been made. I think it is a great pity the order was ever made, because what will happen in this case or may happen in this case is what has happened recently in several other cases: that the parties may go to the Lords, the Lords may decline to decide the question at all, as they did in a recent case; and it will be sent back for hearing more than two years—three years perhaps—after the cargo arrived, and when everybody has either forgotten about it, or several of the most important witnesses are dead or have disappeared. Preliminary questions of law may be ordered to be stated in a way such as seriously to embarrass the trial of the action. But here is the order, and the judge has dealt with the part of it I am going to read, and so I deal with it; but I regret that the order was ever made.

Now I am asked whether the bills of lading are between the parties to the action subject to the provisions of the Government of Palestine Carriage of Goods by Sea Ordinance. The question begins with a Convention at Brussels, signed by a large number of people with certain reservations which I will refer to. Art. 10 of that convention, which draws up a code of rules to be embodied in bills of lading, is: "The provisions of this convention shall apply to all bills of lading issued in any of the contracting States." We go on, because one wants to know who are the contracting States. Art. 12: "Non-signatory States may accede to the present convention whether or not they have been represented at the International Conference at Brussels." Art. 13: "The high contracting parties"—which includes His Majesty—"may at the time of signature, ratification, or accession declare that their acceptance of the present Convention does not include any or all of the self-governing Dominions, or of the Colonies, Overseas Possessions, Protectorates or Territories under their sovereignty or authority"; and that may raise a very nice question whether a mandated territory is a possession under the authority of the King. I do not know whether the people who framed this

question thought we were going to decide anything about that, or whether they knew anything about it when they settled the provisions. It does not stop there. His Britannic Majesty affixed a reservation to his signature: "I further declare that my signature applies only to Great Britain and Northern Ireland, I reserve the right of each of the British Dominions, Colonies, Overseas Possessions, and Protectorates, and of each of the territories over which His Britannic Majesty exercises a mandate"—the people who drew that up did know about Palestine—"to accede to this Convention under Art. 13"—then an Ordinance: "Whereas a Convention for the unification of certain Rules relating to bills of lading was adopted by the International Conference on Maritime Law, held at Brussels in 1922 and 1923. And Whereas it is expedient that the Rules of the Convention, as set out in the schedule to this Ordinance, should, subject to the provisions hereof, be given the force of law in Palestine." Whether the Government of Palestine sent a notice of that to the Government at Brussels the parties have not troubled to inform us; probably because they had not looked at the Ordinances to see if they might or might not be material. But it is quite clear that the Government of Palestine has intended to accede to the Convention and adopt the rules laid down by the Convention. England has adopted the rules by the Carriage of Goods by Sea Act 1924. Palestine, being a mandated territory under the King, has adopted the rules by the Ordinance. Palestine has gone rather further than England. Palestine has inserted this clause: "Every bill of lading or similar document of title issued in Palestine"—this bill of lading was issued in Palestine—"which contains or is evidence of any contract to which the rules apply, shall contain an express statement that it is to have effect subject to the provisions of the said rules." The people who drew up this bill of lading have disobeyed that law, and have not included, as they are told to in the Ordinance, an express statement that it is to have effect subject to the provisions of the said rules. The Government of Palestine have anticipated that people in Palestine might disobey the law, and so they have added the words "shall be deemed to have effect subject thereto, notwithstanding the omission of such express statement." Palestine, therefore, has endeavoured to carry out and reduce to law the Convention to which England and Palestine agreed, that all bills of lading wherever signed shall include what used to be known as the Hague Rules, and are now known as the Rules in the Schedule. It has occurred to most of the firms that they might upset the whole apple-cart—if I might use a conventional expression—of the countries who have agreed to it by simply putting in a clause into their bill of lading, as they have done: "This bill of lading wherever signed, is to be construed in accordance with English law." If that has the effect of striking out the whole of the schedule, it will be quite simple for every shipowner to defeat the whole of the Convention and the whole system under it by simply putting in a clause: "This bill of lading is to be construed by the law, not of the place where it is made, but by the law of the place to which the ship is going." Now it will take very strong evidence to convince me that such a clause has that meaning. I read the effect of the Palestine Ordinance as this: In every bill of lading, whether you state it or not, these terms of the schedule, the Hague Rules, are to be included as part of the terms. Consequently, when I come to construe this bill of lading, I read into it those terms. I give perfectly sufficient effect to the clause about English law, if it has any effect, by saying: Yes, here is the bill of lading with those terms in it. Now construe it according to English law. If English law were faced with the same question on a bill of lading signed in England with a clause: "This bill of lading is to be construed in accordance with Palestine law," I have no doubt that the English courts would hold that they had to construe the bill of lading containing, in compliance with the English statute, the Rules in the schedule, according to Palestine law. I think exactly the same result follows if you turn it round and sign the bill of lading in Palestine, where it has to comply with Palestine law, and construe it according to the law of England.

For these reasons, I think, without going into all the reasons that he gives, the result at which Langton, J. arrived is a correct result. In my view, most of the cases cited have nothing to do with the question. I do not think that any case has raised this sort of point before. Certainly *Re The Missouri Steamship Company* (6 Asp. Mar. Law Cas. 423; 61 L. T. Rep. 316; 42 Ch. Div. 321) seems to me to have done nothing like raising it. *The Missouri* case was this: Here is a bill of lading made in Massachusetts, with a clause in it printed which the courts of Massachusetts would declare to be void as contrary to public policy. Inasmuch as public policy differs in all sorts of countries, and the United States think that the negligence clause is contrary to public policy whereas the English courts do not think it is contrary to public policy, the English courts do not regard the view of public policy when they come to interpret that document, and do not strike the clause out of the bill of lading, because their view of public policy differs from the view of public policy taken in the United States courts. But it is quite a different thing when you have a question, not of following a clause in that bill of lading, but a question of trying to strike out the clause which the law of the place says shall be incorporated in every bill of lading made in that country. For those reasons, limiting the answer which I give to the main part of the question, I answer that the bills of lading are subject to the provisions of the Government of Palestine Carriage of Goods by Sea Ordinance, and that the Rules are included in the bill of lading. I decline to go on and answer the question what the effect of that is on the various people mentioned in par. 4, because there are no facts which enable me to decide in what relation those people mentioned there stand to the property and to the conveying; and I decline to answer a question which requires knowledge of facts which the parties have not given me.

For these reasons I think the appeal must be dismissed with costs; and in my view, the sooner the parties go to trial and determine the facts the more likely is justice to be done.

Greer, L.J.—I agree. Though the terms of the Ordinance strictly and literally interpreted seem to apply if the question is asked not only with regard to the contracts contained in the bills of lading of which the parties mentioned in par. 3 of the statement of claim are assignees, and in the same position as the original contractors were to the bill of lading, I think we ought not to decide, notwithstanding the wise words of the Ordinance, what the effect is of the implied contract made with other parties who were not assignees and do not appear to have been assignees of the bills of lading and the contract therein contained, but between whom and the ship the contract has to be implied out of the circumstances under which they came to pay the freight—

present the bill of lading and pay the freight. It may be that in some of these instances the persons coming to pay were the agents of the shippers and were therefore, as between them and the ship, people on whom the whole of the contract made by the bill of lading and the other considerations which applied to the contract in Palestine had effect. It may be on the other hand that different considerations might apply to them if they were mere strangers to the original transaction ; and the only materials on which it can be determined what the contract between them and the ship was arise out of the fact that they came with the bill of lading, with a written document, in England, and said to the ship : "Deliver me these goods on the terms of this document." That may prove to be a difficult question which possibly may never arise, and which can only be determined when the facts of the case are fully proved ; and I think it is a question that ought not to be determined as a preliminary point upon these pleadings. I direct my attention solely to the claim in par. 3 of the statement of claim ; and the question then is : whether, as against the people to whom the property passed in the bill of lading, the terms of the Palestine Ordinance are to be read into the contract contained in the bill of lading, that is to say, the contract made by the shippers at the port of shipment.

Now in 1923, as the result of various conferences between representatives of shipping firms and representatives of merchants, a Convention was arrived at with the laudable object of securing a certain amount of uniformity in the contracts of carriage which were made by bills of lading. That uniformity is desirable was universally admitted, though the result of uniformity and the creation of a statutory form may be in some respects to restrict the freedom of contract. That is of very little importance compared to the advantages obtained when you get a position created by law in which people without much investigation can know what rights are undertaken by a ship with regard to the goods which are carried. So long as there is no dictation as to what the rate of freight is, the freedom of contract remains ; because if the shipowner thinks that he is undertaking liabilities by reason of the statutes passed in the various countries that put a burden upon him which he was not under before, he can rectify that difficulty by a small addition to the freight. The restriction of the freedom of contract is of much less importance now than it was in the old days ; because the question which both parties have to face is merely which party, the shipper or the shipowner, is going to pay the premium to insure the goods for the voyage. Now I read the Ordinance as meaning this : Par. 4 in my judgment contains an imperative order to those who are making contracts for the shipment of goods from Palestine to this country to insert in a contract made by bill of lading or similar document, an express statement that it is to have effect subject to the provisions of the Rules which are stated in the Ordinance, and that any shipper and any master of a ship who contravenes that order is doing something which by the law of Palestine is illegal. But in order to prevent that illegality from having the effect of entirely destroying the contract of carriage between the parties, those who drew up this Ordinance wisely added a provision that though there has been disobedience to the first part of par. 4 and the contract has not contained the express statement provided for, the contract shall be deemed, notwithstanding the omission of such express statement, to have effect subject to the rules. And I find some difficulty in supposing that under those circumstances the shippers of these goods and those who represented the ship, the agents of the ship, in Palestine, did not make a contract which contained the provisions of the Ordinance. I think it is clearly established that, making their contract as they did subject to the laws which prevailed in the country where they made it, they made it just as much subject to the rules contained in the Ordinance as if they had expressed it so in the document ; and if they had expressly stated so in the document the provision in the contract that the contract should be construed in accordance with the laws of this country would not have eliminated those terms from the contract, but would have only directed the parties and the courts in this country to construe the words of the Ordinance according to the rules of construction prevailing in this country.

I agree with my Lord that there are no authorities which prevent this court from coming to the conclusion that they have done. The only case that is anywhere near this is *Re Missouri Steamship Company* (*sup.*), which has been much discussed in the course of the argument. That was a case where in accordance with the laws of Massachusetts an agreement and the terms of a contract of carriage which relieved the carrier from liability for the negligence of his employees was void by the law of Massachusetts. There was nothing in the law of Massachusetts to say that it was illegal, and there was nothing in the law of Massachusetts to say that if it was not put in the contract it should be deemed to be in the contract made within the Massachusetts territory, and there are observations made by Lord Halsbury and other members of the House of Lords which make it quite clear that in their Lordships' judgment they were not deciding that, if a term in the contract was illegal by the law of the place where it was made, this country would fail to recognise that illegality. On the other hand, I regard the decision of the House of Lords as meaning that if in the country where the contract was made the contract was illegal—not merely void and unenforceable, but illegal—then the courts in this country would recognise the illegality and act in accordance with the law of the country where the contract was made. And that being so, I do not regard that case as any authority with regard to the present case ; because in my judgment, apart from the statutory correction of the illegality, the contract, if it did not contain these terms, would have been by the law of Palestine an illegal contract.

For these reasons, without referring at any greater length to the principles of law which have been under discussion, I think the learned judge was right.

We are indebted to Sir Robert Aske for a clear and unambiguous argument. Where I differ from his argument is this : his argument treated the Ordinance as if it were a mere statement that the clause in the document would be null and void. I treat it as a statement that it would be illegal not to put it in, and that whether it is put in or not, it is there in the contract. And if that is right, that determines this appeal.

I agree with my Lord that it would be extremely unfortunate if the result of this case were to be, as it would be, to bring to nought the attempt that has been made by means of the Conventions with the various countries, to secure a uniform bill of lading —a more or less uniform bill of lading—to be recognised by one country in regard to the goods shipped from that country, and by the other party to the Convention with regard to the goods shipped from his country. I am not persuaded by the argument that we are bound to bring this Convention to the

unfortunate nullity that would come upon it if we decided this case otherwise than in the way we are deciding it.

I agree that this appeal should be dismissed with costs.

Slesser, L.J.—In this appeal a conflict arises in the following way. In the bills of lading under consideration it is provided that the bill of lading wherever signed is to be construed in accordance with English law. The bill of lading was in fact signed at Jaffa, and therefore, being signed outside the United Kingdom, would not be a bill covered by the Carriage of Goods by Sea Act 1924. But in Jaffa, which is within the mandated territory of Palestine, there is an Ordinance which substantially applies the provisions of the Carriage of Goods by Sea Act, and substantially carries out the results of the International Conference at Brussels in 1922 in language which was thought appropriate to produce that result in that mandated territory. Now the question we have to consider and the question which we are asked is this: Whether in the circumstances of the case—if the bill of lading is stated to be construed in accordance with English law, it has to be construed in accordance with that Ordinance or not.

Now the Ordinance provides in clause 4 that "Every bill of lading or similar document of title issued in Palestine which contains or is evidence of any contract to which the rules apply shall contain an express statement that it is to have effect subject to the provisions of the said rules." And the rules are contained in the schedule to the Ordinance entitled "Rules relating to Bills of Lading." And in the particular clause, No. 8 of art. 3, it provides that "Any clause, covenant, or agreement, in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these rules, shall be null and void and of no effect." The first question which I ask myself is this: Whether sect. 4 of the Ordinance which so applies to clause 8 of the rules, which is the clause here most material, is or is not a provision merely that a contract not containing such provisions shall be void or whether there is there an express prohibition of the making of a bill of lading otherwise than in accordance with clause 4 and the rules thereby applied. In my opinion it is clear beyond any doubt that the first limb of clause 4 does contain an express prohibition and an express mandate that the bill of lading shall take a particular form. The language is: "Every bill of lading . . . shall contain an express statement." Now Sir Robert Aske has argued that that provision cannot be regarded as a prohibition within the meaning of the observations made by Lord Halsbury in the *Missouri* case, because there is no penalty attached to the disobedience of the mandatory provision. In my view that is not at all conclusive of the matter. Had this provision been contained in the English statute I entertain no doubt that in the absence of penalty, where someone was in terms by statute in a public matter required to do a certain act, or if the act were to be done, to do it in a certain way, that if that person failed to obey that statute, the act done would be in contempt of the statute, and therefore, though there were no express penalty provided, the ordinary common law rules would apply, and in such case, the matter being one of public obligation and the act done in contempt of the statute, in an appropriate case the remedy would lie for misdemeanour. The matter is so stated in Hawkins' Pleas of The Crown, book 2, chap. 25, sect. 4, in this matter: "It seems to be a good general ground, that wherever a statute prohibits a matter of public grievance to the liberties and security of a subject, or commands a matter of public convenience, as the repairing of the common streets of a town, an offender against such statute is punishable, not only at the suit of the party aggrieved, but also by way of indictment for his contempt of the statute, unless such method of proceeding do manifestly appear to be excluded by it." That doctrine has been applied in several cases, two only of which I will cite. The first is *Reg.* v. *Price* (11 Ad. and Ell. 727), where a person apparently innocently failed to inform the registrar of particulars regarding the birth of a child. On being requested to furnish the information he refused, and it was held that he was indictable for a misdemeanour. In that case of course the original innocence ceased to act after the matter had been pointed out to him. The indictment was on the refusal, and there was no penalty attached in express terms. The second case is the case of *Reg.* v. *Hall* (89 L. T. Rep. 394; (1891) 1 Q. B., at p. 747) to the like effect, where the passage I have read in Hawkins' Pleas of the Crown is cited with approval. I think, therefore, had the matter fallen for consideration within the realm, the mere absence of a penalty on this matter on which Sir Robert Aske relies would not in itself in any way have militated against the mandatory provision being deemed to be illegal; and it is a general rule of law that in the absence of evidence to the contrary one must assume that the foreign law is the same as the English; and indeed it is almost inconceivable that where in any State a statute or an ordinance requires something to be done, the mere absence of an express penalty mentioned would destroy the sanction of the obligation which the sovereign authority sought to impose upon the subject.

Had the matter rested at the end of the first limb of clause 4 I think it is clear that the obligation is mandatory and express. But the clause goes on to say "and shall be deemed to have effect subject thereto, notwithstanding the omission of such express statement." I do not think those words, which strengthen the force of the ordinance in this sense, that if contrary to the provision of the statute the bill of lading does not contain the statement the whole matter might be null and void—the provision of machinery that the terms are in any event to be imported into the bill of lading do not make the obligation under the bill of lading less mandatory. And, therefore, I think to that extent the case does fall directly within the compass of the observations of Lord Halsbury in the *Missouri* case, where he says: "Where a contract is . . . contrary to such positive law as would prohibit the making of such a contract at all, then the contract would be void all over the world, and no civilised country would be called on to enforce it." Here we are not concerned with the whole contract, but with the introduction of a particular term; and I would, therefore, add the observation which has been cited to us from Salmond on Contracts to the effect that the matter may be regarded as a question of whether the exclusion or insertion of a particular obligation is or is not contrary to the comity of nations. I find it very difficult to think that where you have had an international convention—and such is the case here—to which various nations have agreed—and, as my Lord has pointed out, Palestine has ultimately agreed

to carry out the obligations of that convention—it would not be contrary to the comity of nations not to give force to those provisions and allow the particular individuals in a special contract really to make a special provision for themselves out of the universal international obligation and agreement. But however that may be, and that point may assume greater and greater importance as more and more international conventions are carried out, I am prepared to found my view on the assumption that this was expressly provided. And if that be so—if the bill of lading were drawn otherwise than in accordance with the Ordinance—then, by virtue of clause 4, sect. 8 must be read into this bill of lading. We then apply to that, if it is applicable, that the words shall be construed in accordance with English law. I think the learned judge was right in the answer which he gave to that part of this case which alone we have to consider; because I agree with my Lord that the question of the respective liabilities of the various plaintiffs cannot here be decided, as not asked in terms, and we have not the necessary materials on which to decide it, and that therefore this appeal must be dismissed.

Appeal dismissed.
Leave to appeal refused.

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

Solicitors for the respondents, *Pritchard* and *Sons*, agents for *Andrew M. Jackson* and *Co.*, Hull.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Oct. 20, 21, 22, 23, 28, 29, 1931; *May* 13, 14, *and June* 7, 1932.

(Before LANGTON, J.)

The Zigurds. (*a*)

Freight—Authority to collect given by master to ship's agents—Intention to assign—Whether legal or equitable assignment—Law of Property Act 1925 (15 *Geo.* 5, *c.* 20), *s.* 136—*Right to sue* in rem *without making assignor party.*

Mortgage—Assignment of freight—Notice of assignment—Constructive notice—Action by mortgagee—Whether necessary to make mortgagor party.

Necessaries—Bunker coals supplied in Germany—German law—Rights of priority analogous to maritime lien—Whether priorities determined by German or English law.

Necessaries—Repairs to boilers—Value of vessel enhanced—Priorities.

Necessaries—Stevedores' charges—Priorities as between stevedores and equitable assignees of freight—Whether equitable assignee of freight entitled to priority as against stevedores' charges incurred in earning freight.

The Latvian steamship Z. arrived at the port of West Hartlepool with a cargo of pit props. On arrival the master of the Z. gave to the ship's agents a document in the following terms: "Please pay the freight for my vessel the Z. and all demurrage which may be payable under the charter to my agents . . ." On receipt of this document the ship's agents made certain advances for necessaries. They, further, gave notice to the receivers of the cargo that they had the captain's authority to collect the freight against which they had made advancements.

Held, that this document constituted a valid equitable assignment of the freight, and that the ship's agents were entitled to maintain an action in rem *in respect of it, and were not bound to sue in the name of the assignor.*

The freight of the Z. was then claimed by a mortgagee as assignee under covenants contained in an agreement collateral to the mortgage instrument.

Held, that the covenants amounted to a good equitable assignment of the freight, and that the mortgagee was not bound in the circumstances to join the mortgagor in the action.

Held further, that the notice given to the receivers of the cargo was not a good notice of assignment, and that as between the respective assignees the claim of the mortgagee whose assignment was first in time was therefore preferred to that of the ship's agents.

Various claims were made against the proceeds of the ship and the freight, and judgments obtained in default of appearance.

Bunker coals had been supplied to the Z. at Kiel by a German firm. On behalf of these claimants it was contended that their claim should be preferred to that of the mortgagee upon the ground that by German law if the vessel was under arrest they would have been entitled to be included in a special class of "ship's creditors." Their claims would thus have enjoyed the priority accorded by English law to a maritime lien and they would have been entitled in respect of the proceeds of the ship to priority over the claim of the mortgagee.

Held, that assuming that the German firm had ever acquired the rights of "ship's creditors" under German law, no effect could be given in the English courts to the priority to which such claims might be entitled in Germany. Questions of priority are determined by the lex fori, *and the court would not have recourse to foreign law to ascertain the respective rights of the parties.*

The Colorado (16 *Asp. Mar. Law Cas.* 145; 128 *L. T. Rep.* 759; (1923) *P.* 102) *considered.*

Necessaries claimants who had carried out repairs to the boilers of the Z., which had had the effect of enhancing her value, claimed priority in equity over the mortgagee in respect of the ship fund.

Held, that the mortgagee was preferred.

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

Stevedores who had discharged the cargo of the Z. at West Hartlepool, and thereby enabled the freight to be earned, claimed to be preferred as against the freight fund to the assignees of the freight upon the ground that claimants whose rights to the freight fund were merely equitable ought not to be allowed to take the whole of such fund without discharging the expenses necessarily incurred in bringing such fund into existence.

Held, that the general rule of priority between necessaries men and mortgagees ought to be followed and that the mortgagee was entitled to priority.

[NOTE.—*The decision of Langton, J. as to the priority of the respective assignments was subsequently reversed on appeal : (see* infrà, *p.* 332.]

THESE cases arose out of various claims which were made against the Latvian steamship *Zigurds* or the proceeds thereof in court and her freight. The *Zigurds* arrived at West Hartlepool with a cargo of pitprops in March 1931. An action for necessaries was started, and the vessel arrested by the *Tallinna Laevenhisus A/S.* In a subsequent action by the mortgagee the vessel was sold by the order of the court. The proceeds of the sale of the vessel and of her freight in court were insufficient to meet the various claims which were made against them.

The following actions were started on various dates against the *Zigurds* and her freight and judgment obtained :

(i.) 1932 Fo. 107 : An action by Mr. Alfred Harris Smith as mortgagee of the vessel, and assignee of her freight. The mortgagee, not having taken possession of the vessel, was not entitled to collect her freight as mortgagee, and he therefore claimed the freight as assignee under the following covenants contained in an agreement collateral to the mortgage :

"22. The mortgagee shall be at liberty, so long as any moneys may be due under the said first mortgage and this agreement, and he is hereby empowered in his own name or in the name of the shipowners . . . to demand, sue for, and receive and give receipt for, all moneys due to the shipowners in connection with the said steamship and to institute such legal proceedings as he may think proper. . . ."

"29. In relation to the matters dealt with herein, where they apply, the shipowners hereby appoint the mortgagee their attorney for them and in their name at any time during the currency of this security to collect, sign for, and give effective receipts for all freights . . . which may be or become due and owing to the shipowners. . . ."

(ii.) 1931 Fo. 124 : An action by Messrs. Caspar, Edgar, and Co. Limited, who acted as agents for the *Zigurds* at West Hartlepool, claiming as necessaries various sums which they had disbursed on behalf of the ship, and claiming further that they were entitled to receive the freight under a document dated the 2nd March 1931 given to them by the master, which was in the following terms :

"Please pay the freight for my vessel the *Zigurds* and all demurrage which may be payable under the charter to my agents, Messrs. E. A. Caspar, Edgar, and Co. Limited and oblige."

Messrs. Caspar, Edgar, and Co. Limited claimed that this document constituted an assignment of the freight. By letter dated the 5th March 1931 Messrs. Caspar, Edgar, had informed Messrs. Churchill and Sim, the receivers of the cargo, that they had the captain's authority to collect freight against which they had made advances. The freight was subsequently brought into court.

(iii.) 1931 Fo. 128 : An action for necessaries against ship and freight by Kohlen-Gross-Handel G.m.b.H., who had supplied bunker coal to the value of 492*l.* 14*s.* 5*d.* to the *Zigurds* at Kiel in Sept. 1930.

(iv.) 1931 Fo. 154 : An action by Captain Krauklis the master of the *Zigurds* for his wages and disbursements.

(v.) An action for necessaries by the *Tallinna Laevenhisus A/S.*

(vi.) 1931 Fo. 199 : An action for necessaries by Messrs. Metcalfe, Lamb, and Co., who had carried out repairs to the *Zigurds* at West Hartlepool.

(vii.) 1932 Fo. 62 : An action for necessaries by Messrs. Evans, Reid, Teasdale, and Lidstrom Limited, who had acted as stevedores for the *Zigurds* at West Hartlepool, and claimed the cost of discharging her cargo of pitprops.

There was no appearance by the owners of the *Zigurds* in any of the above actions, and judgment in default was obtained on various dates.

On the 15th June 1931, the action 1931 Fo. 124, in which Messrs. Caspar, Edgar, and Co. Limited were plaintiffs, came on for judgment in default of appearance, and evidence was adduced that the document dated the 2nd March 1931, was given with the assent of the managing owner of the *Zigurds* after he had agreed to make over and assign to Messrs. Caspar, Edgar, and Co. Limited all freight and demurrage.

J. V. Naisby for the plaintiffs, contended that the terms of the document dated the 2nd March 1931, coupled with the evidence, showed that the document was an assignment of the freight and not a mere authority to the ship's agent to collect freight. Counsel relied upon *Harding* v. *Harding* (1886, 17 Q. B. Div. 442) and distinguished the decision of Bailhache, J. in *H. G. Harper and Co. Limited* v. *John Bland and Co. Limited* (13 Asp. Mar. Law Cas. 49 ; 112 L. T. Rep. 724).

Langton, J., pronounced for the validity of the assignment and gave judgment on the claim subject to a reference to assess the amount.

Upon the claim coming before the registrar, the mortgagee and the Kohlen-Gross-Handel G.m.b.H. intervened and appeared at the reference. The registrar held that Messrs. Caspar, Edgar, and Co. Limited could not proceed *in rem* in respect of their claim based upon the assignment of freight and he accordingly allowed nothing for this item.

On the 20th, 21st, 22nd, 23rd, 28th, and 29th Oct. 1931 the following motions came on for hearing before Langton, J. and were heard together :

Motion in action 1931 Fo. 107 by the mortgagee, Mr. Smith, for judgment pronouncing for the validity of the assignment of freight.

Motion in action 1931 Fo. 124 by the interveners, namely, the mortgagee, Mr. Smith, and Kohlen-Gross-Handel G.m.b.H., to set aside the judgment pronouncing for the validity of the assignment of freight to Messrs. Caspar, Edgar, and Co. Limited.

Motion in action 1931 Fo. 124 by the plaintiffs Messrs. Caspar, Edgar, and Co. Limited in objection to the registrar's report.

Motion in action 1931 Fo. 128 by the plaintiffs Kohlen-Gross-Handel G.m.b.H. for a declaration that they were entitled in priority to all other claimants to the proceeds of the ship inasmuch

as their claim was entitled to such priority by German law, which was the law of the place where the necessaries were supplied.

Harry Atkins for the mortgagee.—The mortgage and supplementary agreement constitute a legal assignment of the freight. The mortgagee intervened in the action of *Tallinna Laevenhisus A/S* and his conduct in so doing amounts to notice of the assignment of the freight. In any case the solicitors for Messrs. Churchill and Sim, who were the receivers of the cargo, were aware of the assignment, as is shown by their letter dated the 25th March 1931. There was thus sufficient notice to support the claims of the mortgagee to a legal assignment. But in any case the supplementary agreement amounts to a valid equitable assignment, upon which the assignee is entitled to recover.

Naisby contrà.

Main Thompson contrà.

H. G. Willmer (*Carpmael* with him) upon the motion of the interveners Kohlen-Gross-Handel G.m.b.H , in the action of Messrs. Caspar, Edgar, and Co. Limited.—The document given by the master to Messrs. Caspar, Edgar, and Co. Limited is not an assignment of freight, but is merely an authority to pay the freight to Messrs. Caspar, Edgar, and Co. Limited as ship's agents. The document is not a legal assignment since it fails to show upon its face that it is an assignment at all. If it is merely an equitable assignment the plaintiff could not sue upon it in his own name, but must sue in the name of the assignor. The learned judge ought to have followed Bailhache, J. in *H. G. Harpur and Co. Limited* v. *John Bland and Co. Limited* (20 Com. Cas. 143).

Harry Atkins for the mortgagee supported this motion.

Naisby contrà, for Messrs. Caspar, Edgar, and Co. Limited. The document is upon the face of it a legal assignment of the freight, and complies with the requirements of sect. 136 of the Law of Property Act 1925, namely, it is absolute, it is in writing, and it is not by way of charge. If, however, it is held not to be a legal assignment it is in any case an effective equitable assignment, because it appears from the evidence of the circumstances in which it was given that the intention of the parties was that there should be an assignment. There is no force in the objection that the plaintiffs can only sue in the name of the assignor, because here the assignor can have no possible interest in the funds. In these circumstances the court allowed the assignee to sue in his own name.

Naisby for the motion in the action of Messrs. Caspar, Edgar, and Co. Limited.—The learned registrar was wrong in holding that the plaintiffs were not entitled to recover anything upon their assignment. His finding virtually revises the judgment already pronounced. He was wrong in holding that there was no right to proceed *in rem*. The plaintiffs are entitled to sue *in rem* for necessaries supplied to the ship and to claim *in rem* against the cargo for the freight.

Harry Atkins contrà.

Carpmael contrà.

Main Thompson contrà.

Carpmael for the plaintiffs in action 1931 Fo. 128, Kohlen-Gross-Handel G.m.b.H.—The plaintiffs supplied necessaries in a German port, and the law upon which they were so supplied was therefore German law, by which the necessaries man ranks in a special class of "ship's creditors" who are preferred to the mortgagee. The plaintiffs are entitled to a like priority in this court. In *The Colorado* (16 Asp. Mar. Law Cas. 145; 128 L. T. Rep. 759; (1932) P. 102) the Court of Appeal looked to French law in order to ascertain the rights of a mortgagee under a French mortgage, and having found such rights were similar to those of a mortgagee under an English mortgage, they held that the mortgagee was preferred to a necessaries man who supplied necessaries in England, although by French law the claim of the necessaries man would have been preferred. Similarly here, if the rights of the necessaries man are ascertained by reference to German law then the necessaries man has something equivalent to a maritime lien in English law and therefore should be given the priority accorded by English law to the holder of a maritime lien.

Harry Atkins contrà.

Naisby contrà.

Main Thompson contrà.

[Counsel opposing the motion contended that the priorities should be ascertained according to *lex fori*, namely, English law, and relied upon the decision of the Court of Appeal in *The Colorado* (*sup.*).]

Oct. 22, 1931.—**Langton, J.** stated that in his opinion the document upon which Messrs. Caspar, Edgar, and Co. Limited sued was not a legal assignment but was an equitable assignment of freight; that Messrs. Caspar, Edgar, and Co. Limited were entitled to sue upon it in their own name, and that it was not necessary that the assignor should be made a party to the suit, and that the action was maintainable *in rem*. The learned judge further stated that if so desired he would at a later date state his reasons for these conclusions more fully.

Cur. adv vult.

(Whilst the case stood adjourned Messrs. Evans, Reid, Teesdale, and Lidstrom Limited began their action 1932 Fo. 62, and obtained judgment in default of appearance.)

May 13, 1932.—**Langton, J.**—I am sorry to have to admit that the ill-fortune which has attended this unfortunate vessel has not diminished since its affairs have come into the sphere of the Law Courts. Owing to circumstances not wholly under my own control, judgment in several matters has remained outstanding for several months, and I cannot even claim that the solution of the difficult matters submitted to me has become much clearer as these months progressed.

The first of these outstanding questions is an important point raised by the mortgagee as to whether he has either a legal or an equitable assignment of the freight here in suit. The claim is raised by the mortgagee in his action (Fo. 107) and is opposed by Mr. Naisby on behalf of Messrs. Caspar, Edgar, and Co. Limited, who are both ship's agents and necessaries men, and by Mr. Main Thompson for Messrs. Metcalfe, Lamb, and Co., who are also necessaries men.

At a previous hearing I have already decided that Messrs. Caspar, Edgar, and Co. Limited have an equitable assignment but no legal assignment of the freight.

The claim is based upon a supplementary agreement dated the 30th April 1929 between Edouard Jaunzems and Co. of Riga, Latvia, the owners of the *Zigurds*, and Alfred Harris Smith, the mortgagee, and the parts of the agreement to which my attention was specially directed as affecting an

assignment of the freight were pars, 1, 22, 29 and 30 of this agreement.

So far as my note and my memory serves me the main argument was directed to par. 29, where the following wording occurs:

"29. In relation to the matters dealt with herein where they apply the shipowners hereby appoint the mortgagee their attorney for them and in their name at any time during the currency of this security to collect, sue for, receive and give effective receipts for all freights hire salvage and (or) insurance moneys, whether return of premium claims or otherwise, which may be or become due and owing to the shipowners, and to compromise and settle all claims and disputes in connection therewith."

Mr. Atkins claimed that this paragraph when added to par. 1 constituted an equitable assignment, and that he gave notice sufficient to give him the position of a legal assignee.

His claim upon the question of notice was elaborate and many-headed. He claimed, for example, that the mere fact of his intervention in the proceedings commenced by the *Tallinna Laevenhisus A/S* for necessaries constituted a sufficient notice for the purpose in hand. Again he relied upon the terms of an affidavit of interest in the same proceedings of the 16th March 1931, or alternatively upon a letter from Messrs. Coward, Chance, and Co., acting on behalf of Messrs. Churchill and Sim, which showed that on the 25th March 1931 the consignees knew that the ship and freight were under arrest.

I do but bare justice to his argument upon this matter when I say that every crevice and cranny were explored and every possible document or action which could be construed as notice to the debtor was presented to me in this connection in its most favourable light. The broad answer to all his contentions as regards a legal assignment of this freight seems to me to be apparent when one remembers clearly the three principal pre-requisites of a legal assignment; *i.e.*, it must be in writing, it must be absolute and there must be express notice in writing to the debtor.

Mr. Atkins frankly admitted that without notice of the necessary kind his claim to a legal assignment must fail, and I am quite clearly of opinion that all his claims as to notice here are at the best of a constructive character, and fall far short of anything approaching express notice in writing to the debtor.

In a legal assignment, as I understand it, there is no room for dubiety. Neither the subject-matter, nor the extent of transfer nor the exact character of the notice can be left in any sort of doubt.

Accordingly, an argument to establish a legal assignment which begins with an inference from a mortgage agreement, which is in itself as to some parts (see, for example, par. 22) conditional for its operation upon moneys being outstanding upon the first mortgage, and is as to others in its terms a power of attorney, commences unhopefully. As Mr. Naisby pointed out with force whilst addressing himself to a different aspect of the matter, a power of attorney is not germane to an assignment. It is rather the reverse. A power of attorney is A. empowering B. to do something for him, A. An assignment is A. empowering B. to help himself, B. Again, as laid down by Chitty, L.J. in *Durham Brothers* v. *Robertson* (78 L. T. Rep. 438, at p. 440; (1898) 1 Q. B. 765, at p. 773): "Where the Act applies it does not leave the original debtor in uncertainty as to the person to whom the legal right is transferred; it does not involve him in any question as to the state of the accounts between the mortgagor and the mortgagee."

From these unpromising beginnings the argument went its way to founder, as I think, at length in the sands of constructive notice; and if every other difficulty could be surmounted—a prospect which seems to me to be exceedingly unlikely—I cannot perceive anything in this case which could by any stretch of imagination be described as express notice in writing to the debtor. Upon his claim to a legal assignment of the freight therefore the mortgagee in my judgment fails, and my judgment is based upon the broad ground that the requirements of the Law of Property Act 1925, s. 136, are not complied with.

As to the second point whether this supplementary document contains an equitable assignment of the freight, I have not entertained very much doubt. The whole tenor of this supplementary agreement is in favour of placing the mortgagee in the most favourable position possible in the event of the default of the mortgagor. Such defaults as were in contemplation have undoubtedly occurred, and par. 22 of the agreement is alone enough to establish an intention to assign the freight to the shipowners. If this were not enough I should be prepared to hold that pars. 1, 2, 29 and 30 taken together are clear evidence of the intention of the shipowner to assign. Moreover, in the circumstances, I do not think that the point that the mortgagor is not joined in the action, a point familiar to courts of equity, could possibly be taken in a case where the mortgagor is a shipowner through whose default in business the whole trouble has been occasioned, and against whom judgment has been recovered by the several claimants in default of appearance.

[The learned judge then proceeded to deal with issues of fact which had been raised by the mortgagee as intervener in the claim of Captain Krauklis, action 1931, Fo. 154, which he determined in favour of the plaintiff, and proceeded :] There remains to be considered a question raised by Mr. Carpmael on behalf of Kohlen-Gross-Handel G.m.b.H. und Kieler Kohlen-Kontor G.m.b.H. the plaintiffs in action 1931, Fo. No. 128.

These plaintiffs are necessaries men who have obtained judgment against the ship and freight and have been awarded, after reference to the registrar, the sum of 402*l.* 14*s.* 5*d.*

Their claim is in respect of certain bunker coals supplied to the *Zigurds* in Germany on the 5th and 22nd Sept. 1930 under an agreement dated the 8th June 1929.

The question now raised in reference to this claim is a contention that by reason of the terms upon which these bunker coals were supplied, the plaintiffs are entitled to rank as a matter of priority ahead not only of other necessaries men but also ahead of the mortgagee.

It is not surprising that a contention at once so novel and so bold was most stubbornly contested both by Mr. Atkins on behalf of the mortgagee and by Mr. Naisby on behalf of Messrs. Caspar, Edgar, and Co. and the West Export A. G. I do not remember that any other voices were lifted in protest, but it would not have surprised me if all the various claimants to the meagre proceeds of the sale of this unhappy vessel had arisen in chorus to attempt the defeat of this unexpected claim.

The point, as argued by Mr. Carpmael, was both subtle and ingenious, and not altogether lacking in apparent support from unexceptionable authority. Having first produced evidence to show that the bunkers in question were bought and sold under a

contract which conferred upon the sellers a status known to German law as that of "ship's creditors," he then invoked the German Commercial Code to show: first, that "ship's creditors" have by German law a priority over mortgagees in cases of conflicting claims, and, secondly, that they possess a right to follow their claim against owners subsequent to those who were in possession when the debt was incurred. In support of his claim he adduced in evidence, without objection, the contract upon which it was founded, and the opinion of a practising advocate in Germany named Werner. Against the claim there was an opinion in letter form from a well-known German advocate, Dr. Sieveking. All this evidence was admitted before me without objection either as to form or relevance, and although upon reflection I have some doubts as to its admissibility upon the score of relevance, I do not think it would be fair to decide this point now upon the ground of inadmissibility of evidence, when the parties have proceeded so far without objection from one another or from the court, and without an opportunity being afforded of arguing the matter further. Upon a close consideration of the German Code Mr. Carpmael conceded that he had no claim to priority as against the freights at present in suit, since sect. 756 of the Code limits the lien conferred on ship's creditors to the freight of the particular voyage upon which their claim arises. As regards the proceeds of the ship, however, there is no such limitation, and it was against these proceeds that he pressed his claim.

The first answer to his contention was, of course, that German law has nothing to do with questions of priority in this country, which are determined according to the *lex fori* only, and although he covered much ground in his efforts to distinguish the present case from the general rule, over some of which I propose to follow his argument, I am of opinion that this is the last answer as it is the first, to the proposition for which he contended. By way of distinction to the general rule he invited a close consideration of the several judgments of Hill, J. and of the members of the Court of Appeal in the case of *The Colorado* (16 Asp. Mar. Law Cas. 145; 128 L. T. Rep. 759; (1923) P. 102). In that case the Court of Appeal agreed to look to French law in order to discover the nature for purposes of priority of a certain form of French pledge called a "*hypothèque*," and having discovered that it possessed many of the attributes of an English mortgage, ignored the French law, which notwithstanding those attributes, gave priority to a necessaries man over the holder of the "*hypothèque*," and applied the English law or *lex fori* to the ranking of claimants here, thus preferring the holder of the "*hypothèque*" to the supplier of necessaries. The suggested application of the procedure there followed to the present case was that, having first ascertained by a consideration of German law that the Kohlen-Kontor were "ship's creditors," and as such held a priority to mortgagees in Germany, I must give them that priority even when applying the *lex fori* in England. Similarly and perhaps *a fortiori* I ought, it was said, to prefer them to ordinary necessaries men whose contracts of sale did not put them in any such specially favoured position.

I am of opinion that this argument positively bristles with fallacies. In the first place, I do not at all agree with the basic position which the plaintiffs claim for themselves as established by the evidence. I think that the true view of their position is that which is set forth by Dr. Sieveking in par. 5 of his opinion. Any rights which they have according to the contract and code are rights peculiar to German law, and are of no value and of no avail to the plaintiffs unless and until they are enforced by arrest of the vessel and freight in the German courts. I have known Dr. Sieveking personally for many years, and my respect for his integrity and learning deepen with the increasing length of the acquaintance. I am satisfied that he has stated this matter in its true colours. The German code only purports to provide rights *inter se* of creditors in Germany. To facilitate the process in the German courts it creates a special class called "ship's creditors." If and when the ship and freight are arrested by the German courts certain results follow, but until there is such arrest in Germany no one is intended to be in any different position than they would occupy without these special provisions of the code. No one, I think, would be more surprised than the persons who framed this German code—of whom Dr. Sieveking was quite possibly one—than to hear that it was being invoked in England to settle rights *inter se* of various parties of varying nationalities laying claim to the proceeds of a Latvian ship which had been sold under the order of an English court to satisfy a large number of claims, only one of which was preferred by a German or had its origin in Germany.

A second broad answer to this contention of the German necessaries man, when it is based, as it is here, upon *The Colorado* (*sup.*) case, appears to me to be found at the threshold of the argument in considering the relative positions of the various opposing parties in the two cases. In the case of *The Colorado* the position of the holder of the "*hypothèque*" was definitely challenged by a necessaries man. It is not surprising that in such circumstances the court thought it right to turn to the French law to discover what exactly a "*hypothèque*" was—especially with a view to comparison with an English mortgage. In the present case the position of the Kohlen-Kontor, but for this novel claim as to their ranking, is challenged by no one, and is perfectly well ascertained. They belong to the ordinary class of necessaries men who have supplied the commonest of ship's necessaries at the present day, namely, coal. It is for this reason that I have wondered, when considering this judgment, whether I ought to have admitted evidence upon the nature of their contract at all. Ought I not rather to have followed Lord Sumner (then Hamilton, J.) in *American Surety Company* v. *Wrightson* (1910, 16 Com. Cas. 37), and excluded any such evidence as irrelevant to the law upon which priorities fall to be determined? If one were to adopt this view the plaintiffs' case, of course, falls to the ground; but as I have stated above, this objection was not taken, and it would be unfair to decide the point now upon a ground upon which the plaintiffs were not heard. As a matter of distinction, however, between *The Colorado* (*sup.*) and the present case, the difference in the two positions is plain to see, and I cannot ignore it. It is, to my mind, a vital distinction. In the one case the court seeks instruction in order to deal with an instrument which has only a parallel, and not an exact equivalent, in English law (see for example, Scrutton, L.J. in *The Colorado*, 16 Asp. Mar. Law Cas. at p. 150; 128 L. T. Rep. at p. 764; (1923) P. at p. 109: "It has also a claim by a person who has a '*hypothèque*,' and it may legitimately consult the foreign law as to what a '*hypothèque*' is.") In the other, it is deliberately invited to invest a class of creditors perfectly well-known to English law with certain special attributes on the ground of a foreign

law, and, moreover, if Dr. Sieveking is right, on the ground of a foreign law which has no operation until arrest has been effected in that foreign land.

When pressed by these difficulties, Mr. Carpmael took refuge in a dictum of Scrutton, L.J. in *The Colorado* (*sup.*). Following immediately upon the passage which I have quoted above, the Lord Justice says: "It is proved to be not a right of property in the ship, but a right to arrest the ship in the hands of subsequent owners to satisfy a claim against a previous owner. But such a right is the same as a maritime lien as described by Mellish, L.J. in *The Two Ellens* (1 Asp. Mar. Law Cas. 40, 208; 1872, 26 L. T. Rep. 1; L. Rep. 4, P. C. 161), by Gorell Barnes, J. in *The Ripon City* (8 Asp. Mar. Law Cas. 304; 77 L. T. Rep. 98; (1897) P. 226), and by this court in *The Tervaete* (16 Asp. Mar. Law Cas. 48; 128 L. T. Rep. 176; (1922) P. 259). And the English courts administering their own law would give a claim secured by a maritime lien priority over the claim of a necessaries man, who cannot arrest the ship against the claim of a subsequent owner. The fallacy of the appellants' argument appears to be that because the French courts would give a French necessaries man, or a necessaries man suing in the courts of France, priority over the claimant under a '*hypothèque*,' therefore an English court should give an English necessaries man similar priority. The answer is that the appellants are not asking for French remedies, but English remedies; and the English law postpones them to persons who have what is equivalent to a maritime lien."

Turning again to the German code, Mr. Carpmael pointed out that the code gives the "ship's creditors," to which class his clients belonged by right of their special contract, the right to follow their claims against subsequent owners. Accordingly he claimed to have a maritime lien as defined by Scrutton, L.J. and to be in a better position than the mortgagee and other necessaries men.

I am not sure whether Scrutton, L.J. would be satisfied that the right conferred upon the German necessaries man by the code in this case does in fact amount to a maritime lien. The Kohlen-Kontor may be sufficiently attracted by the prospect of solving this problem to take the case a step higher, but in the view which I have formed as to the effect of the evidence, I do not think that I need indulge in speculation upon this topic. If Dr. Sieveking be right, as I think he is, there is no right to follow, no maritime lien, and no special position of "ship's creditors" at all until arrest by the German court. It is thus idle to consider what an English court may have said or decided concerning debatable questions as to maritime liens in other and different cases.

Mr. Atkins for the mortgagee claims *The Colorado* (*sup.*) as an authority in his favour. It certainly is so to this extent, that it is only one more of the long line of authorities which have established that the English courts will look to English law and English law only for the purpose of ranking competing claims against a ship or its proceeds. Because in *The Colorado* (*sup.*) case the court, in special circumstances, first turned aside to look at foreign law, in order to obtain light concerning the legal character of a foreign instrument, I do not think that the case can be claimed as an authority for the introduction of any foreign law which any party chooses to adduce in order to qualify and alter the English rules of ranking. Indeed, it is noteworthy that both Hill, J. and the Court of Appeal declined to take any note of the French law in the matter outside of the instruction which they derived from the evidence as to the nature of a French *hypothèque*. Once they were clear as to what it was, they returned at once to the English law to decide the order of its ranking. I am of opinion, therefore, that Mr. Carpmael's valiant and determined effort to persuade me that *The Colorado* (*sup.*) decision affords ground for enabling him to say that his necessaries man has a maritime lien, thus forcing me to disregard the *lex fori* as to necessaries men, is unavailing.

The parties then argued their respective claims to priority.

J. V. Naisby for Messrs. Caspar, Edgar, and Co. Limited.—It is conceded that the assignment of the mortgagee was prior in date to that of Messrs. Caspar, Edgar, and, apart from other circumstances, would on that account be entitled to priority. But Messrs. Caspar, Edgar are, however, entitled to priority because they gave notice of their assignment to the consignees of the cargo, and no notice of his assignment has ever been given by the mortgagee. The notice is contained in a letter dated the 5th March 1931 addressed by Messrs. Caspar, Edgar, and Co. Limited to Messrs. Churchill and Sim. [The terms of this letter fully appear from the judgment of Langton, J. The learned counsel then proceeded to argue that the terms of the letter amounted to a notice of assignment.]

Harry Atkins for the mortgagee contrà.

Main Thompson for Messrs. Metcalfe, Lamb, and Co.—These necessaries men ought to be given priority over the claimants to the ship fund because the repairs which they carried out, namely, repairs to the engines of the vessel, enhanced her value and thus enured to the benefit of the claimants who now claim to take in priority.

Geoffrey Hutchinson for the stevedores, Messrs. Evans, Reid, Teesdale, and Lidstrom Limited.—These plaintiffs ought to be preferred to the claimants to the freight fund. It has been held that the claimants to the freight fund have an equitable right only, and therefore they ought not to be allowed to take this fund without discharging the expenses of bringing it into existence. The maxim, "He who comes to equity must do equity" applies; it would be inequitable to allow the assignees of the freight to assert a prior equitable right to the freight unless they discharge the expenses which have necessarily been incurred in earning the freight. If they take the freight fund in court, they will in fact receive the gross freight, whereas the owner could only have received the net freight. Equitable rights ought not to bring about such a result. There is no direct authority on the point, for this case is probably unique, but this court has acted upon a similar principle in dealing with the claims of the master for his disbursements in the days before the master had any maritime lien for his disbursements. *Bristowe* v. *Whitmore* (4 L. T. Rep. 622; 9 H. L. 391) is an instance where the court postponed the claim of a party who was asserting an equitable right to freight to the claim of the master for his disbursements incurred in earning it. It is submitted that the court should act on the same principle in dealing with this case. See also *The Feronia* (1868, 17 L. T. Rep. 619; L. Rep. 2, A. & E. 65) and *The Red Rose* (L. Rep. 2, A. & E. 80 (*n*)).

J. V. Naisby contrà.

Harry Atkins contrà.

[Reference was made to *The Rene* (16 Asp. Mar. Law Cas. 24; 128 L. T. Rep. 96).]

Cur. adv. vult.

June 7. 1932.—**Langton, J.**—The points which remain for decision in this matter are pure questions of priorities as between the several claimants. I think, however, that it may serve a useful purpose if I commence by implementing a promise which I gave in October of last year to give the reasons for my first judgment delivered on the 22nd Oct. 1931. In that branch of the case Messrs. Caspar, Edgar, and Co. Limited, the ship's agents, claimed that a certain letter of the master of the 2nd March 1931, which was identified in the suit as "D.E. 1," and exhibited to an affidavit of Mr. Douglas Edgar of the 2nd June 1931, was a legal assignment of the freight of the *Zigurds*. The letter was in these terms: "Please pay the freight of my vessel, the *Zigurds*, and all demurrage which may be payable under the charter to my agents, Messrs. Caspar, Edgar, and Co. Limited and oblige," signed, F. Krauklis, master. It is material to observe that the letter in reality was a printed form, and the only words which have been inserted by typewriter in this particular instance are, first, the date; and secondly, the following: "*Zigurds* and all demurrage which may be payable under the charter." It is not, I think, necessary to elaborate reasons why I held that this document was not a legal assignment of the freight. As I said in giving judgment upon a kindred point the other day, raised by the mortgagee, there is no room for dubiety in the matter of legal assignment. Neither the subject-matter nor the extent of transfer nor the exact character of the notice can be left in any sort of doubt. Now this document, although perfectly clear as to the subject-matter, makes no mention of any kind of transfer, and does not purport to give any kind of notice as to any transfer having been made. It is, as I said in October, nothing more in form than a mere authority to pay, and falls short in at least two vital respects of the essential requisites of a legal assignment.

Alternatively, it was argued on behalf of Messrs. Caspar, Edgar, and Co. Limited, that this document constituted an equitable assignment of the freight and demurrage when taken in conjunction with the circumstances in which it was given, as described in evidence by Mr. Douglas Edgar, before the Admiralty Registrar on the 22nd July 1931. Various interpretations were suggested by the several counsel engaged in the case as to the meaning and value of this evidence. Taking the matter broadly the view at which I arrived was that in this case after the arrival of the *Zigurds* Mr. Edgar became dissatisfied as to the financial stability of his clients or principals, the owners of the *Zigurds*. Accordingly he declined to make any of the usual payments or advances until the managing owner of the *Zigurds* agreed to make over and assign to his firm all the freight and demurrage due to the vessel. This was quite an unusual step for him to take, but when he had obtained the managing owner's verbal agreement to assign, Mr. Edgar employed the customary form as exemplified in exhibit "D.E. 1," to obtain from the master his authority to collect the freight and demurrage. Upon the facts as I find them there can, I think, be little doubt concerning this alternative question, as to an equitable assignment. The main point, namely, the intention to assign, is not in doubt. Upon this matter I accept Mr. Edgar's evidence completely, and when this is clear there remains upon the documents available very little left for argument. I was accordingly satisfied that Messrs. Caspar, Edgar, and Co. were justified in their claim that there had been an equitable assignment to them of the freight and demurrage due upon the *Zigurds*. I have given these reasons now in the hope that they may clarify the succeeding reasons which I now propose to give for the determination at which I have arrived concerning the question of priority.

Turning now to those questions, there remain in court for distribution amongst the various claimants three sums derived from three different sources, first, from the proceeds of the ship a sum of 1421*l*. 3*s*. 6*d*.; secondly, from proceeds of freight, 1837*l*. 14*s*. 10*d*.; and thirdly, by way of demurrage, 60*l*. In the matter of demurrage there is now no contest in regard to priority. It is agreed that Messrs. Caspar, Edgar, and Co. have unquestioned priority to this small sum. As regards the proceeds of the ship, it is agreed that certain disbursements of the master stand first, and after that the mortgagee upon my findings stands unchallenged in the matter of priority, save as to a claim which struck me as being much more ingenious than sound, which was put forward by Mr. Main Thompson on behalf of Messrs. Metcalfe, Lamb, and Co. Mr. Main Thompson contended that his clients were entitled to priority over the mortgagee in respect of both ship fund and freight fund upon the grounds that their work consisted of repairs to boilers which were essential to the existence of the vessel as a ship in being in contrast to a mere useless hulk, and that the repairs of this class stood upon a different footing. He invoked the equitable jurisdiction of the court, but did not point to any actual authority which would cover or justify this somewhat surprising claim. I do not think it requires much consideration to be satisfied that it is quite unsound. The repairs were ordered by the owners; and the marshal, in his discretion, declined to take over the work of these repairers. I am satisfied that Messrs. Metcalfe, Lamb, and Co. looked to the owners for payment, and I know of no equitable doctrine which can cause their claim to be preferred to that of the mortgagee in respect of either fund. A somewhat similar contention was once raised as between two sets of necessaries men, in a case to which my attention was called by Mr. Naisby, namely, *The Rene* (16 Asp. Mar. Law Cas. 24; 128 L. T. Rep. 96), but Hill, J. refused to prefer one class of necessaries man to another in that case, and I cannot doubt that for the same reasons this necessaries man has no claim here to precede the mortgagee.

There remain two major contests which concern the freight fund only, in the first of which Mr. Naisby on behalf of Messrs. Caspar, Edgar, and Co. claimed priority over the mortgagee on the ground that notice of his equitable assignment was given, on the 5th March 1931, to the consignees, Messrs. Churchill and Sim, of London, and secondly, the novel and attractive claim put forward by Mr. Hutchinson for priority over both equitable assignees of the freight fund in favour of the stevedores, Messrs. Evans, Reid, Teesdale and Lidstrom Limited, whose claim originally formed part of the claim put forward by the ship's agents, but was disallowed by the registrar on the ground that it could not fall upon Messrs. Caspar, Edgar, and Co. as a liability.

To deal first with Mr. Naisby's contention. His claim was based upon a letter of the 5th March 1931, from his clients Messrs. Caspar, Edgar, and Co. to Messrs. Churchill and Sim. The letter is in these terms: "Dear Sirs.—S.S. *Zigurds*.—We beg to give you notice that we hold Captain's authority to collect the freight per this steamer's cargo, against which we have made payments. Yours faithfully, for E. A. Caspar, Edgar, and Co. Limited, (sgd.) D. EDGAR, DIRECTOR." He claimed that

this letter constituted notice to Messrs. Churchill and Sim that the freight had been assigned to his clients. He did not dispute that if he failed in satisfying me that this letter was a good notice, the general rule must prevail and that priority as between his clients and the mortgagee would fall to be determined by date. Since the date of the mortgage was very much earlier than the 5th March 1931, he must consequently fail unless the notice were good. Mr. Atkins for the mortgagee did not contend that if the notice were good he could claim a priority against the ship's agents, but he contended that the letter was altogether insufficient to constitute a notice as required. The point between them therefore narrowed itself to the one point as to the meaning and sufficiency of the letter of the 5th March 1931. I have found it, and still find it, an exceedingly difficult point to determine. The words "against which" make it perfectly clear that there is a reason and a good reason why the captain has given his authority to collect the freight. Furthermore, there is to my mind force in Mr. Naisby's contention that the last six words of the letter are mere surplusage unless the intention is to convey to the reader's mind that there is some reason why the consignees ought to pay this freight to the ship's agents for the reason there stated. I have had to ask myself the question how far must a notice go in order to be good and sufficient for the purpose here required. Mr. Atkins, for the mortgagee, cited a passage from the judgment of Vice-Chancellor Kindersley in *Brown* v. *Savage*, 4 Drewry, 635, at p. 640, in which he says: ". . . . a verbal and informal notice is sufficient, provided the fact of the assignment is distinctly and clearly brought to the mind and attention of the trustee." Mr. Atkins puts this as the minimum requirement, and says that the letter of the 5th March does not even suggest an assignment to the mind of the reader. When one considers, however, that the reader was a most experienced business man, who could not possibly be interested in the mere fact that Messrs. Caspar, Edgar, and Co. had made payment against the freight, it seems to me that this reading puts too low a value upon the last six words in the letter. The conclusion to which I have come, after considerable doubt and hesitation, is that these words might convey to an experienced business man that an assignment had already taken place, but they are not so clear and conclusive as to be an actual notice of an assignment. As I understand the matter, a communication which might suggest an assignment to one man, but would not necessarily suggest it to another, is not enough for Mr. Naisby's purpose. Accordingly, in my view, Messrs. Caspar, Edgar, and Co. fail in their contention, and the mortgagee takes priority over them upon this branch of the claim.

The stevedores' claim was put in two ways by Mr. Hutchinson, the second of which has given me very considerable food for thought. To begin with, he claimed priority over the mortgagee for his clients, the stevedores, on the ground that it was through their exertions that the freight fund was brought into existence at all. There is a certain echo in this of the claim put forward by necessaries men against other necessaries men in the case which I alluded to above, *The Rene* (*sup.*). It has also a certain kinship to the claim of which I have already disposed, put forward in this case on behalf of Messrs. Metcalfe, Lamb, and Co. by Mr. Main Thompson. To my mind this is putting the services of the stevedores altogether too high and in the wrong light. It is possible to have great sympathy with them, as Hill, J. had with the claimants in the case of *The Rene*, without presenting them in the false light of a quasi-salvor. The so-called services or exertions which they contributed to the adventure of the *Zigurds* are not in reality in the least akin to salvage services or exertions. In plain fact they are nothing more than ordinary commercial labour rendered upon agreed conditions at a regulated rate of hire.

The second angle, however, from which Mr. Hutchinson approached this point was far more convincing. The mortgagee, he said, is here claiming an equitable jurisdiction of the court. He comes here asking for the proceeds of the freight upon an equitable assignment. It is a principle of equity that he who claims equity should do equity. If he does not pay the stevedores' charges he will be getting more than the owners could ever have got, he will *pro tanto* be getting the gross freight and not the net freight. Why, he asks, should a man whose claim is based upon equity, not pay the just amount to persons whose work has contributed to bringing that fund into being? He did not pretend that there was any authority precisely in point, but he cited to me the case of *Bristow* v. *Whitmore* (4 L. T. Rep. 622; 9 H. of L. Cas. 391), to reinforce his proposition that the court of equity would not be slow to interfere to see justice done to a ship's master as against a mortgagee. It is worthy of note that in that case the Lord Chancellor (Lord Campbell) after stating in the widest terms that: "The plaintiff's claim is most reasonable, and natural justice requires that it should be conceded," goes on immediately afterwards to say: "Still, if it is opposed to any established rule of law, or if it can be admitted only by drawing a nice and subtle distinction between this case and former decisions establishing a settled rule, it ought to be disallowed." I think Mr. Hutchinson was right in saying that there is no established rule of law which applies to the present case, but I doubt whether the matter is so entirely at large as he would have me to believe. It is true that the assignment conveyed by the mortgage is not, as I have found the matter, a legal assignment of the freight, but I have found an equitable assignment in the hands of the mortgagee springing from this mortgage. People who deal in shipping affairs, and with ships, must be taken to do so with their eyes open to the ordinary risks and liabilities incident to these affairs. No one who was conversant with maritime affairs could pretend to surprise on learning that a ship was sailing the seas under the burden of a mortgage; nor would it be surprising to learn that the mortgage deed secured to the mortgagee at least an equitable assignment of freights earned. If I were to accede to Mr. Hutchinson's argument I should find myself at once in a very considerable quandary as to the position of Messrs. Caspar, Edgar, and Co. *vis-à-vis* the mortgagee. I should have to ask myself whether there is, in fact, anything specially meritorious about the performance of stevedore work which entitles it to be put upon a different footing to the work performed by ship's agents which has been equally necessary to bring this freight fund into being. As I understand the facts of this case, Messrs. Evans, Reid, Teesdale, and Lidstrom Limited were, in fact, brought on the scene by the exertions of Messrs. Caspar, Edgar, and Co., and if their claim to be paid stands upon a special footing, I find it difficult to see why the claim of Messrs. Caspar, Edgar, and Co. does not equally stand upon a special or even better footing.

I am afraid that the truth of the whole matter is, whichever way one looks at it, that it is beset with perplexities, and some perfectly innocent people have obviously got to suffer. To my mind it would

be better to follow here a general rule and give the priority to the mortgagee.

Solicitors: For the mortgagee, *Constant* and *Constant;* for Caspar, Edgar, and Co. Limited, *Middleton, Lewis,* and *Clark*, agents for *Middleton* and *Co.*, Sunderland; for the Kohlen-Gross-Handel G.m.b.H., *Stokes* and *Stokes*, agents for *Bramwell Clayton*, and *Clayton*, Newcastle-upon-Tyne; for Captain Krauklis, *Tallinna Laevenhisus A/S*, and Metcalfe, Lamb, and Co., *Parker, Garrett*, and *Co.*, agents for *Botterell, Roche*, and *Temperley*, West Hartlepool; for Evans, Reid, Teesdale, and Lidstrom Limited, *Charles M. Finney*.

Supreme Court of Judicature.

COURT OF APPEAL.

Wednesday, Dec. 14, 1932.

(Before Scrutton, Lawrence and Greer, L.JJ.)

The Zigurds. (*a*)

ON APPEAL FROM THE ADMIRALTY DIVISION.

Shipping—Freight—Authority to collect freight given by master to ship's agent—Equitable assignment of freight—Notice—Letter to receivers of cargo informing them of authority to collect freight " against which we have made payments "—Sufficiency of notice—Priorities.

The master of the Latvian steamship Z., on arrival at the port of West Hartlepool, gave to the appellants who were the ship's agents, an equitable assignment of the freight. Unless such an assignment had been given the ship's agents would have refused to make the necessary disbursements for the Z. Thereupon the ship's agents wrote the following letter to the receivers of the cargo, who were liable to pay the freight: " S.S. Zigurds. *We beg to give you notice that we hold the captain's authority to collect the freight for this steamer against which we have made payments."*

Held, that the appellants' letter was a good notice of their assignment, and that as between the appellants and an earlier equitable assignee of the freight, by whom no notice had been given, the appellants were entitled to priority.

Judgment of Langton, J. (reported 148 *L. T. Rep.* 72; (1932) *P.* 113) *reversed.*

Appeal from a judgment of Langton, J. (*ante*, p. 324; 148 L. T. Rep. 72; (1932) P. 113.)

The appellants, Messrs. Caspar, Edgar, and Co. Limited, had acted as agents for the Latvian steamship *Zigurds* at West Hartlepool in March 1931, and in that capacity had made various disbursements on behalf of the vessel. Before making any such disbursements, and as a condition of so doing, the appellants obtained from the master of the *Zigurds* a document in the following terms:

> " Please pay the freight for my vessel the *Zigurds* and all demurrage which may be payable under the charter to my agents, E. A. Caspar, Edgar, and Co. Limited, and oblige."

Upon receiving this document the appellants wrote the following letter to Messrs. Churchill and Sim, who were the receivers of the cargo by whom freight was payable:

> " Dear Sirs,—S.S. *Zigurds*: We beg to give you notice that we hold captain's authority to collect the freight per this steamer's cargo, against which we have made payments.—Yours faithfully, for E. A. Caspar, Edgar, and Co. Limited (Signed) D. Edgar, director."

The freight was also claimed by Mr. Alfred Harris Smith, an earlier equitable assignee, who was also mortgagee of the ship. Langton, J. held that the letter written by the appellants to Messrs. Churchill and Sim was not a sufficiently clear indication that the freight had been assigned by way of security and was not notice of the assignment, and that Mr. Smith was therefore entitled to priority.

Messrs. Caspar, Edgar, and Co. Limited appealed.

W. P. Spens, K.C., and *Naisby*, for the appellants.

Harry Atkins for the respondent.

Scrutton, L.J.—Counsel have said all that can be said in this case. The point is a very short one and turns on very short documents. As has been repeatedly the case in the last two or three years of bad times, a small vessel has arrived in this country laden with debts and obligations in the sense that any number of people had claims against the master, and the procedure *in rem* has put the ship and freight in the Admiralty Court. The Admiralty Court is then concerned in sorting out the priorities of a fund which is generally quite insufficient to satisfy all the claims on the ship and shipowner.

In this particular case a large number of claims have been put forward at various times, but, fortunately they have disappeared at this stage, and the present conflict is between two people who are alleged to have equitable assignments. As I understand it, in those circumstances—apart from notice—the equitable assignments go by priority. The notice may change the later assignment into a prior assignment. Now the two parties who are contending are a mortgagee, who is said to have, and is assumed for this purpose to have, an equitable assignment of the freight, and the ship's agents. The ship's agents' case is that they have an equitable assignment because they obtained this document from the master, representing the owner:

> " Dear Sir,—Please pay the freight of my vessel, the *Zigurds*, and all the demurrage which may be payable under the charter, to my agents, Messrs. Caspar, Edgar, and Co. Limited, and oblige.—(Signed) F. Krauklis, Master."

There is no express mention of the party to whom that letter is addressed, but it is obviously addressed to somebody who is liable to pay freight. There is this evidence as to the circumstances in which the document came to be given; when the *Zigurds* came into West Hartlepool, first the master and then the owner went to Caspar, Edgar, and Co., who were acting as ship's agents, and asked them

(*a*) Reported by Geoffrey Hutchinson, Esq., Barrister-at-Law.

to do the ship's work and find the money to make the necessary payments. But Messrs. Caspar, Edgar, and Co. declined to make the payments, and thereupon in order to induce them to make the payments, the master, with the consent of the owner, gave this letter to Messrs. Caspar, Edgar, and Co., which would put into their possession a fund out of which they could make payments.

So much for the equitable assignment—it is not disputed that it is an equitable assignment. Then comes the next question : Was notice of it given to the person who had to pay the freight, so as to bind that person to pay the freight to Messrs. Caspar, Edgar, and Co. ? That turns on a letter of the 5th March 1931 addressed to a well-known London firm, largely dealing in timber—Messrs. Churchill and Sim—who, it appears, were the people mentioned in the bill of lading as being liable to pay freight. The letter was :

> "Dear Sirs,—S.S. *Zigurds :* We beg to give you notice that we hold captain's authority to collect the freight per this steamer's cargo, against which we have made payments.—Yours faithfully, for E. A. Caspar, Edgar, and Co. Limited (Signed) D. EDGAR, Director."

I am bound to say I do not know why that notice should not have been made clearer than it is. But there it is, and I think it amounts to this : "You must pay the freight to us, and the reason why you must do so is that we have this authority to collect, and have made advances against it." The question is : Is that sufficient notice ? It is quite clear from the repeatedly cited passage in the case of *W. M. Brandt's Sons and Co.* v. *Dunlop Rubber Company Limited* (93 L. T. Rep. 495 ; (1905) A. C. 454, at p. 462), in Lord Macnaghten's judgment, that the form of an equitable assignment may be very vague : "It may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor ignores such a notice, he does so at his peril."

Now, the learned judge, who, I am sure, displayed his usual patience in dealing with a multitude of people on a multitude of points, puts in two sentences his question and his answer : "The conclusion to which I have come, after considerable doubt and hesitation, is that these words might convey to an experienced business man that an assignment had already taken place, but they are not so clear and conclusive as to be an actual notice of an assignment. . . . Accordingly, in my view, Messrs. Caspar, Edgar, and Co. fail in their contention, and the mortgagee takes priority over them upon this branch of the claim."

Now, the question—and it is a very short one—is whether this court takes the same view of the letter of the 5th March, and I have come to the conclusion, especially because of the concluding words, "against which we have made payments," that they should convey to Messrs. Churchill and Sim that Messrs. Caspar, Edgar, and Co. have the right given them by the captain to receive these payments. They made advances on the faith of that right, and they say that Messrs. Churchill and Sim must pay the freight, if freight is due, to Messrs. Caspar, Edgar, and Co. If there is that notice, then the ship's agents obtain the priority they ask for, and the schedule of priority in the judge's judgment must be altered so as to put Messrs. Caspar, Edgar, and Co.'s claim in priority to that of the mortgagee to the extent of the 1800*l.* odd which is their claim.

Lawrence, L.J.—I agree. One of the requisites to constitute a legal right to sue for a debt on an assignment is that the debtor should be notified of that assignment. That is provided by sect. 136, sub-sect. (1), of the Law of Property Act 1925. Now, the Act does not lay down what constitutes express notice, and on the corresponding section of the Supreme Court of Judicature Act 1873, s. 25, sub-s. (6), there are decisions showing all that is requisite to give such notice to the debtor is to bring home to his mind that he cannot safely ignore it and pay the money to somebody else after having received the notice. Now was such notice given to the debtors in this case ? The facts are that by a document which has now been held to amount to an equitable assignment the persons giving the notice were authorised to receive the debt from the debtors. They gave notice that they had received that authority. Now I can conceive its being said that that might not have brought home to the debtor's mind that that authority amounted to an equitable assignment, but the creditors were careful to add to that notice words which, I think, must have, or ought to have, brought home conclusively to the debtors—and I have no reason to believe that they did not—that the authority had been given for valuable consideration.

The words are : "We beg to give you notice that we hold captain's authority to collect the freight per this steamer's cargo, against which we have made payments."

Now the learned judge in the court below thought that that notice was doubtful because it might convey to a debtor that there had been a previous assignment to the agents of the freight, and that this was only the statement of that assignment. I am afraid, with all respect to the learned judge, I do not follow that view at all, because there is no suggestion here that they were the owners of the freight before this authority had been given. It seems to me expressly to state the effect of the authority, namely, that it had been given in consideration of their having made advances against the freight. We have not got the debtors here saying they mistook that authority for something else and paid the freight in good faith to a third party. This is a claim made by the mortgagee, who failed to give notice, and he has the unenviable task of trying to persuade the court that these business people to whom this letter was addressed—Messrs. Churchill and Sim—did not understand that it meant that the agents had been given that authority for value which could not be revoked.

There is no trace to be found that they mistook the meaning of it, or that they attempted to ignore that notice, and pay somebody else. In my judgment the notice is sufficient to bring home to the minds of the debtors that there had been an equitable assignment of the debt. Therefore, I agree that this appeal succeeds and ought to be allowed.

Greer, L.J.—I also agree. There is no question involved in this appeal which raises any doubt as to whether Messrs. Caspar, Edgar, and Co. Limited did obtain—before they wrote the letter of the 5th March—an equitable assignment which gave them a charge upon the freight, and authority to charge upon it in respect of the advances which they, in the ordinary course, had made or would make as agents for the ship which was coming or had come to West Hartlepool. The only question is whether they could claim priority to an earlier

equitable assignment by reason of the fact that they were the more diligent of two equitable assignees in giving notice to the persons who were liable to pay the freight—Messrs. Churchill and Sim. They gave notice in these terms: "We beg to give you notice that we hold captain's authority to collect the freight per this steamer's cargo, against which we have made payments." Now, if the notice had stopped with the word "cargo" I should be inclined to the view that it was not a notice of any equitable assignment, though in the ordinary course, if Messrs. Caspar, Edgar, and Co. had collected the freight and nobody had interfered to prevent them from collecting the freight, they would have had a lien at common law in respect of their charges and advances. I cannot understand the words "against which we have made payments" being added except with the object of informing Messrs. Churchill and Sim that the plaintiffs had obtained rights against the freight in respect of the payments which they had made or were going to make. I do not for a moment suppose that Messrs. Churchill and Sim misunderstood the letter which they so received. It is common knowledge in the shipping business that one of the ways in which this business is carried on for foreign vessels coming to this country is that the agents do not incur expense on behalf of the ship without obtaining some security. Messrs. Churchill and Sim, I should think, would have no difficulty in interpreting this document as meaning: "The captain has given us authority to collect the freight in order that we may use it as the security for payments which we are going to make on behalf of the ship." I have no doubt that that was intended, because Messrs. Caspar, Edgar, and Co. refused to have anything to do with the ship until they got this authority.

I cannot help thinking that it is a pity that in business matters where large sums are involved people do not think it worth while to run across the street to their solicitors and ask for 13*s*. 4*d*. worth of protection against liabilities that may be incurred. But they do not do it. They do it in small matters where they are considering liabilities of a few pounds, but they do not do it in these large matters. They think they are quite competent to protect themselves sufficiently by their everyday business language, and the result is that we get litigation of this kind, which has to come to the Court of Appeal to be finally settled, or, if not there finally settled, it will have to be settled by some further tribunal. I agree that this appeal should be allowed, and the order made as my Lord has said.

Solicitors for the appellants, *Middleton, Lewis*, and *Clarke*, agents for *Middleton* and *Co.*, Sunderland.

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

April 20, 21, 22, 27, 28, 29; *May* 2, 3 *and* 13, 1932.

(Before SCRUTTON, GREER and SLESSER, L.JJ.)

Williams v. Atlantic Assurance Company. (*a*)

Insurance (Marine)—Open policy on goods—Assignment—Value of goods—"Prime cost"—Beneficial interest in goods insured—Marine Insurance Act 1906 (6 *Edw.* 7, *c.* 41), *ss.* 14, 16, 50, *sub-s.* (2)—*Law of Property Act* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 136, *sub-s.* (1).

A firm of C. V. and Co. had insured through the Alexandria agency of the defendants by an open and unvalued policy certain cotton goods on a voyage from Alexandria to Liverpool to the extent of 8000*l. The goods were lost at sea by fire. One W. had established a claim against the firm for* 7000*l., and in settlement of that claim he took over as assignee the claim of the firm under the insurance policy and thereupon sued the insurance company in his own name to recover the value of the insured goods.*

Held, per Scrutton, L.J., that the plaintiff had failed to prove the value, if any, of the goods shipped.

Held, per Greer and Slesser, L.JJ.; Scrutton, L.J. dubitante, *that the plaintiff had not obtained the beneficial interest in the policy which would be necessary to enable him to sue in his own name under sect.* 50, *sub-sect.* (2), *of the Marine Insurance Act* 1906, *and* (2) *that the assignee of part of the debt could not, as an equitable assignee, sue without having his assignor made party to the action.*

Held, per Scrutton and Greer, L.JJ., that the "prime cost" in sect. 16 *of the Marine Insurance Act* 1906 *meant the prime cost to the assured at or about the time of shipment, or at any rate at some time when the prime cost could be reasonably deemed to represent their value to the owner at the date of shipment.*

APPEAL from a decision of MacKinnon, J. in an action tried by him without a jury.

The action was brought upon a policy of marine insurance, and the plaintiff, Leonard Lloyd Williams, claimed against the defendants in respect of a loss on twenty cases of textile goods shipped on board the *Parthian*, a ship on the American register in 1921, on a voyage from Alexandria to Liverpool. The action was originally brought in the names of Andrea Constantinou and George Valsamis, formerly carrying on business in Egypt as Constantinou, Valsamis, and Co., as assured, and the above-named Leonard Lloyd Williams as their assignee. On the 23rd Nov. 1927 the two first-named plaintiffs were crossed out by amendment of writ, and Leonard Lloyd Williams remained as the only plaintiff, being the person to whom the firm had assigned the benefit of all claims or moneys which might become due under the policy which was dated the 7th July 1921. The *Parthian* sailed on that

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

date, put into Oran on the 16th July, and remained there until the 24th July, when a fire broke out on board. In order to extinguish the fire the port authorities sunk the vessel, and the cargo was extensively damaged by fire and water.

MacKinnon, J. came to the conclusion that the defendants had entirely failed to satisfy him that fraud had been established, or that there had been any concealment. In his opinion, 8000*l.* was in excess of the real value of the goods, and he gave judgment for the plaintiff for 4000*l.*

The defendants appealed, and there was a cross-appeal by the plaintiff.

The facts are fully set out in the judgment of Scrutton, L.J.

Porter, K.C. and *David Davies* for the appellants.

James Dickinson, K.C. and *John Whyatt* for the respondent.

Cur. adv. vult.

Scrutton, L.J.—MacKinnon, J. begins his judgment by saying that this case is the most unsatisfactory case he ever had to deal with, the evidence as presented on both sides being hopelessly unsatisfactory. I entirely agree with him. The court in 1932 is asked to deal with a loss under a marine policy which occurred on the 24th July 1921. Two material witnesses have died. The writ in the action was issued on the 23rd July 1927, one day before the Statute of Limitations would have destroyed the claim. The writ was originally issued in the name of Constantinou and Valsamis, formerly trading as the firm of Constantinou, Valsamis, and Co., and Leonard Lloyd Williams. On the 23rd Nov. 1927 the first two plaintiffs were struck out and Williams remained as sole plaintiff. His interest being derived from the first two plaintiffs, he was exposed to all the defences available against them. They had insured through the Alexandria Agency of the defendant company by an open and unvalued policy certain cotton goods on a voyage from Alexandria to Liverpool to the extent of 8000*l.*, but with no agreement as to value. It was not in evidence who, on behalf of the insurers or assured respectively, effected the policy, or what was disclosed or not disclosed when the policy was effected, or how the very unusual device of an open instead of a valued policy was adopted. The appellant, Mr. Williams, against whom it is right to say no suggestion of fraud or bad faith was or could be made, came into the transaction after loss, because he had established a claim against Constantinou and Valsamis in the Egyptian courts for over 7000*l.* in respect of some improper dealings of theirs as his agents with some rum of his, and in settlement of the claim he took over their claim under the insurance policy on terms to be considered hereafter.

The cotton goods insured, the subject of the claim, were said to be shipped on the steamship *Parthian*, a steamer on the American Register, but owned and commanded by Greeks. She apparently started from Alexandria with insufficient bunkers. Her captain put into Oran to get some more coal, but had no money to pay for it. The steamer lay in the harbour at Oran for some days. During a Sunday night the captain alleged that a fire broke out in the engine-room, an event which the judicial experts at Oran reported to be "not impossible but little probable." To extinguish the fire the port authorities sank the vessel, and the cargo was extensively damaged by fire and water. The loss was very suspicious, as when the shipping boom of 1919–20 was followed by the disastrous shipping slump of 1921, that year, 1921, was the period in which this court found several Greek ships to have been intentionally scuttled or burnt with intent to defraud underwriters; and counsel for the underwriters asked us to find that there was here a loss not accidental, but by collusion between Greek shipowners and cargo-owners, Constantinou and Valsamis having at least three shipments on the vessel, all heavily over-valued. But the underwriters had not the courage to plead this; no evidence was called about the ship, although there is reason to believe it was under-insured, and all the direct evidence as to the cargo-owners was an answer to a question to Constantinou: "I put it to you that both you and Valsamis were aware that the goods shipped in the *Parthian* were not likely to reach their destination?—(A.) This is not true." I decline to deal with the matter on the suspicion that there was an arranged loss.

Starting, then, with the position that an honest assured has, this being an open policy, to prove the amount of his loss, sect. 16 of the Marine Insurance Act 1906 provides that "subject to any express provision or valuation in the policy, the insurable value of the subject-matter insured must be ascertained as follows: . . . (3) in insurance on goods or merchandise, the insurable value is the prime cost of the property insured, plus the expenses of and incidental to shipping, and the charges of insurance upon the whole." "Prime cost" would ordinarily mean the first cost of manufacturing and would, on the cardinal principle of insurance indemnity, refer to the state of the goods at or about the time of their first being at risk, the time of commencing the adventure. The underwriters would not pay on an open policy on goods for the loss of a profit or rise in the market price which was expected to be made in the future; nor would the assured recover for a loss, which had already been made at the time of starting the adventure because the market price had fallen heavily since the assured bought or manufactured the goods.

But the assured may not be the manufacturer, or he may have bought some time before the adventure commenced. What is to be the measure of value? There is practically no English authority on the point. Lord Mansfield in *Lewis* v. *Rucker* (2 Burr. 1167, at p. 1170) uses the phrase "prime cost"—in an open policy—"or value in the policy," but the point was not involved in the case, which related to a valued policy. Arnould on Marine Insurance, 11th edit., s. 365 (2), has the sentence: "The prime cost of goods is generally evidenced by the invoice price, but is not conclusively fixed by it. . . . As a practical rule, the prime cost, as evidenced by the invoice price, is by far the most convenient standard." The United States have no statute, but that excellent writer, Mr. Phillips, who, I may say, has probably been taken as one of the most authoritative writers on marine insurance, puts the matter thus. Sect. 1226 says (vol. 2, 3rd edit., at p. 39): "The amount of insurable interest in goods is their market value at the time and place of the commencement of the risk. The best, though not conclusive, criterion of this interest, is the cost of the goods to the assured. This is the most satisfactory proof of the value, in case they are purchased near the time when the risk commences." The first paragraph of sect. 1229 says: "The amount of insurable interest is most frequently the invoice price. But stating a price in the invoice does not determine the amount of interest any further than as it is a proof of the actual cost." The test is put in the Supreme Court of New York by Thompson, J. in *Le Roy* v. *United*

Insurance Company (7 Johns. (N. Y.) Cas. at p. 355) in this way: "The prime cost of the goods might not, in many cases, be a just rule of computation, as where they were not purchased with a view to an immediate exportation, and had remained on hand for a considerable length of time. But in matters of commerce the plainest and simplest rules are always the best. And I should incline to think that, generally speaking, the prime cost would be the best rule by which to test the value of the subject. The prime cost is commonly the market price of the article. And as the shipment, in the usual course of business, is made soon after the purchase, the prime cost is, ordinarily, the real value of the subject." It has frequently been pointed out by great judges, and especially by Bowen, L.J. in *Castellain* v. *Preston* (49 L. T. Rep. at pp. 33, 34, 35; 11 Q. B. Div. at pp. 397, 401, 406): "When there is a contract of indemnity no more can be recovered by the assured than the amount of his loss." . . . "In all these difficult problems I go back with confidence to the broad principle of indemnity. Apply that and an answer to the difficulty will always be found." . . . "Apply the broad principle of indemnity, and you have the answer. The vendor cannot recover for greater loss than he suffers."

Apply this to the present case. The assured has at the commencement of the risk goods of uncertain value. He desires to insure that value against marine risks. If he bought the goods a year before and the market has fallen heavily, he cannot insure against that loss; it has already happened. Nor can he recover on an open policy the loss he suffers by the possibility of the goods having a higher market value on arrival at the port of destination which he loses by the ship's not arriving. What he has lost is the value when the adventure starts. Put the case of the insurance of a picture in an open policy which forty years ago when the painter was fashionable cost 4000*l.*, but at the time of shipment, when the painter is out of date, would only sell for 400*l.* The assured could not say: "The prime cost was 4000*l.*" As Phillips says: "The purchase price must be near the time when the adventure commences." Similarly, if Lawrence's "Red Boy," for which 95,000*l.* has been refused, were insured on an open policy, the underwriters could not say: "The prime cost when Lawrence painted it a hundred years ago was a few hundred pounds; that is its prime cost and the only amount recoverable." I approach the case, therefore, from the point of view of underwriters who are concerned to determine the cost to the assured, or the invoice or market value at or near the time of the shipment.

Constantinou, Valsamis, and Co.'s connection with the goods is said to be that they held them as security for a debt owed to the firm by Valsamis, one of the partners, in that he had promised when the firm was formed in July 1919 to put 6000*l.* into the firm as capital, but had only paid 2000*l.*, and consequently owed the firm 4000*l.*, for which sum he had pledged the goods as security. There are no documents or books to prove this transaction, which rests upon the oral evidence of Constantinou. Valsamis refused to give evidence for Williams, unless the latter promised him 25 per cent. of the amount recovered. [The Lord Justice referred in detail to the evidence relating to the value of the goods at the time of shipment, dealing with the inconsistencies in the statement of each witness, and stated his conclusion thus:] I am unable to make any finding in view of the innumerable frauds and contradictions which the plaintiff, himself innocent, has to put forward to support his assignors' claim. If Constantinou and Valsamis were plaintiffs, I should unhesitatingly say they had not satisfied me of any amount of value. As it is, the first 1000*l.* recovered by Mr. Williams, if he should recover anything, will go to Constantinou, Valsamis, and Co. I have very carefully considered the evidence, and the plaintiff has not satisfied me of any value that I can reasonably place on whatever goods were contained in the twenty cases described in the manifest as "twenty caisses manufacture," which I am satisfied were shipped in the *Parthian* by Constantinou, Valsamis, and Co. I do not think MacKinnon, J. was himself satisfied on that point.

This is enough to put an end to the case, the judgment being set aside with costs, but I deal shortly with some other matters argued. The underwriters said that, if a value was proved for the goods, there must have been a concealment, either with or without fraud, of a material fact, namely, that the real value of the goods was so much below the amount insured. They accordingly pleaded, in par. 5 of the defence: "Alternatively, at the time of effecting the said insurance the said Constantinou, Valsamis, and Co. fraudulently omitted to disclose or alternatively failed to disclose to the defendants a material fact which was then known to the said Constantinou, Valsamis, and Co., and unknown to the defendants, namely, that the said goods were of far less value than the sum insured," but in the result they were in the very unusual position of not having called the underwriters to prove what they were or were not told when the insurance was effected in Alexandria by the agents of the defendants, Augustino and Co., through one Cohen. This question came before the court in *Visscherrij Maatschappij Nieuwe Onderneming* v. *Scottish Metropolitan Assurance Company* (10 Ll. L. Rep. 579) the case of a Dutch trawler. Rowlatt, J. found the trawler was scuttled, and this court did not disturb his decision. The underwriters, while pleading concealment, gave no evidence as to what they were or were not told. Lord Sterndale, M.R. said (10 Ll. L. Rep. at p. 583): "The underwriters gave no evidence at all as to what facts about the ship were communicated to them. They gave no evidence as to whether such an over-valuation as this would have been a material fact. They left the whole thing absolutely bare. Without saying the judge was wrong, I will only say I think the evidence was nothing like as complete as it ought to have been; and therefore I should have doubts about that if I had to give judgment on it. But I think my judgment on the other point is sufficient to dispose of the case." But I do wish to say I have the gravest doubt whether the judge was right on the question of concealment. The underwriters have not taken the course, which in my view should always be pursued, of going into the box and saying what they knew and what was the material fact which they did not know. In my view an underwriter pleading concealment must come and say what he was or was not told. He may not remember directly, but may be able to say, as he said in *Greenhill* v. *Federal Insurance Company Limited* (17 Asp. Mar. Law Cas. 62; 135 L. T. Rep. 244; (1927) 1 K. B. 65), that he cannot have been told this material fact; that if he had known it he would never have dreamed of writing this policy at the ordinary rate of premium. Now in the present case the policy was underwritten by a foreign agent, who would get commission on the premium by underwriting the policy and who might think that, as the policy was an open policy, and therefore the assured must prove his actual loss, it would not matter how much was insured; the larger the sum the larger

his commission. We do not know what happened; the underwriter may have been shown the Levi invoices and made his own inquiries about value. Anyhow, the underwriter, Cohen or another, was not called. The London representatives of the defendants had intended to call him, but for reasons of which we have no evidence he was not found or called. An application was then made to reopen the commission; it was refused by MacKinnon, J., and the refusal was not appealed against. It is said that that very experienced judge in marine insurance matters said it was not necessary to call him. I can hardly believe this, but if he said so I cannot agree with him. In my view in a plea of concealment the underwriter must be called to say what he was told, unless all communications are in writing. The defendants then got an affidavit from Cohen and applied at the trial to read it. The application was refused, and in view of Order XXXVII., r. 1, rightly refused, as it was obvious that there would be a *bona fide* desire to cross-examine on the affidavit. If, therefore, the case had turned only on concealment, I should have refused to decide against the plaintiffs on it, as I think the matter of such general importance that calling the underwriter should be strictly required. As it is, the evidently gross over-valuation supports the insuperable difficulty I find in putting any value on the goods.

A further suggestion of fraud was made in connection with a firm named Metaxa, who in 1922, in company with Valsamis, put forward to the solicitors for the underwriters some correspondence between Metaxa and Valsamis in 1921 before the shipment, purporting to show that the shippers had reason to believe they could sell the insured goods in England. The underwriters called some evidence to suggest that this correspondence was forged. I see no reason to accept this suggestion, but I see no particular reason to attach any weight to this correspondence. What is relevant is, as already stated, that the invoice Valsamis then produced does not agree with the Levi invoices in values or quantities.

There remain some complicated points about the title of Williams to sue. The insurance was apparently effected by Constantinou, Valsamis, and Co. to cover both the firm's interest as pledgees and Valsamis's interest as pledgor. Williams was engaged in litigation with Constantinou, Valsamis, and Co. over the rum already referred to, and had an Egyptian judgment against them for 7000*l.* Apparently in part settlement of this claim they, on the 26th April 1927, assigned to Williams 50 per cent. of the claim in the present action, and gave notice to the Atlantic Assurance Company, the appellants. This assignment is not produced, unless the document of the 11th Oct. 1927 is said to be it. This document does not refer to the letter of the 26th April. On the 23rd July 1927 the present writ was issued in the names of Constantinou, Valsamis, and Williams, but not served. On the 9th and 30th Sept. 1927, the solicitors for the underwriters informed the solicitors for the plaintiffs that the underwriters would not discuss the claim so long as Constantinou, Valsamis, and Co. had anything to do with it, but if Williams got an assignment of the remaining 50 per cent. of the claim they would offer him without prejudice an *ex gratia* payment of 500*l.*, but he must take this or fight. Thereupon Williams's solicitors served on the 11th Oct. the writ they had issued on the 23rd July 1927, and amended it on the 23rd Nov. 1927, by striking out Constantinou and Valsamis as plaintiffs. Meanwhile, on the 7th Nov., Williams purported to accept an offer from Constantinou as liquidator of the firm, to assign the remaining interest of the firm in three policies, including the one sued on here, for 2000*l.*, and enclosed a letter for Constantinou to sign, terms of payment 400*l.* down, 600*l.* in three months, and 1000*l.* when, and only when, Williams received payment to that extent from the insurance company. This was accepted on the 10th Nov. Notice was given to the insurance company on the 14th Nov. of an assignment of the remaining 50 per cent. of the claim. In fact the assignment was not executed until the 18th Nov. and acknowledged on the 6th Dec. The notice alleged that Williams was now the only person interested in the action. In view of the fact that Constantinou, Valsamis, and Co. were interested in the recovery to the extent of 1000*l.*, this was hardly accurate. The decision of Luxmoore, J. in *Cotton* v. *Heyl* (143 L. T. Rep. 16; (1930) 1 Ch. 510) appears to show that they had an equitable assignment of the proceeds of the action up to 1000*l.* The 400*l.* and the 600*l.* were paid, though not punctually.

MacKinnon, J. has held that the liquidator of the firm can only assign the interest of the firm as pledgees, which is only 4000*l.*, and not the interest of the pledgor, Valsamis, to the remaining 4000*l.* claimed, and that, as he thinks the value of the goods at the time of shipment was more than 4000*l.*, although he cannot find what it was between 5000*l.* and 7000*l.*, the judgment must be limited to 4000*l.* The plaintiff cross-appeals against this, while the defendants appeal against any judgment for any amount.

On this part of the case the underwriters took various technical defences, which I think resolved themselves into the question whether the original assured must be parties to the action. They had been parties, and, as such, had made affidavits of ship's papers. I do not like the action of the underwriters in taking these points, as they induced Williams and his advisers to get rid of the original assignors by saying that they would not make any proposal to him so long as Constantinou and Valsamis were parties, and when he struck those parties out, but was not able to accept the proposal made to him without prejudice, the underwriters did not say: "Now mind, if you go on you must see you have the necessary parties to the action." It is unnecessary for me to decide these points, as I am against the plaintiff on the merits of the case, but I think it is fair that I should state provisionally, but not finally, the opinion I am inclined to form. Under sect. 14 of the Marine Insurance Act 1906 the mortgagee or pledgee may insure the whole value of the subject-matter insured, being under an obligation to the mortgagor to account to him for any surplus over the mortgage debt. MacKinnon, J., thinks that the mortgagee cannot assign more than his actual pecuniary interest in the policy; this is why he limits the claim to 4000*l.* I am inclined to doubt the correctness of this and to think that the mortgagee can assign the whole interest he has, namely, the right to recover the whole amount, with an obligation to account for part of it to the mortgagor, which does not affect the underwriters. I think it is true that on this assignment the assignor retains against the assignee an equitable interest in the first 1000*l.* recovered, but I am disposed to think this is only as between assignor and assignee, and does not afford the underwriters any defence. I think the assignment *pendente lite* was valid under Order XVII., r, 3, and the pleadings were sufficient notice. But, as I have said, I do not think it necessary to decide these technical points finally. I decide against the plaintiff on the merits. I am sorry for him, as

I think he is free from blame, except for getting into bad company, but he must suffer for the faults of his assignors.

The appeal must be allowed with costs, and the judgment below set aside and judgment entered for the defendants with costs. The cross-appeal must be dismissed with costs.

Greer, L.J.—I entirely sympathise with the great difficulty experienced by the learned trial judge in his effort to ascertain and find the facts relevant to any decision of this case. The evidence obtained by the examination of witnesses in Palestine is most unsatisfactory, and was insufficiently tested by cross-examination. The appellants contended that they were entitled to succeed for all or several or one of five distinct reasons: (1) They say in the first place the plaintiff failed *in limine* by not giving any evidence that should have satisfied the court that the goods had any ascertainable value. (2) They contend that the judge should have inferred from the facts proved that these goods were shipped and insured as part of a fraudulent conspiracy on the part of those in charge of the ship that the ship should be scuttled and the shippers should thereby realise a value by over-insurance that they were totally unable to realise by sale. (3) They say that the goods were over-insured to an amount which justifies the inference of fraudulent insurance. (4) They say that even if the over-insurance falls short of that which would afford a reasonable inference of fraud, it was such as to justify the inference of concealment of material facts; and (5) they say that the plaintiff's only title was as equitable assignee who could not succeed after the deletion of the names of his assignors as plaintiffs in the action.

It seems to me more convenient to deal first of all with the last point raised, as it amounts to a preliminary objection to the plaintiff's right to sue on the policy. It is said that he cannot sue under the Marine Insurance Act 1906, s. 50, sub-s. (2), because the assignment did not pass the beneficial interest in the policy, that is to say, the whole beneficial interest in the policy, so as to entitle the plaintiff Williams to sue thereon in his own name, and it is said in the second place that, inasmuch as there was no written notice of assignment within the terms of the Judicature Act 1873, s. 25, sub-s. (6), now the Law of Property Act 1925, s. 136, he cannot sue in his own name as legal owner. This branch of the argument involved two distinct contentions. It was contended in the first place that the firm never had the whole beneficial interest in the policy, because the goods covered by the policy were goods of which they were only mortgagees for the amount of 4000*l.*, the capital which Valsamis had agreed to provide for the firm of Constantinou, Valsamis, and Co. In my judgment this argument ought not to succeed. I deal with this point on the assumption that there is no reason to disbelieve what the witness Constantinou says in his evidence as to the arrangements he made with Valsamis with reference to the goods. According to his evidence all the goods which were shipped on the *Parthian* and insured by the policy which was the subject-matter of the action, were transferred by Valsamis to the firm of Constantinou, Valsamis, and Co., on the terms that when sold the proceeds should be held to the amount of 4000*l.* as Valsamis's contribution to the capital of the firm, and the balance should be held to his credit. I think the meaning of this is that the goods and the whole of their proceeds of sale were to belong to the partnership, but that the partnership would have to account to Valsamis by putting 4000*l.* to the credit of his capital account, and crediting him with the balance, if any, as the amount due from the partnership to him. The policy was taken out on behalf of the firm, and it was not a policy in which Valsamis had any interest except as a member of the firm. I think this contention fails.

But the appellants also contended that, inasmuch as in assigning the policy to Williams, Constantinou, representing the firm, stipulated as part of the arrangement that the first 1000*l.* received under the policy should be paid to him, the beneficial interest in the policy was partly in Constantinou as representing the firm and partly in Williams, and that even if the interest of Constantinou in the first 1000*l.* had been created by a separate transaction, it would have amounted to an equitable assignment of an interest in the policy. It seems to me this is established by the decision of Lawrence, L.J., then P. O. Lawrence, J., in *Re Steel Wing Company* (124 L. T. Rep. 664; (1921) 1 Ch. 349), and the decision of Luxmoore, J., in *Cotton* v. *Heyl* (*sup.*). I think that these decisions correctly lay down the law, and that it is impossible to say that the plaintiff Williams obtained the beneficial interest in the policy which would be necessary to enable him to sue in his own name under sect. 50 of the Marine Insurance Act. It is not material whether the beneficial interest in part of the policy moneys arose after an assignment by the beneficial owner of the whole interest, or, as in the present case, by a retention of part of the beneficial interest by the assignor at the time of the assignment.

The question remains whether the assignee of part of a debt is a legal assignee who can sue in his own name, or whether, if he be an equitable assignee, he can sue without having his assignor made a party to the action. It seems to me quite clear, notwithstanding the decision of Lord Coleridge in *Brice* v. *Bannister* (1878, 38 L. T. Rep. 739; 3 Q. B. Div. 569) that the assignee of a part of a debt is merely an equitable assignee, and at any rate, unless the equitable assignment be accompanied by a power to give a discharge, it is impossible for the assignee to succeed unless he sues in the name of the assignor: (see the observations of the Court of Appeal in *Durham Brothers* v. *Robertson*, 78 L. T. Rep. 438; (1898) 1 Q. B. 765, and the decision already cited in *Re Steel Wing Company* (*sup.*).) In *Brandt and Co.* v. *Dunlop Rubber Company* (93 L. T. Rep. 495; (1905) A. C. 454) judgment was given in favour of equitable assignees who sued without their assignors having been made parties to the proceedings. The assignment was one like that in *Brice* v. *Bannister*, giving the power to give a perfectly good receipt. Lord Macnaghten in his speech says (93 L. T. Rep., at p. 498; (1905) A. C., at p. 462): "Strictly speaking, Kramrisch and Co."—the assignors—"or their trustee in bankruptcy, should have been brought before the court. But no action is now dismissed for want of parties, and the trustee in bankruptcy had really no interest in the matter. At your Lordships' bar the Dunlops disclaimed any wish to have him present, and in both courts below they claimed to retain for their own use any balance that might remain after satisfying Brandts." In the present case the appellants seriously object to the presence of Constantinou and Valsamis as co-plaintiffs with Williams. The objection is one which they are entitled to take, and in my judgment it is fatal to the action as at present constituted. We have not been asked to amend the proceedings by rejoining these two parties who were struck out. I do not think the fact that the defendants refused to consider any question of compromise as long as

the firm were parties with whom they had to deal, but were willing to offer 500*l.* to Williams if he were the sole person with whom they were concerned, estops them from saying that as he did not accept their offer he was not entitled to proceed with his action in the absence of the two persons who were in law necessary parties, and who, if the action had proceeded with their names as plaintiffs, might have been subjected to the duty of answering inconvenient interrogatories. In my judgment the action should fail on this ground, but, inasmuch as the other grounds have been argued, I think it right to express my view on them.

I think the learned judge was right in refusing to infer that there was in this case a fraudulent conspiracy between the shippers, or one of them, and somebody on board the ship, that the ship should be scuttled. If the defendants based their defence on an accusation of that kind, they ought to have stated it plainly in their pleading. They not only did not state it, but they gave no evidence which would, in my view, have justified any such finding by the learned judge.

As regards the question of fraudulent overvaluation, or material concealment, it seems to me that the case made by the plaintiff was deficient in two respects. No evidence was given as to what facts were communicated by Constantinou, or whoever acted for him, to the insurers, or the agent acting for them in Alexandria, and I do not think the inference ought to be drawn either (1) that there was any concealment, or (2) that if the facts had been stated in Alexandria to the company's agents, those facts would have been regarded as of sufficient importance to have resulted in the refusal of the insurance. It is to be remembered that a good premium is a desirable thing from the point of view of insurers and commission agents, and over-valuation may not be regarded by them as of great importance in an unvalued policy, because they would know that whatever value has been put in the policy, the insurers, in the event of a loss, will not have to pay any more than the proved value, and that if there should be no loss the insurers would be able to profit by a higher premium than they would otherwise have obtained, and the agent by a higher commission. I have no doubt whatever that there was a very substantial overvaluation of the goods which were the subject-matter of the policy sued upon.

In my opinion sect. 16 of the Marine Insurance Act 1906 is to be construed in the light of the consideration that the object of all insurance is indemnity—see especially per Lord Esher, M.R. (then Brett, L.J.) and Bowen, L.J. in *Castellain* v. *Preston* (49 L. T. Rep. at pp. 30, 33 ; 11 Q. B. Div. at pp. 386, 397). I think the words "prime cost" in that section mean the prime cost to the assured at or about the time of shipment, or at any rate at some time when the prime cost can be reasonably deemed to represent their value to their owner at the date of shipment. To hold that the prime cost at a period of boom long past must by statute be taken to be the value at a time when values had become diminished by 50 per cent. would have the effect of enabling the assured to recover under his right to indemnity for loss during the voyage a sum which would represent a loss incurred long before the voyage started. I am disposed to think that the values as stated in the invoices should, in the absence of evidence justifying a finding of fraud, be taken to be the value at the time when Valsamis acquired the goods towards the end of 1919, or the early part of 1920 ; and I am also inclined to think that the evidence is sufficient to prove that the goods had by the time of shipment retained value to the extent of about 50 per cent. But having regard to the view already expressed that the action fails because of the disjoinder of Constantinou and Valsamis as co-plaintiffs, it is unnecessary for me to give any decision on the question whether judgment might otherwise have been given for 4000*l.*

I desire to make one or two further observations, which I have not written down. I have some difficulty in drawing any inference about the fraudulent under-valuation for the purposes of the Customs in Alexandria which enables me to come to any conclusion as to the real value of the goods in question in this case. It is an unfortunate fact that nearly all over the world, with business people who are not too scrupulous, it is regarded as permissible to cheat the Customs whenever the opportunity occurs ; but in addition to that, there is another difficulty about this, and that is, that the valuation to the Customs is only fraudulent because we are satisfied that the goods had a much larger substantial value than the 250*l.* put down. It does not seem to me one can assume, or ought to assume, that the goods have no value at all, because we say they were under-valued when the shippers were dealing with the Customs. But be that as it may, as I have said, it is unnecessary for me to form a final conclusion as to whether the judge was right in entering judgment for 4000*l.*, because I think the absence of the two members of the firm as plaintiffs in the action is fatal to the success of the action.

I agree that the appeal should be allowed with costs, and the cross-appeal should be dismissed with costs.

Slesser, L.J.—In this appeal objection is taken at the outset by the appellants to the title of Mr. Williams, the plaintiff, to sue as assignee in law of the beneficial interest in the marine policy. No question is raised on the equitable title of Mr. Williams. Originally the assignors of the policy were joined with Mr. Williams as plaintiffs, but in Nov. 1927 they were struck out, and it is said that Mr. Williams can no longer rely on his equitable interest by reason of the fact that the legal owners are no longer parties to the action.

The history of the assignment reveals two matters, (*a*) as regards the immediate assignors to the plaintiff, a firm known as Constantinou, Valsamis, and Co., Mr. Constantinou, as liquidator of the firm, on the 18th Nov. 1927, for consideration purported to assign to the plaintiff the benefit of all claims and all money which might become due under the policy, and by letter of the same date Mr. Constantinou requested the agents of Mr. Williams, the plaintiff, to hand over to him the assignment on certain terms, which terms were accepted by Mr. Williams on the 6th Dec. So far as is material to an ascertainment of the exact nature of the transaction, I quote from this letter of the 6th Dec. to the following effect : Mr. Williams agrees to pay to the liquidator "from the first money received from the Atlantic Insurance Company, in respect of the insurance claim for manufactured textile goods lost per steamship *Parthian* off Oran, Algeria, in July 1921, an amount up to but not exceeding 1000*l.*, this amount to become due and payable only if and when I receive same from the said insurance claim. Should I only receive a lesser amount than 1000*l.*, then my liability under this undertaking is limited to the amount I receive. This being the final payment in respect of the assignment to myself of the whole remaining interest of the said firm of Constantinou, Valsamis, and Co. in the three marine insurance claims as set forth in the assignment to myself dated the 18th Nov. 1927." In my opinion,

the real result of these transactions, apart from over-nice subtleties, was that the liquidator, who held the policy which had been taken out in the name of the firm, retained a beneficial interest in the policy to the extent of 1000*l.*, and that consequently at most Mr. Williams had a beneficial interest in part only of the policy.

By sect. 50, sub-sect. (2), of the Marine Insurance Act 1906: "Where a marine policy has been assigned so as to pass the beneficial interest in such policy the assignee of the policy is entitled to sue thereon in his own name; and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected." These latter words indicate that the person by or on behalf of whom the policy was effected has parted in the conditions contemplated by the section with the whole of his beneficial interest. At common law the assignee could not sue in his own name on the policy, but an action could be brought by the assignor as trustee for the assignee: (*Gibson* v. *Winter*, 5 B. & Ad. 96). The power of the assignee to sue in his own name was conferred by the Policies of Marine Assurance Act 1868, s. 1, and amended by the Act of 1906, and it is incumbent upon an assignee who wishes so to sue and does not join the assignor to satisfy the section. For the reasons I have stated Mr. Williams has failed to bring himself within the Act, for he is not, in my view, possessed of more than part of the beneficial interest in the policy, part of which is either still in the legal ownership of the liquidator on behalf of the assignors or at least is impressed with an equitable interest in their favour: (see per P. O. Lawrence, J., in *Re Steel Wing Company* (*sup.*), and Luxmoore, J. in *Cotton* v. *Heyl* (*sup.*)). In neither view has the beneficial interest passed within the meaning of the 1906 statute. The principle that the contract is one of indemnity implies that the beneficial interest in the policy cannot while it remains in force be severed from the interest assured: (Arnould on Marine Insurance, 11th edit., s. 176).

A further ground to establish the title of Mr. Williams is sought in the Law of Property Act 1925, s. 136, as applied by Order XVII, r. 3. There is no doubt that the requirements of sect. 136 of the Law of Property Act 1925, as such, have not been complied with, that is to say, no express notice in writing had been given to the appellants. The only written notice relied upon was given to them on the 14th Nov. 1927, but the assignment was not executed until the 18th Nov. Faced with this difficulty the plaintiff seeks to rely upon Order XVII., r. 3, which provides that in case of an assignment *pendente lite* the cause may be continued by the person to whom the title has devolved. Notwithstanding this rule, I am of opinion that the statutory requirements of express notice must be complied with, and that a tender of notice of the assignee as a party and an amended pleading is not in itself an express notice in writing within the meaning of sect. 136; it is at most an indirect and adjectival notice. The statute amends the common law by giving the assigneee a legal title and must be strictly complied with, though Order XVII., r. 3, operates to permit such express notice to be given *pendente lite*.

The second obstacle in the way of the plaintiff to establish his legal title to sue is as follows: I do not propose to review the evidence, but, in my opinion, the result of the tortuous transactions between Mr. Valsamis and his firm was that the firm never became more than pledgees of his goods to them to the extent of 4000*l.*, his contribution owing to the capital of the firm. I think that the insured goods were bought by Valsamis himself, that the legal ownership remained in him, and that they were never transferred to the firm at all. The later invoices showing the goods in the possession of the firm clearly do not relate to any actual legal assignment of the goods or delivery of them from Valsamis to the firm. It follows that the interest of the firm is limited, in any event, to 4000*l.* as security, and as the declared interest was 8000*l.* I do not think that, in any event, they were in a position to assign more than 4000*l.*, that is, 50 per cent. of the value, as mortgagees, for that was the full extent of their interest either in equity or in law. On this view it is immaterial whether Constantinou, Valsamis and Co. actually recover the 4000*l.* pledged or less. On any view of the value, the partnership were never interested as pledgees in more than one-half of the value of the goods whatever it was. At most they had only a moiety of the interest.

These conclusions operate to non-suit the plaintiff, but had I to consider the case on merits I should have arrived at the same result, that the plaintiff fails.

By sect. 16, sub-sect. (3), of the Marine Insurance Act 1906 it is provided that: "In insurance on goods or merchandise, the insurable value is the prime cost of the property insured, plus the expenses of and incidental to shipping and the charges of insurance upon the whole." As the policy here under consideration is an open policy, it becomes necessary for the plaintiff to prove the prime cost of the goods. This prime cost it is sought to prove by adducing as evidence certain invoice prices which are said to be the prices which the assignors of the policy paid for the goods. I have come to the conclusion that these invoices have no evidential value for the reasons stated by Scrutton, L.J., which it is unnecessary for me to repeat. In these circumstances the only evidence of value which exists is that contained in the Customs declaration of the 11th June 1921, in which the goods are said to be worth 250*l.* [The Lord Justice then referred in detail to the evidence relating to and purporting to explain this declaration, and proceeded :] While I do not find it necessary to decide whether the Customs declaration was or was not a true declaration of value, I can find no evidence to support the claim of the plaintiff that the value was more than that declared to the Customs, and I take the 250*l.* as the highest value which the plaintiffs have proved. It seems to me, even assuming that there was corruption among Customs officials, extremely undesirable that the plaintiff should be allowed to set up his own assignor's fraud as a means to escape the declaration of value which the assignor made in accordance with the laws of the country from which the goods were exported, and I see no sufficient reason to make the assumption. The misrepresentation that the goods were worth 8000*l.*, when in fact they were worth, as I find, at any rate not more than 250*l.*, is an over-valuation so gross that it is calculated to influence and must in fact have influenced the underwriters in taking the risk. This misrepresentation, unlike the cases of concealment and fraud, is apparent on the face of the documents, and, if I am wrong on the technical question of assignment, I hold that, under sect. 20 of the 1906 Act, the underwriters were entitled to avoid the contract for an untrue material representation. That is to say, I find the value which was declared at 8000*l.* to have been in fact 250*l.* and no more.

I agree, however, with my brothers that the allegation of concealment and fraud must fail. The underwriters have not proved that they were led to act upon any misrepresentation. It is not proved that their agent was unacquainted with the fall in the value of cotton goods at the time of shipment, nor is it proved that he did not know the true circumstances of the history of the invoices and other transactions relied upon. He who avers concealment or fraud must prove it and that it induced the results complained of, and in the present case such latter proof is wholly lacking.

I hold that this appeal must succeed, because the plaintiff has no title to sue, or, alternatively, has so over-valued his goods as to entitle the defendants to avoid the contract.

Appeal allowed.
Cross-appeal dismissed.

Solicitors for the appellant, *Parker, Garrett, and Co.*

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

June 7, 8, *and* 20, 1932.

(Before SCRUTTON, GREER and SLESSER, L.JJ.)

Young v. Merchants' Marine Insurance Company Limited. (*a*)

Insurance (Marine)—Against total loss—Running down clause with cross liabilities principle included in policy—Reinsurance against total loss only—Collision—Payment by insurers and reinsurer as for total loss—Both vessels equally to blame—Payment by owner of insured ship on basis of single liability—Payment by insurers under running down clause on basis of cross liabilities, as agreed—Claim by reinsurer from insurers on account of notional sum received by insurers—Alleged subrogation.

Insurers insured vessel A. *on an all risks policy containing a running down clause providing for claims under the clause to be settled on the principle of cross liabilities, and they reinsured their risks under the policy with the exception of their liability under the running down clause. Vessel* A. *collided with vessel* B., *both being found equally to blame, the damage to vessel* B. *being greater than that to vessel* A. *The insurers paid the owners of vessel* A. *as on a total loss, and also a sum in respect of their third-party liability under the running down clause. The reinsurer, having paid the insurers as on a total loss, claimed that he was entitled to repayment from the insurers of his proportion of the sum represented by half the damage to vessel* A., *as being payable by the owners of vessel* B. *on the principle of cross liabilities.*

Held, that though the reinsurer, having settled as for a total loss, was entitled to be subrogated to any legal rights the insurers and the owners of vessel A. *had in respect of that loss, the owners' right being for a single liability on balance judgment under the Admiralty rule, and the balance being against him, there was no legal right against the owners of vessel* B. *to which the insurers or the reinsurer could be subrogated. The claim of the owners of vessel* A. *against the insurers under the principle of cross liabilities was* res inter alios acta *as between the reinsurer and the insurers. The terms of the running down clause as to the principle of cross liabilities could not operate to actualise the notional or conventional payment to the owners of vessel* A. *of the half damage of that vessel by the owners of vessel* B. *—a sum which in fact was not actually paid.*

APPEAL from a decision of MacKinnon, J. in the Commercial Court.

The defendants, the Merchants' Marine Insurance Company Limited, insured the *Whimbrel* by an all risks policy for twelve months in the sum of 1715*l.*, that vessel being valued at 26,000*l.* The policy contained a " running down clause " against third-party liability, which was in the following terms :

" And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel and the assured shall in consequence thereof become liable to pay by way of damages to any other person or persons any sum or sums in respect of such collision, the undersigned will pay the assured such proportion of three-fourths of such sums or sums so paid as their respective subscriptions hereto bear to the value of the ship hereby insured, provided always that their liability in respect of any one such collision shall not exceed their proportionate part of three-fourths of the value of the ship hereby insured, and in cases in which the liability of the ship has been contested or proceedings have been taken to limit liability, with the consent of the undersigned, they will also pay a like proportion of three-fourths of the costs which the assured shall thereby incur or be compelled to pay : but when both vessels are to blame, then, unless the liability of the owners of one or both of such vessels becomes limited by law, claims under this clause shall be settled on the principle of cross liabilities as if the owners of each vessel had been compelled to pay to the owners of the other of such vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the assured in consequence of such collision."

The defendants reinsured the risks under this policy and under other policies which they had issued to the owners of the *Whimbrel* on the rest of their fleet in respect of " the risk of total and (or) constructive total loss " for £34,930 (including the £1715 on the *Whimbrel*). In this reinsurance policy there was no " running down clause " against third party liability. Francis Gordon Young, the plaintiff, an underwriting member of Lloyds, underwrote this reinsurance policy for 34,930*l.* in the sum of 3,123*l.*

During the currency of both policies the *Whimbrel* came into collision with the Canadian Pacific liner, the *Marloch*. The *Whimbrel* was sunk and the defendants paid the owners of that vessel 1715*l.* as on a total loss under the policy of insurance, and the plaintiff, on the reinsurance policy paid to the defendants his proportion of the 1715*l.* on the policy of reinsurance.

On cross actions by the owners of both vessels in the Admiralty Court, both vessels were held equally to blame. One-half of the damage to the *Marloch* was 12,720*l.*, and one-half of the damage

(*a*) Reported by C. G. MORAN, Esq., Barrister-at-Law.

to the *Whimbrel* was 7760*l.*. The owners of the *Whimbrel*, therefore, paid to the owners of the *Marloch* the balance under the Admiralty rule of single liability, the owners of the *Marloch* making no payment to the owners of the *Whimbrel*: (see *The Khedive; Stoomvaart Maatschappy Nederland* v. *P. and O. Steam Navigation Company*, 1882, 4 Asp. Mar. Law Cas. 567; 47 L. T. Rep. 198; 7 App. Cas. 795).

The owners of the *Whimbrel* then claimed payment under the "running down clause" against the defendants and other underwriters under their policy of insurance in respect of the third-party liability on the basis of cross liabilities as provided in the "running down clause." Their claim was for three-quarters of half the damage sustained by the *Marloch*—12,720*l.*, *i.e.*, 9540*l.* The fourth quarter of 3180*l.* was a claim on the club. Against this sum of 9540*l.* to which was added 18*l.* proportion of salvage expenses, in all, 9558*l.*, credit was given under the principle of cross liabilities for one-half the damage sustained by the *Whimbrel*, for which the owners of the *Marloch* were liable to the owners of the *Whimbrel*, *i.e.*, 7760*l.*, together with 4*l.* net proceeds of ship's gear salved. The balance of 1794*l.* was the net amount for which underwriters were liable to the owners of the *Whimbrel*, whose value was 26,000*l.* And the defendants were liable to the owners of the *Whimbrel* for their proportion, 118*l.* 7*s.* 10*d.*, which sum they paid under the running down clause, as well as the 1715*l.* already paid as for a total loss.

The plaintiff was not liable on the reinsurance policy for third-party liability, as it contained no "running down clause": (see *De Vaux* v. *Salvador*, 1836, 4 A. & E. 420). But having paid under the reinsurance policy his proportion of the 1715*l.* as for total loss of the *Whimbrel*, he contended that as the owners of the *Whimbrel* in their claim on the "running down clause" against the defendants on the basis of cross liabilities had been credited with 7760*l.* as a sum payable to the owners of the *Whimbrel* by the owners of the *Marloch*, that sum was payable in respect of the total loss of the *Whimbrel*, and should be treated as a diminution of the defendant's liability for the loss of the *Whimbrel*, and that he, the plaintiff, was entitled to a share of that payment. Accordingly he brought this action for repayment of that share from his proportion of the 1715*l.* he had paid to the defendants as for a total loss of the *Whimbrel*.

MacKinnon, J. held that the sum of 7760*l.* had not in fact been received by the shipowners in diminution of their total loss of the ship, and the defendants had not become entitled as against the shipowners to any diminution of their liability to the shipowners in respect of the total loss by virtue of the receipt of any money by the shipowners. The sum of 7760*l.* appeared in the assessment as a figure of account only, and simply because by the convention between the shipowners and the insurers on an all-risks policy, it had been agreed that in assessing that sum which was to be paid by the insurers under the "running down clause" the matter was to be treated as though these were cross liabilities. The truth was that the shipowners had not in fact received any sum in diminution of their total loss, and therefore the liability of the defendants to the shipowners to pay them for a full total loss had not in any way been diminished. Consequently, the liability of the plaintiff to pay to the defendants in full the amount of the total loss which he had reinsured had not been diminished in any way. Accordingly, he gave judgment for the defendants.

The plaintiff appealed.

Raeburn, K.C. and *F. Martin Vaughan* for the appellant.—Before the year 1882, on a collision where both ships were found to blame, the liabilities of their owners were assessed on the basis of cross liability; there were two judgments, or cheques were exchanged: (see *Chapman* v. *Royal Netherlands Steam Navigation Company*, 1879, 4 Asp. Mar Law Cas. 107; 40 L. T. Rep. 433; 4 Prob. Div. 157). But in that year the present Admiralty rule of single liability was established: (see *The Khedive; Stoomvaart Maatschappy Nederland* v. *P. and O. Steam Navigation Company*, 1882, 47 L. T. Rep. 198; 7 App. Cas. 795). By that rule one judgment was to be given for the ship sustaining most damage. Accordingly, where the ships were equally to blame judgment was now given for half the excess of the damage of the ship sustaining most damage over the damage of the other ship. Where there was no specific provision as to the measure of liability in a "running down clause" this rule was held to be applicable as between a shipowner and his insurer: (see *The Balnacraig; London Steamship Owner's Insurance Company* v. *Grampian Steamship Company*, 1890, 6 Asp. Mar. Law Cas. 506; 62 L. T. Rep. 784; 24 Q. B. Div. 663). This did not meet with the approval of the parties, and accordingly the form of the "running-down clause" was altered to that in the insurance policy on the *Whimbrel*, providing that "when both vessels are to blame, then, unless the liability of the owners of one or both of such vessels becomes limited by law, claims under this clause shall be settled on the principle of cross liabilities as if the owners of each vessel had been compelled to pay to the owners of the other of such vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the assured in consequence of such collision." It was, therefore, on the basis of cross liabilities that the defendants settled the claim of the owners of the *Whimbrel* under the running-down clause. On this basis the defendants have received a credit of 7760*l.* on the hull and cargo of the *Whimbrel*. That credit has diminished their total loss and accordingly the appellant, the reinsurer, who has paid the defendants as on a total loss, is entitled to the benefit of that diminution of total loss by way of subrogation.

Le Quesne, K.C. and Sir *Robert Aske* for the respondents.—There are two propositions underlying the judgment of MacKinnon, J. in favour of the respondents, the insurers: (1) The plaintiff did not reinsure the liability which the defendants had undertaken with their insured under "the running-down clause"; the plaintiff only insured the other risks under the defendants' policy of insurance. (2) No sum of 7760*l.* was ever received by the owners of the *Whimbrel* from the owners of the *Marloch*. The credit of 7760*l.* is only a notional and conventional figure used by agreement in assessing the liability of the defendants *vis-à-vis* the owners of the *Whimbrel*. The defendants never received this sum of 7760*l.* from any one, and consequently there can be no subrogation by the plaintiff to that sum or any proportion of it. The owners of the *Whimbrel* never received this sum. On the contrary, the only money that passed was a payment by the owners of the *Whimbrel* to the owners of the *Marloch*. If this sum of 7760*l.* is to be taken as a sum that the defendants have received, then they must be taken to have paid out the sum of 9540*l.*, by which it has been extinguished.

Raeburn, K.C. in reply.

Cur. adv. vult.

Scrutton, L.J.—This appeal raises a question of marine insurance law which we were told has been a subject of much difference of opinion amongst underwriters and average adjusters. It arises on these facts: The steamship *Whimbrel* and the steamship *Marloch* came into collision, and in a collision action were found both to blame. The effect of this in the Admiralty Court is that the damage to each ship being unascertained, one judgment is given for the ship sustaining most damage for half the excess of her damage over the damage of the other ship. This is called "the single liability principle," and was held to be correct by the House of Lords in the case of *The Khedive; Stoomvaart Maatschappy Nederland* v. *P. and O. Steam Navigation Company* (1882, 4 Asp. Mar. Law Cas. 567; 47 L. T. Rep. 198; 7 App. Cas. 795). Treating this as the correct principle, instead of the method of treating each ship as having a claim for which it obtains judgment, has at any rate some very important consequences. When one of the ships limits the liability and the fund is insufficient to pay all claims, the other ship cannot prove on the fund for the total amount of her damage, but only for the balance of the two amounts of damage. It has this further result that when an underwriter has paid a shipowner for the total loss of his ship and is therefore subrogated to the shipowner's legal claim in respect of the subject-matter insured (see sect. 79 of the Marine Insurance Act 1906, 6 Edw. 7, c. 41) he is subrogated not to a claim for his whole loss, but to a claim for half the balance of the two losses, which if his loss is the smaller will be nothing.

In the present case the *Whimbrel* had been insured by the Merchants' Marine Insurance Company against total loss from marine perils, and also against third party liability from collision. This latter head, which is loss to the shipowner's pocket, not to his ship, has since *De Vaux* v. *Salvador* (1836, 4 A. & E. 420) been held not to be a loss by perils of the sea, and is therefore covered by a separate clause known as the "running down clause." When after the decision in *The Khedive* a question arose in the case of *The Balnacraig; London Steamship Owners' Insurance Company* v. *Grampian Steamship Company* (1890, 6 Asp. Mar. Law Cas. 506, 62 L. T. Rep. 784; 24 Q. B. Div. 663) whether, when both colliding ships were to blame, the subsequent liabilities under the "running down clause" were to be treated as separate claims, each ship for its own damage, or only for a balance claim by the ship having the greatest loss, and the "running down clause" said nothing on the subject, Mathew, J. and the Court of Appeal held that the matter under the decision of *The Khedive* was to be treated as one liability for the balance, and not as two liabilities or claims for the whole damage sustained by each ship. As a result of this decision a new "running down clause" was framed which purported expressly to establish by agreement "the principle of cross liabilities."

The next and most vital point in the case is that the Merchants' Marine Company had reinsured with Lloyds Underwriters not the whole of their risk on the *Whimbrel*, but only "the risk of total and (or) constructive total loss." They did not reinsure the third party risk of liability covered by the "running down clause," and the reinsurance policy did not therefore include that clause or say anything about "the principle of cross liabilities." The original underwriters, the Merchants' Marine Insurance Company, settled with the shipowners for a total loss in the sum of 1715*l.*, and the reinsurers, Lloyds Underwriters settled for a total loss with the original underwriter, for the same sum. This settlement had nothing to do with the "running down clause." The original underwriters then settled a claim under the "running down clause" for 118*l.* 7*s.* 10*d.* (their proportion of 1794*l.*), and of course did not claim anything from the reinsurer who had not insured this risk. But this figure was arrived at by taking the balance of the two third-party liability claims, the *Whimbrel's* claim against the *Marloch*, some 7760*l.*, as compared with the *Marloch's* larger claim against the *Whimbrel*. It then occurred to those advising Lloyds Underwriters, the reinsurers of total loss only, to say: "We have paid you so many pounds for total loss of the *Whimbrel*, but you have recovered from the *Marloch* so much (7760*l.*) for their liability for your loss. We must have credit for this as reducing our loss. The question is whether this claim of Lloyds Underwriters represented by the plaintiff is right; MacKinnon, J. has held it is not right, and Lloyds Underwriters, the reinsurers, appeal.

I approach the matter on comparatively simple lines and do not think it necessary to make any complicated average adjustments to illustrate my view. Lloyds Underwriters, the reinsurers, have settled a total loss on hull and cargo and are therefore entitled to be subrogated to any legal rights the Merchants' Marine Insurance Company, the insurers, and the shipowners have in respect of hull and cargo. But the shipowners' right being to a simple liability or balance judgment, and the balance being against him, there is no legal right of his against the *Marloch* to which the reinsurers can be subrogated. It is true that by reason of the "running down clause" and the "principle of cross liabilities" therein contained the defendants, the Merchants' Marine Insurance Company, have paid a further sum, obtained by treating them as having received 7760*l.* in respect of the *Marloch's* liability in respect of the damage the *Marloch* did to the *Whimbrel*, and having paid a larger sum in respect of the damage the *Marloch* has sustained from the *Whimbrel*. But Lloyds, the reinsurers, have not reinsured liability under the "running down clause" and have not made any agreement applying "the principle of cross liabilities." All this is to Lloyds *res inter alios acta;* they are not bound by it, and cannot take advantage of it.

The case for the reinsurers is put in this way. Assume both ships to blame, and each ship to have sustained 10,000*l.* loss for which the other ship is liable. We have settled a total loss for a larger sum than 10,000*l.*, but the shipowner has received 10,000*l.* in respect of that loss from the other ship, we are entitled to have the benefit of that sum by which the shipowner has lessened his loss, which we have paid him. The answer made by MacKinnon, J. which, I am of opinion is correct, is that the shipowner has "received" nothing. On the facts stated there will be no judgment in favour of either ship, not a judgment for each ship for 10,000*l.*, so that you Lloyds can get the benefit of the judgment against the *Marloch* for 10,000*l.* The appearance of 10,000*l.* in the figures from which a balance is obtained is only due to a formula adopted by the shipowner and his underwriter in respect of a matter in which you Lloyds are not interested, by an agreement to which you are not a party. You, Lloyds, having paid a total loss, are entitled to be subrogated to any right of the shipowners in respect of loss of hull and cargo, but as on the principle in *The Khedive*, the balance being against the shipowners, they have no judgment in their favour, you cannot claim the benefit

of any of the figures from which the balance against the shipowners is calculated.

I only desire to mention, as MacKinnon, J. does not mention it, that if the balance had been in favour of the *Whimbrel*, the reinsurer would, of course, have been entitled to reduce his loss by the amount of that balance, but not by the amount of the claim used in computing that balance, which is only relevant to a subject-matter and a contract to which he is a stranger. The appeal must be dismissed with costs.

Greer, L.J.—I think I can make my opinion clearer if I assume that the defendants were the sole insurers of the hull at an agreed value, and the sole insurers of the whole of the liability of the *Whimbrel* to the *Marloch*. This will make it unnecessary to state the liability of the insurers in proportions, but the principle applicable will be exactly the same as if it were so stated. For the same reason I treat the reinsurer, the plaintiff in the action, as having reinsured the whole of the defendants' liability on the insurance on the hull and machinery and cargo of the *Whimbrel*.

While insured by the defendants the *Whimbrel* came into collision with the *Marloch*, and as a result of the collision became a total loss. Cross-actions were brought in the Admiralty Court by the respective owners of the two vessels, and both vessels were declared to be equally to blame. As the *Marloch's* half damage exceeded the *Whimbrel's* half damage, the latter had to pay the balance under the Admiralty rule of single liability in accordance with the decision in *The Khedive; Stoomvaart Maatschappy Nederland* v. *P. & O. Steam Navigation Company* (1882, 4 Asp. Mar. Law Cas. 567; 47 L. T. Rep. 198; 7 App. Cas. 795). In the result, on the principle of single liability, the *Whimbrel* became liable to pay the owners of the *Marloch*, and did pay to them, that balance. They were entitled to, and did recover, three-quarters of this liability under the "running down clause" in their policy with the defendants and other insurers of hull, &c., and one-fourth from their Mutual Insurance Club. This division of insured liability is immaterial, and I treat them as having become entitled to recover the whole of their liability from the defendants, and as having been paid that sum.

The defendants had reinsured their liability on hull, &c., with the plaintiff, who paid them the whole of their liability on this head in respect of the total loss of the *Whimbrel*. On discovering the form of the "running down clause" in the *Whimbrel's* policy with the defendants, the reinsurer claimed that he had overpaid the defendants by the amount of 7760*l.*, being the amount the *Whimbrel* would have been entitled to recover from the *Marloch* if that liability had been determined separately and independently of the liability of the *Whimbrel* to pay half the *Marloch's* damage.

The owners of the *Whimbrel* never in fact obtained any benefit from the Admiralty judgment, having been found liable to pay the *Marloch* the balance of the *Marloch's* half damage over that of the *Whimbrel*, which they in fact paid. They could not under the Admiralty rule be called upon to pay more than that sum, nor could they recover any sum from the *Marloch*. They could not under their policy, construed as a whole, claim anything more than an indemnity for what they had to pay. Their right to recover from their insurers for their total loss under the insurance on hull and cargo is not affected by the fact that they had an additional right to recover the balance they had to pay to the owners of the *Marloch*. Nor could the defendants, their insurers, if subrogated to their rights, in fact recover anything more than the *Whimbrel* could, that is to say, nothing.

If the claim of the plaintiff is to be determined by the true facts of the case, it seems plain that the original insurers have in fact paid the *Whimbrel* the *Whimbrel's* total loss on the insurance on hull and cargo, and have been entitled to recover nothing against that loss by subrogation. The argument for the appellant, the reinsurer, was entirely based on the special form of the "running down clause" in the *Whimbrel's* policy with the defendants.

The clause is in these terms: "And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel and the assured shall in consequence thereof become liable to pay by way of damages to any other person or persons any sum or sums in respect of such collision the undersigned will pay the assured such proportion of three-fourths of such sum or sums so paid as their respective subscriptions hereto bear to the value of the ship hereby insured, provided always that their liability in respect of any one such collision shall not exceed their proportionate part of three-fourths of the value of the ship hereby insured, and in cases in which the liability of the ship has been contested or proceedings have been taken to limit liability, with the consent of the undersigned, they will also pay a like proportion of three-fourths of the costs which the assured shall thereby incur, or be compelled to pay; but when both vessels are to blame, then unless the liability of the owners of one or both of such vessels becomes limited by law, claims under this clause shall be settled on the principle of cross liabilities as if the owners of each vessel had been compelled to pay to the owners of the other of such vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the assured in consequence of such collision."

I will try to do justice to the appellant's argument, though I am not sure that I understood it accurately. As I understood it, it was as follows: The liability of the insurers was by agreement to be determined by an assumed state of facts contrary to the decision of the Admiralty Court. It was to be assumed as between the owners of the *Whimbrel* and their insurers, the defendants, that the Admiralty Court had ordered the *Marloch* to pay the owners of the *Whimbrel* half the damage to the *Whimbrel*, which has been ascertained at the amount of 7760*l.*, and that the owners of the *Whimbrel* had to pay the owners of the *Marloch* half the *Marloch's* damage, a sum which exceeded that sum of 7760*l.*

It is contended that as a result of this conventional form of settlement the amount paid by the insurers for a total loss must be reduced by the amount they could on this conventional state of facts have recovered from the owners of the *Marloch*. They would then have to pay to the *Whimbrel* on the running-down clause the total amount of the half of the *Marloch's* damages, which the *Whimbrel* would in the conventional state of facts have been called upon to pay to the *Marloch*. Therefore, say the appellants, the reinsurers, they never paid a total loss on the insurance on hull, they only paid a total loss less the amount they are conventionally treated as receiving from the *Marloch*. Therefore the reinsurers say: "We find that we have overpaid you, the insurers of the hull and cargo, 7760*l.* more than you paid on the policy on hull and cargo. We did not reinsure your liability on the 'running down clause,' to which the loss of this sum should be attributed,

therefore pay us back the amount of our overpayment."

This is an attractive argument, but in my judgment, it is unreal and unsound. It is susceptible of two answers. (1) The amount obtained by subrogation does not enable the insurer to say that his liability for a total loss is reduced. He must acknowledge and pay his liability for total loss before he obtains any right to subrogation. What he recovers by subrogation does not reduce the amount payable for total loss, it is in the nature of salvage, which the insurer is entitled to keep. (2) The special terms of the running down clause only affect the relations of the *Whimbrel* and her underwriters as to the insurance under the running down clause. They cannot be implied as part of the terms of the reinsurance contract which is concerned only with the reinsurance of the amount of the total loss. These conventional terms were *res inter alios acta.*

The substance of the matter is, in my judgment, accurately stated by MacKinnon, J. towards the end of his judgment : " The truth is that the shipowner has not received any sum in diminution of his total loss, and therefore the liability of the defendants to the shipowner to pay him a full total loss has not been diminished in any way, and as the liability of the defendants to pay the shipowner in full his claim for a total loss has not been diminished in any way, so in my judgment the liability of the plaintiff to pay the defendants in full has not been diminished in any way." It follows that the defendants have not been overpaid by the plaintiff, and the plaintiff is not entitled to recover anything from the defendants.

For these reasons I agree that this appeal should be dismissed with costs.

Slesser, L.J.—I agree, and have very little to add. The payment which it is suggested that the *Whimbrel* recovered from the *Marloch*—an amount equal to that recoverable by the *Marloch* from the *Whimbrel* less a balance—is entirely notional. In reality, under the principle of single liability the *Whimbrel* never recovered their half damage at all ; it was cancelled out by the half damage of the *Marloch* : (see *The Khedive; Stoomvaart Maatschappy Nederland* v. *P. & O. Steam Navigation Company* 1882, 4 Asp. Mar. Law Cas. 567 ; 47 L. T. Rep. 198 ; 7 App. Cas. 795). The *Whimbrel* alone actually paid damages.

The clause in the *Whimbrel's* policy with the defendants to the effect that " claims under this clause shall be settled on the principle of cross liability " cannot operate to actualise the notional payment to the *Whimbrel* of the half damage by the *Marloch* which was in fact never paid. Perhaps these words were intended to produce the result here contended for by the plaintiff ; but, if so, they fail to effect it, because, in reality, the *Whimbrel* has not received any payment at all in reduction of her loss, and, consequently, the plaintiff must look on the defendants as paying the insured loss without abatement.

Appeal dismissed.

Solicitors for the appellant, *William A. Crump and Sons.*

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

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

June 6, 7, *and* 10, 1932.

(Before GODDARD, J.)

Motor Union Insurance Company Limited v. Mannheimer Versicherungs Gesellschaft. (*a*)

Marine insurance—Principal and agent—Claim for indemnity—Contract of reinsurance—No policy issued to reinsurers—Stamp Act 1891 (*54 & 55 Vict., c.* 39), *s.* 93, *sub-ss.* (1) *and* (3)—*Marine Insurance Act* 1906 (6 *Edw.* 7, *c.* 41), *ss.* 22 *and* 23.

By an agreement between two marine insurance companies, it was provided that one company should act as agent in London for the other company on the terms that an agreed proportion of the risks accepted by the agent company should be treated as having been accepted by them on behalf of the principal company.

Pursuant to this agreement the agent company issued policies in which their name alone appeared as underwriters. No reinsurance policies were issued between the agent company and the principal company. The premiums were collected by the agent company and all claims were paid by them.

The business resulted in a loss, and the agent company sought to recover from the principal company their proportion thereof.

Held, that the relationship between the parties was not that of principal and agent, but that the transactions were contracts of reinsurance, and were unenforceable by reason of the provisions of the Stamp Act 1891, *s.* 93, *and the Marine Insurance Act* 1906, *ss.* 22 *and* 23, *and that the agent company were not entitled to be indemnified by the principal company.*

SPECIAL case stated by an arbitrator, on a reference between the Mannheimer Versicherungs Gesellschaft (hereinafter called the Mannheimer Company), a German marine insurance company carrying on business at Mannheim, in Germany, and the Motor Union Insurance Company Limited (hereinafter called the Motor Union Company), an English company carrying on a similar business in London.

The dispute between the parties arose in the following circumstances. In the year 1924 the Mannheimer Company were minded to do marine insurance in England, and negotiated with the Motor Union Company as to the terms on which the latter should act as their agents in England. Ultimately an agreement was entered into between the parties, dated the 7th April 1925. That agreement, in which the Mannheimer Company were described as principals, and the Motor Union Company as agents, provided *inter alia* (by clause 1) that as from the 1st April 1925 all marine risks accepted in London by the agents should be treated as having been accepted on behalf of the principals to the extent and subject to the limits and provisions contained therein ; (by clause 3) that the agents

(*a*) Reported by V. R. ARONSON, Esq., Barrister-at-Law.

should retain for themselves not less than the same amount in respect of each risk accepted by them and on the same terms as their retention for the principals, but if for any reason the agents decided to reinsure partly or wholly the amount retained by them against certain specific risks, they should be entitled to do so subject to the reinsurance by them at the same time and on the same terms of a similar amount underwritten by them for the account of the principals; (by clause 4) that all proper accounts should be kept and in such accounts the principals should be credited with the original rates of premium received by the respondents and should be debited with deductions chargeable against them and with their proportion of bad debts, and various other items, and the agents should be credited with any claims and (or) reinsurance and (or) return premiums and (or) profit commission appertaining to the principal's share of the underwriting; and (by clause 14) that any disputes arising between the parties should be referred to arbitration.

By a supplementary agreement dated the 20th Aug. 1928 it was agreed that as from the 1st July 1928 the principals should receive 75 per cent. of the amounts received, and the agents 25 per cent.

The agreements were terminated by notice as from the 31st Dec. 1929, and disputes having arisen an arbitrator was appointed pursuant to the above-mentioned clause 14.

The claim made by the Motor Union Company in the arbitration was to recover certain amounts alleged to be due from the Mannheimer Company representing the difference between premiums received and losses paid over a period of eighteen months ending on the 31st Dec. 1931. It was agreed that if liability existed at law, the amount for which the Mannheimer Company were liable was 47,392*l.* 3*s.* 8*d.*

Various defences to this claim were put forward, but the only one persisted in was that the agreements were unenforceable by reason of the provisions of the Stamp Act 1891, s. 93, sub-ss. (1) and (3).

Those sub-sections provide as follows:

"(1) A contract for sea insurance . . . shall not be valid unless the same is expressed in a policy of sea insurance.

"(3) A policy of sea insurance shall not be valid unless it specifies . . . the names of the subscribers or underwriters."

The Marine Insurance Act 1906 provides:

Sect. 22: "Subject to the provisions of any statute, a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with this Act. . . ."

Sect. 23: "A marine policy must specify . . . the name or names of the insurers."

The arbitrator stated his award in the form of a special case. Therein he found that the arrangement embodied in the agreement was genuinely intended by the parties to be, as on the face of the agreement it purported to be, an agency agreement whereby the Motor Union Company were to accept risks for and on behalf of the Mannheimer Company as principals, and was not merely a colourable agreement designed to evade the provisions of the Stamp Act 1891. He further found that in the policies issued the name of the Mannheimer Company was not disclosed to the assured, and that no policies were ever issued by the Motor Union Company to the Mannheimer Company. He stated that the Mannheimer Company contended that, although the parties might have intended the relationship to be that of principal and agent, nevertheless the business was in essence a business of reinsurance, and as there were no policies issued between the parties, the agreements were void under the Stamp Act 1891. In his opinion that contention failed, and he accordingly made an award in favour of the Motor Union Company, with an alternative award in favour of the Mannheimer Company if the court should be of opinion that his view of the law was wrong.

A. T. Miller, K.C., and *H. Atkins*, for the Mannheimer Company.

Stuart Bevan, K.C. and Sir *Robert Aske*, for the Motor Union Company.

Cur. adv. vult.

June 10, 1932.—**Goddard, J.**—This is a special case stated in an arbitration between two insurance companies, both interested in the writing of marine risks. The dispute arises out of an agreement dated the 7th April 1925, varied by subsequent agreements, under which the Motor Union Company were to accept risks on the English market as agents for the Mannheimer Company as undisclosed principals, retaining for themselves not less than the same amount and on the same terms as their retentions for the Mannheimer Company, the amount being subsequently varied to the proportion of 75 per cent. for the Mannheimer Company and 25 per cent. for the Motor Union Company. In the events which happened the business resulted in a considerable loss, and the Motor Union Company sought to recover in the arbitration an amount representing the difference between premiums received and losses paid over a period of some eighteen months. The agreement itself did not provide expressly for the payment of such a loss, and the Motor Union Company based their claim on the term implied by law whereby an agent is entitled to be reimbursed by his principal any loss or expense incurred by him on his principal's behalf. The only defence insisted upon before the learned arbitrator was that the agreement, by which I mean both the original and subsequent agreements read together, was unenforceable by reason of the Stamp Act 1891, no policies having been issued between the parties. The learned arbitrator rejected this contention and, subject to the opinion of the court, awarded in favour of the Motor Union Company.

The arbitrator has found that the agreement was genuinely intended by both parties to be what it purported to be, that is, an agency agreement whereby the Motor Union Company accepted risks as agents for the Mannheimer Company, and was not a reinsurance agreement under the guise of agency. But it is contended by Mr. Miller on behalf of the Mannheimer Company that, assuming the good faith and genuine intentions of the parties, and even assuming that the parties might have worked the business differently under the agreement, the way in which it was in fact conducted resulted in reinsurance and nothing else; and that the claim for indemnity arose because the Motor Union Company had paid a marine loss, and that if they sought to be repaid that was a reinsurance. He further contended that any agreement to reimburse, whether express or implied, was a contract relating to sea insurance, so that in either view the claim failed for want of a policy. Mr. Miller disclaimed the necessity of saying that the agreement itself must be unenforceable, because he said the parties might have worked it differently, namely, by the Motor Union Company issuing policies in the name of the

Mannheimer Company. But to do so would, I think, both on the findings of fact by the arbitrator and on the true construction of the agreement have been contrary to the true intention of the parties and to the express term of the agreement itself. The first recital and clause 3 seem to me to make it clear that policies were to be issued always in the name of the Motor Union Company, the Mannheimer Company remaining an undisclosed principal. The question is what is the effect in law of such an agreement; can the agent enforce the implied contract of indemnity in such circumstances?

It is a commonplace of the law of agency that an undisclosed principal may sue or be sued upon a contract made on his behalf, but in the case of sea insurance the Marine Insurance Act 1906, s. 22, provides that a contract of marine insurance is inadmissible in evidence unless embodied in a marine policy in accordance with the Act, and by sect. 23 the policy must specify, among other things, the name or names of the underwriters. By sect. 93 of the Stamp Act 1891, a contract of sea insurance, which includes reinsurance, is void unless expressed in a policy, and a policy is void which does not specify the names of the underwriters. Clearly, therefore, as the name of the Mannheimer Company did not appear in the policies issued in pursuance of the agreement, they could not have intervened as principals so as to sue the assured for a premium, nor could they have been sued for a loss. In either case the absence of a policy subscribed in their name would have been fatal. The statutes prevent any privity of contract being established between the Mannheimer Company and the assured by the action or agency of the Motor Union Company, and the latter, and they only, in my judgment are the insurers. Any premiums received were received by them, and any losses paid were paid by them as principals, in respect of a liability which was theirs and only theirs. If that be so, it seems to me that any claim they may have against the Mannheimer Company is not for indemnity against loss sustained as agents but is in the nature of a reinsurance, and I am fortified in this opinion by the case of *English Insurance Company* v. *National Benefit Assurance Company* (140 L. T. Rep. 76; (1929) A. C. 114). True it is that the agreement in that case did not purport to be one of agency, and was described as a participation agreement; but while its terms differ in expression from those under consideration, the general effect seems to be the same. In that case the English Insurance Company were to write the risks in their name and to settle claims, the National Company sharing in the premiums and losses. The parties were called participators, but in effect the one company was acting as agent for the other. It seems to me to matter little if at all whether the parties are called participators, partners, or principal and agent; what does matter is what is effected by the agreement. In that case it was held that it was reinsurance, and both Lord Hailsham, L.C., and Lord Atkin stress the point that, as in the present case, there was no privity created between the National Company and the assured. I refer particularly to that part of Lord Atkin's speech where he says: "The test of whether it is reinsurance or not has been in my view quite correctly stated to be the question whether or not the reinsurers or the alleged reinsurers have assumed a contractual liability to the original assured, for such an original contractual liability is not an incident of reinsurance, and if such an original liability had been assumed then there would have been a contract of insurance upon which a stamp had already been paid on the policy issued by the English Company, who it is said for this purpose were the partners, or the agents, apart from partnership, of the National Company" (140 L. T. Rep. at p. 79). I do not think that the case cited is distinguishable in principle from the present, and accordingly I must hold that the claim here is in effect a claim for reinsurance, and so must fail for want of a policy. Accepting to the full the finding of the arbitrator as to the good faith and intentions of the parties, the statutes do not in my judgment permit of the agreement being enforced.

A minor question is raised in the special case as to whether the claimants can succeed on an account stated as to part of their claim. Mr. Bevan admitted that this point was covered by the judgment of Maugham, J. in *Re Home and Colonial Insurance Company* (142 L. T. Rep. 207; (1930) 1 Ch. 102), and consequently while desiring that the point should be left open to him in another court he did not ask me to differ from that decision. The result is that I answer the question propounded in par. 20 of the case in favour of the respondents and confirm the award in favour of the respondents set out in par. 23 of the case.

With regard to costs, in *Genforsikrings Aktielskabet* v. *Da Costa* (11 Asp. Mar. Law Cas. 548; 103 L. T. Rep. 767; (1911) 1 K. B. 137) a defendant who succeeded on a plea of the Stamp Act was deprived of his costs by Hamilton, J., as he then was, and one naturally gives effect with some reluctance to a defence set up not from a desire to protect the revenues of the country but merely to escape a liability which in honour the respondents ought to pay. But I have nothing to do with the costs of the arbitration, and as the learned arbitrator has awarded them to the Mannheimer Company in the event of the special case being resolved in their favour, I do not think I ought to deprive them of the costs of this argument, and the order will accordingly be with costs.

Solicitors for the Mannheimer Company, *Constant* and *Constant*.

Solicitors for the Motor Union Company, *Ince, Roscoe, Wilson*, and *Glover*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Thursday, July 7, 1932.

(Before Bateson, J.)

The Chr. Knudsen. (a)

Collision—Barge sunk in dock—Expenses of raising and disposing of the wreck—Action in rem *by harbour authority—"Damage done by a ship"—Jurisdiction—Judicature (Consolidation) Act* 1925 (15 *&* 16 *Geo.* 5, *c.* 49, *s.* 22, *sub-s.* (1) (a) *(iv.)*.

In consequence of a collision between the barge A. B. *and the Norwegian steamship* C. K., *belonging to the defendants, the* A. B. *sank in a dock of which the plaintiffs were the owners and the harbour authority. Notice of abandonment was given by the owners of the* A. B. *The plaintiffs, in order to render their dock fit*

(a) Reported by Geoffrey Hutchinson, Esq., Barrister-at-Law.

and safe for navigation, raised the wreck of the A. B. *and incurred expenses in so doing, and in lighting, buoying, and destroying the wreck. They then began an action* in rem. *against the* C. K., *claiming to recover such expenses.*

Held, on a motion to set aside the writ, that the obstruction caused in the dock by the wreck was "damage done by a ship" within the meaning of sect. 22, *sub-sect.* (1) (a) (*iv.*), *of the Judicature* (*Consolidation*) *Act* 1925, *and that the expenses of removing such obstruction were, therefore, capable of being sued for in an action* in rem *against the vessel alleged to have been negligent.*

MOTION to set aside a writ *in rem.*

The plaintiffs, the London, Midland, and Scottish Railway, claimed in an action *in rem* "the expenses incurred in and about the lightering, buoying, removal and destruction of the barge *Ada Burton* which was sunk in the plaintiffs' harbour by the negligence of the defendants or their servants in the month of June 1932." The defendants were the owners of the Norwegian steamship *Chr. Knudsen.*

On the 16th June 1932 the *Chr. Knudsen* came into collision with the barge *Ada Burton* in Stalbridge Dock, Garston, in consequence of which the *Ada Burton* was sunk and became a total loss. The plaintiffs, as owners of Stalbridge Dock, accordingly raised the wreck of the *Ada Burton* and removed it from the dock, and incurred expenses in so doing and in lightering, buoying, and disposing of the wreck. Notice of abandonment had been given by the owners of the *Ada Burton.* The plaintiffs then commenced the present action claiming to recover the expenses so incurred, and threatened to arrest the *Chr. Knudsen.* An undertaking to appear and put in bail was given under protest, and the defendants moved to set aside the writ.

Lewis Noad for the motion.—It is conceded that an action *in personam* may be brought to recover expenses of this nature: (see *The Ella,* (1915) P. 111; *The Dee Conservancy Board* v. *McConnell,* 17 Asp. Mar. Law Cas. 433; 138 L. T. Rep. 656; (1928) 2 K. B. 159). An action *in rem* for such expenses is without precedent and will not lie. The damage claimed is not "damage done by a ship" within the meaning of sect. 22, sub-sect. (1) (*a*) (iv), of the Judicature (Consolidation) Act 1925. In order to maintain an action for such damage the plaintiff must have some right or interest in the thing or chattel or property damaged. Here the plaintiffs had no interest in the *Ada Burton.* Their claim is not a claim for damage at all, but is a claim for expenses incurred after the damage had been done. In any case the writ is bad, because the indorsement does not show in what capacity these expenses are alleged to have been incurred.

Geoffrey Hutchinson for the plaintiffs.—The damage is "damage done by a ship." It is only necessary that the damage should be done by negligent navigation in order to found the jurisdiction *in rem.* Here it is alleged that the Stalbridge Dock was damaged by the negligenc of the defendants' servants in causing the *Ada Burton* to sink in the dock, and these expenses had to be incurred in order to make the dock fit and safe again for navigation. No physical contact is necessary between the defendants' vessel and the thing damaged; there are many instances where an action *in rem* is brought for damage not resulting from contact with the plaintiffs' property, *e.g.,* claims for personal injury; the claim of the master and crew suing for their lost effects; also, where a vessel grounded owing to negligence in towing; where an anchor and cable was lost by dragging owing to the negligence of another vessel; and where a telegraph cable was cut with an axe in order to free the propeller.

Noad replied.

Reference was made to *The Solway Prince* (1914, 31 Times L. Rep. 56; *The Nightwatch,* Lush. 542; *The Clara Killam,* 23 L. T. Rep. 27; L. Rep. 3 A. & E. 161; *The Beta,* 20 L. T. Rep. 988; L. Rep. 2 P. C. 447; *The Industrie,* 1871, L. Rep. 3 A. & E. 303; *The Port Victoria,* 9 Asp. Mar. Law Cas. 314; 86 L. T. Rep. 804; (1902) P. 25.)

Bateson, J.—I think that this motion must fail. On the 16th June of this year a collision took place between a vessel called the *Chr. Knudsen* and a barge called the *Ada Burton,* whereby the *Ada Burton* was sunk in the Stalbridge Dock. The dock is at Garston, near Liverpool, and is owned by the London, Midland, and Scottish Railway Company. The affidavit of Mr. Hartley, who deposes to the facts in the case on behalf of the defendants, is to the effect that the *Ada Burton* was removed by the London, Midland, and Scottish Railway from the dock to the bank outside. The affidavit of the representative of the railway company is that the wreck was an obstruction in the dock and rendered it unfit and unsafe for navigation and that in order to remove such obstruction and make the dock properly safe and fit for navigation the plaintiffs had to raise and remove the wreck from the dock. The owners of the *Ada Burton,* or their representatives, gave notice of abandonment of their barge on the 18th June. On the same day the owners of the *Ada Burton,* or their representatives, issued a writ against the defendants in this case, the owners of the *Chr. Knudsen,* for their damage. On the same date the London, Midland, and Scottish Railway Company gave notice to the owners of the *Chr. Knudsen* of a claim and of their intention to arrest and detain the *Chr. Knudsen* until bail was given to meet their claim. On the 23rd June the railway company issued their writ in the present action, and the endorsement upon it was as follows: "The plaintiffs claim for expenses incurred in and about the lighting, buoying, removal, and destruction of the barge *Ada Burton* which was sunk in the plaintiffs' harbour by the negligence of the defendants or their servants in the month of June 1932." That is a writ claiming damages for negligence and specifies that the damages consisted in lighting, buoying, removal, and destruction of the wreck of the *Ada Burton.* On the 24th June the solicitors for the defendants gave their undertaking, under protest, to appear and put in bail.

It is now contended for the defendants that there is no right *in rem* by the plaintiffs against the *Chr. Knudsen,* and that contention is based on the ground that what the plaintiffs claim is not "damage done by a ship." The contention put forward by Mr. Noad, for the defendants, as I understand it, was that a right to arrest the ship and proceed *in rem* was only given in Admiralty to the party who had the ownership of the chattel damaged, and that, therefore, as the railway company had no title or interest in the chattel damaged, which he says is the barge, at the time of the accident or at any other time, they had no remedy *in rem.*

Mr. Hutchinson, for the railway company, relies upon the Supreme Court of Judicature (Consolidation) Act 1925, which by sect. 22, sub-sect. (1) (*a*) (iv.), repeats the words of sect. 7 of the Admiralty Court Act 1861, and gives jurisdiction *in rem* over " any claim for damage done by a ship." The question, therefore, which I have to determine is whether the claim of the plaintiff is for damage done by a ship. I have not the least doubt that it is. The plaintiffs are the owners of the Stalbridge Dock and the *Chr. Knudsen* did damage to that dock by sinking the barge and causing an obstruction in the dock. Whether they were negligent in so doing can only be ascertained when the case comes to be tried, but the allegation of the plaintiffs is that the defendants have been negligent, and I must assume that that is true for the purposes of this motion and that they have suffered damage to their property by reason of the alleged negligence of the *Chr. Knudsen*. In those circumstances, it seems to me, without any doubt, that they are covered by the words of sect. 22.

Mr. Hutchinson also says there is no question as to the right of the railway company to recover by an action *in personan* as for a tort. That was decided in *The Ella* (1915) P. 111). He also referred me to numerous cases in which claimants had recovered by actions *in rem*, although there had been no physical contact between the property injured and the ship. For instance, he referred to claims for personal injuries, to claims by master and crew for loss of effects, to a claim by a diver, to cases of damage done by a wash of a ship, to the case of a ship forced to run aground by the negligence of another ship, and to the case in which a telegraph cable was cut with an axe, in order to free the propeller, by the mate of a ship. There are a great many cases of that kind in which it has been held to be damage done by ship although there has been no physical damage done directly by the ship.

Mr. Hutchinson said that damage done by a ship means damage done by the navigation of a ship. I think that probably he is right, but in this case it is not necessary to consider or determine that having regard to my view that the owners of the dock have suffered damage by reason of this ship causing an obstruction in this dock. That obstruction had to be removed, and the plaintiffs claim to recover as damages the expenses of lighting, buoying, removing, and destroying that obstruction, and so reducing the damage done by the defendants' ship.

In my opinion the plaintiffs' claim is a perfectly good one on the face of it. Whether they will be able to prove their allegation of negligence is quite another matter. Mr. Noad tried to frighten me by saying what a terrible thing it would be if all dock companies were entitled to sue *in rem* when a ship had the misfortune to sink another ship in dock or harbour. That does not frighten me in the least, if they can bring their claims within sect. 22, and although the exhaustive research undertaken by Mr. Noad and those who instruct him has failed to find a precedent for such an action as this being brought *in rem*, I am not deterred from coming to the conclusion at which I have arrived. The explanation probably is that nobody ever before thought there was anything in the point raised by the defendants on this motion. That is the answer which can always be made when there is failure to find authority for a particular point. The motion must be dismissed.

Leave to appeal was granted.

Solicitors for the defendants, *Pritchard and Sons*, agents for *Batesons* and *Co.*, Liverpool.

Solicitor for the plaintiffs, *Alexander Eddy*.

Thursday, July 28, 1932.

(Before BATESON, J.)

The West Wales. (*a*)

Collision—Detention of warship—Repairs in naval dockyard—Measure of damages.

A British battleship was damaged in collision with a merchant vessel. Repairs occupying fifteen days, during which time the Admiralty Commissioners were deprived of the use of the vessel (although drills and exercises were continued on board), were carried out in the naval dockyard, and cranes and other appliances belonging to the Admiralty Commissioners were employed. The life of the vessel was estimated at twenty years. At the time of the collision she was under four years old. In assessing damages the registrar allowed nothing for the use of the naval dockyard and the cranes and appliances, and he allowed for detention interest at 2½ per cent. upon half the initial value of the vessel, less her scrap value, for a period of fifteen days.

Held, that the registrar ought to have allowed something for the use of the naval dockyard, cranes, &c., and further that in adopting a rate of 2½ per cent. upon half the initial value of the battleship, and in apparently failing to take depreciation into consideration, the registrar had proceeded upon a wrong basis.

MOTION in objection to the registrar's report. The claimants, the Admiralty Commissioners, claimed damages in respect of injuries and loss sustained in consequence of a collision between H.M.S. *Nelson* and the respondent's steamship *West Wales*, which took place on the 29th March 1931. It was agreed that the owners of the *West Wales* should pay 60 per cent. of the damages sustained by H.M.S. *Nelson*. The repairs to H.M.S. *Nelson* were carried out in the naval dockyard with the use of cranes and appliances belonging to the Admiralty, and occupied fifteen days, during which time certain drills and exercises were carried out on board. H.M.S. *Nelson* was built in 1927 at a cost of 6,520,000*l*. Her estimated life was twenty years, and her annual depreciation was therefore taken at one-twentieth of her original cost less scrap value. The Admiralty Commissioners claimed rent in respect of the use of the dockyard and appliances, and damages for loss of use calculated at 5 per cent. upon the reduced capital value of the vessel during the period whilst she was undergoing repairs. The registrar allowed nothing in respect of the use of the dockyard, and assessed the damages for detention on a basis of 2½ per cent. on half the initial cost of the vessel less her scrap value.

The Admiralty Commissioners moved in objection to the registrar's report.

Raeburn, K.C. and *Carpmael* for the claimants.

Bucknill, K.C. and *Cyril Miller* for the respondents.

Bateson, J.—I think this case must go back to the learned registrar.

The collision happened on the 29th March 1931, The vessels in collision were the *Nelson*, the flagship of the Home Fleet, and a merchant ship, the *West*

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

Wales. The case was settled on terms of 60 per cent. blame against the *West Wales* and 40 per cent. against the *Nelson.*

The *Nelson* was due for the summer cruise in home waters between the 29th April and the 21st July. She had some temporary repairs done to her, and left in time for her summer cruise. She was due for her annual refit in June, which would have lasted forty-two days, and she was due for her autumn cruise to begin on the 9th Sept. As a matter of fact, her summer cruise shortened and she was brought back on the 24th June because it was known that her collision repairs would exceed her annual refit repairs. She was docked on the 1st July and undocked on the 31st Aug. She was able to leave Portsmouth on the 11th Sept., two days after the rest of the fleet.

The time allowed for her repairs has been fifteen days, and Mr. Raeburn does not dispute the number of days, but what he does quarrel with are certain items, Nos. 4, 8 and 11, in the learned registrar's report. Nos. 4 and 8 are the same point, to my mind. No. 4 is : "Dock rent (thirty-four days at 1½*d.* per ton per diem) on 25,618 tons—4536*l.* 10*s.*" No. 8 is : "Charges for use of cranes for docking, and cleaning and coating bottom." The learned registrar has allowed nothing for either of those items. I think it is clear that something must be allowed. What the figure may be is a matter for him to decide, but I do not think it can be right to say that the Admiralty have suffered no loss by giving up their dry dock and by using their cranes in doing these repairs. The *Nelson* occupied the dock to the exclusion of other ships, and made use of the cranes, and so on, for the purpose of docking and cleaning, and coating the bottom, which would be necessary in connection with these repairs. Docks and cranes cannot be used without expense, and there must be some damage to the Admiralty from these matters. The learned registrar says that in respect of these there was not a pecuniary expenditure or loss, and, therefore, these items are not allowable. I think that is wrong. I think there was pecuniary expenditure and loss. It may not be actual money paid out to any particular person, but these expensive appliances cannot be utilised without some loss.

With regard to item eleven : "Loss of use of H.M.S. *Nelson* for twenty days," that is a question which depends on a proper application of such principles as are to be discovered in the books, and particularly those in *The Chekiang* (17 Asp. Mar. Law Cas. 74 ; 135 L. T. Rep. 450 ; (1926) A. C. 637), with regard to warships. The *quantum* is, of course, a matter entirely for the learned registrar, but in this case, I cannot think, from reading his report, that he has paid sufficient attention to what are the principles laid down in that case. He refers to *The Chekiang* (*sup.*) in his report in this way : "There is no doubt that the claimants are entitled to damages for the deprivation of their vessel, and also that the basis of interest on a capital value has been judicially approved as a means for arriving at a figure to represent the damages suffered." Interest upon capital value is not the only thing that has been laid down, and it looks to me as if the learned registrar had rather overlooked other matters that are referred to in the judgments. "It is equally clear, however, from *The Susquehanna* (135 L. T. Rep. 456 ; (1926) A. C. 655) "—he goes on to say—" and those cases which preceded it, that this basis is not to make the award a matter of rule of thumb, but that as far as possible the tribunal is to apply it having regard to all the facts before it." There he is repeating what I think he has said above, that he has to apply "it"—that is, "the basis of interest on a capital value." He says nothing there about depreciation or maintenance. It is obvious, for example, that the circumstances of the time whether it be one of war or peace, must have weight in the case of a battleship not less, for instance, than the possibility of a cruiser's use as was, in *The Chekiang* (*sup.*), that of the *Cairo*, a light cruiser. Again, the *Nelson* was not completely out of use, for drills and exercises were continued. A merchant vessel, when in dock, is prevented from being loaded and discharged, and proceeding from port to port and is totally out of use, and the delay is an absolute loss to her owner." That passage has given me a little difficulty, because, to my mind, when the *Nelson* was in dock she, as a ship, was totally out of use. It may well be that some of the crew, part of the time, were standing by and were not allowed to be idle, but so far as any use by the Admiralty of the ship is concerned, it seems to me she was quite out of use. The small amount of training which might go on would, I should think, be negligible. It might almost as well be said that, because the owner of a merchant ship has the captain and officers standing by the ship and remaining on board to carry out their duties, the owner does not lose the use of his ship. I have never heard that put forward as a ground for reducing damages in favour of the tortfeasor. The learned registrar continues : "Various other points occur for consideration, but there are not substantial data as in the case of a commercial vessel which afford safe guidance, and calculations based on annual depreciation and interest are not conclusive guides." There he does mention depreciation as well as interest. Then comes the final passage : "In our view, taking all the facts into consideration, if half the initial value of the *Nelson* less scrap value on this initial value be taken, with interest at 2½ per cent., a reasonable allowance in respect of the fifteen days allowed will have been made."

I think that what has happened here is that the learned registrar, while saying that all the facts have to be taken into consideration, has taken, as part of the facts, half the initial value of the *Nelson* less scrap value with interest at 2½ per cent. That seems to me to be one of the bases on which he has formed his judgment of the proper award to make. I do not think that is right. It is not disputed that the *Nelson* has an estimated life of twenty years, and that at the time of the detention she was three-and-three-quarter years old. Therefore, to take half her initial value at the time of this loss seems to me to be quite wrong.

Then, again, has the learned registrar taken into account depreciation ? I do not know. He mentions it in one place and leaves it out in another, but the depreciation on this ship for one year is 322,500*l.* and, of course, even for the fifteen days it would be a considerable sum. Whether he has considered that the ship did not deteriorate so fast in the dock, or not, I do not know, but that is quite a different thing from the depreciation of a ship which is depreciating every day of her life at a very high rate, seeing the shortness of her life and her very high cost. Then there is the item : "Annual cost of maintenance repairs," which he has not paid any attention to so far as one can see. Lastly, the interest that he has calculated on his reduced value is taken at 2½ per cent. That, again, seems to me to be a figure which cannot be justified at the time of the trouble that the *Nelson* was in. So much for the facts.

With regard to the law on the matter, I think that it is necessary to follow the decision in *The*

Chekiang (*sup.*), which really sums up the other cases as well. Lord Sumner, in his speech, says: "*The Marpessa* (10 Asp. Mar. Law Cas. 464; 97 L. T. Rep. 1; (1907) A. C. 241) was a decision which was consequent on *The Medina* (9 Asp. Mar. Law Cas. 41; 82 L. T. Rep. 95; (1900) A. C. 113) and *The Medina* professed to follow the 'principle' of the *Greta Holme* (8 Asp. Mar. Law Cas. 317; 77 L. T. Rep. 231; (1897) A. C. 596, 605). The only principle as to this measure that I can find there stated is in Lord Herschell's words"; and then he cites the words: "'How can they the less be entitled to damages because, instead of hiring a dredger, they invested their money in its purchase? The money so invested was out of their pockets, and they were deprived of the use of the dredger, to obtain which they had sacrificed the interest on the money spent on its purchase. A sum equivalent to this, at least, they must surely be entitled to.' To this I would add Lord Loreburn's words above quoted: 'Those services are at least worth what we are habitually paying for them year after year, including what we sacrifice in depreciation.'" At the end of his judgment he says: "I am of opinion that, in the present case, there is no ground for interfering with the conclusion of the learned registrar, but I think that, except in cases very strictly comparable with the present case, or in cases where admissions are made, the Admiralty could be required, as part of their claim, to give evidence of the character of the ship to explain what her duties are and the true relation of the original cost to her duties at the time of the damage, and so to enable a clear judgment to be formed of the appropriate rates of depreciation and of interest." What the several Lords insist upon is that the deprivation to the complainant is a deprivation of interest on money spent on the thing purchased, "a sum equivalent to this, at least, they must surely be entitled to"—that is Lord Herschell. Lord Loreburn says: "Those services are at least worth what we are habitually paying for them year after year, including what we sacrifice in depreciation"; and "judgment to be formed of the appropriate rates of depreciation and of interest." Lord Phillimore in his speech says: "As I have ventured already to observe, ships of war are not built, commissioned or put on station for idle purposes, and it is to be presumed that they are worth to the State which owns them what it has cost the State to construct and run them."

The principles enunciated in those passages also are consistent with the observations of Sir Gorell Barnes in *The Marpessa* (10 Asp. Mar. Law Cas. 197; 94 L. T. Rep. 168; (1906) P. 14), where he speaks of the plaintiffs "having sufficient to compensate them for their actual out-of-pocket expenses, depreciation upon the vessel, and loss of interest upon the capital." In my opinion, therefore, this matter will have to be reinvestigated. Of course, in arriving at the figure for the depreciation of the ship, and the other items, all the circumstances have to be taken into account. How the learned registrar will do that is for him, but I think he must apply the principles I have stated, and I think he has not done so in the report that is before me. For these reasons these three items will go back for his further consideration. Of course, if the learned registrar says that he has—although I do not find it in the report—followed what I have suggested he will say so.

Solicitors: for the appellants, *The Treasury Solicitor*; for the respondents, *Ince*, *Roscoe*, *Wilson*, and *Glover*.

Oct. 17 *and* 31, 1932.

(Before LANGTON, J.)

The Lalandia. (*a*)

Practice—Service of writ—Foreign corporation—Agents in this country booking freight and selling passenger tickets—Remuneration by commission on bookings—Service on agent—Whether foreign corporation resident in this country—R.S.C., Order IX., r. 8.

Shipping agents in this country who book freight and sell passenger tickets for a foreign corporation on a commission basis, but who have no authority to make any contract on behalf of the foreign corporation other than as an agent, and have no authority to vary the terms of such contracts, all of which are fixed by the foreign corporation abroad, does not carry on the business of the foreign corporation in this country so as to make such foreign corporation resident and liable to be sued here. Service upon such agents of a writ against the foreign corporation is not good service and may be set aside.

MOTION to set aside a writ and service.

The plaintiffs, owners of the motor vessel *Henry Stanley*, of London, claimed damages against the East Asiatic Company in respect of injuries received by their vessel in a collision with the defendants' motor ship *Lalandia*. The collision took place outside the territorial waters.

The defendants were a foreign corporation residing and carrying on business at Copenhagen, with branch offices at Singapore and Bangkok, and agencies at various places, including London. The writ was served on Mr. McGrath, one of the partners in Messrs. Escombe, McGrath, and Co., of Fenchurch-avenue, E.C. Messrs. Escombe, McGrath, and Co. acted as agents in London for the defendants. The circumstances under which such agency was conducted were fully set out in affidavits sworn by Mr. McGrath and by one of the directors of the defendants. In Mr. McGrath's affidavit he stated the following facts: The defendants were a foreign corporation carrying on business in Copenhagen, and had no residence or place of business in Fenchurch-avenue. The firm of Escombe, McGrath, and Co. were ship and insurance brokers and carried on the business of freight and passenger agents at 13, Fenchurch-avenue. In the course of their business the firm had acted for about thirty years as agents for the defendants. They also acted as freight and passenger agents for several other foreign steamship companies. Beyond the ordinary duties of ship brokers, such as the booking of freight and the issue of passenger tickets, the firm transacted no business and had no authority to transact business or enter into any contracts on behalf of the East Asiatic Company Limited, or for any of the other companies. The rates of freight and passenger fares were fixed by the defendants. Bills of lading and passenger tickets were supplied to the firm on forms prepared by the defendants and printed in Denmark. Such bills of lading and passenger tickets were invariably signed by the firm as agents only and constituted or evidenced contracts only with the defendants. The terms of the bills of lading

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

provided that questions arising thereunder should be governed by the law of Denmark and decided in Copenhagen. The only name appearing upon the doors of the offices in Fenchurch-avenue was that of Messrs. Escombe, McGrath, and Co., and upon the windows of the ground floor their name was exhibited as agents for the East Asiatic Company Limited and other foreign companies. Upon a window of the basement the name of the East Asiatic Company Limited, of Copenhagen, was exhibited together with a copy of that company's house flag, and upon adjoining windows were the names of other foreign steamship companies for whom Messrs. Escombe, McGrath, and Co. acted as agents. The letter paper used by Messrs. Escombe, McGrath, and Co. when transacting any agency business stated the names of the various shipping companies for whom they were agents. Apart from these matters Messrs. Escombe, McGrath, and Co. had no connection with the East Asiatic Company Limited, in the management of which they had no concern, and in which they had no financial interest. The only remuneration received by Messrs. Escombe, McGrath, and Co. was the customary agent's remuneration on freights and passage money and brokerage. The East Asiatic Company had no interest or concern in the offices at Fenchurch-avenue, the rent of which was paid by Messrs. Escombe, McGrath, and Co. All the staff employed at the offices were servants of Messrs. Escombe, McGrath, and Co.

In an affidavit by one of the directors of the East Asiatic Company Limited it was stated that the company was a corporation registered under the laws of Denmark, with its head office in Copenhagen, and branch offices at Singapore and Bangkok. There were agencies at various places in different parts of the world. The company employed Messrs. Escombe, McGrath, and Co. to act as one of its agents in the United Kingdom. The company had no residence, office, or place of business in the United Kingdom. It had no registered address within the United Kingdom such as is provided for by sect. 344 of the Companies Act 1929. There was no head officer or clerk resident or employed at 13, Fenchurch-avenue, or elsewhere in the United Kingdom.

Willmer for the defendants.—The evidence filed by the defendants shows that they were not in fact carrying on business in the United Kingdom, and the writ was therefore not properly served upon Messrs. Escombe, McGrath, and Co. Whether the service was good must depend upon whether the defendants reside or carry on business because they employ agents here; whether Messrs. Escombe, McGrath, and Co.'s head office is in fact their office for this purpose; and whether their address is for this purpose the address of the defendants. It is submitted that these questions should all be answered in the negative. *The Princesse Clementine* (8 Asp. Mar. Law Cas. 222; 75 L. T. Rep. 695; (1897) P. 18) shows that a shipping agent, carrying on business normally as such, is not an agent upon whom good service may be made. The evidence shows that this case is entirely different from *La Bourgogne* (8 Asp. Mar. Law Cas. 462; 79 L. T. Rep. 331; (1899) P. 1; affirmed *sub. nom. La Compagnie Générale Transatlantique* v. *Thomas Law and Co.*, 8 Asp. Mar. Law Cas. 550; 80 L. T. Rep. 845; (1899) A. C. 431).

Pilcher for the plaintiffs.—The test is whether the agents had authority to make contracts for the defendants or whether what they did merely amounted to entering into contracts, all the terms of which were already formulated by the defendants, without any authority to vary or alter such terms: (see *The Thames and Mersey Marine Insurance Company* v. *Societa di Navagazione a Vapore del Lloyd Austriaco*, 12 Asp. Mar. Law Cas. 491; 111 L. T. Rep. 97). In this case it is submitted that Messrs. Escombe, McGrath, and Co., were the persons who were really entering into contracts on behalf of the defendants.

Willmer replied.

[Reference was also made to: *Saccharin Corporation* v. *Chemische Fabrik Van Heyden A/G.* (104 L. T. Rep. 886; (1911) 2 K. B. 516), *Okura and Company* v. *Forsbacka Jernverks A/B.* (110 L. T. Rep. 464; (1914) 1 K. B. 715), *Alison* v. *The W. A. Sholten* (6 Asp. Mar. Law Cas. 244; 1887, 58 L. T. Rep. 91; 13 Prob. Div. 8), *Dunlop Pneumatic Tyre Company Limited* v. *A/G. für Motor und Motorfahrzeubau vorm. Cudell and Co.* (86 L. T. Rep. 472; (1902) 1 K. B. 342), and *Nutter* v. *Messageries Maritimes* (54 L. Jour. Q. B. 527).]

Cur. adv. vult.

Oct. 31, 1932.—**Langton, J.**—This is a motion to set aside a writ and the service of the writ on the ground that the defendants, the East Asiatic Company Limited, are not resident within the jurisdiction, and that the service that has been made upon Messrs. Escombe, McGrath, and Co., is not therefore a good service. I have delayed giving my judgment in the case, not because I felt any great doubt about it, but partly on account of the business of the court the week before last, and circumstances over which I had no control last week.

The case belongs to a certain class, but it is not a difficult example of that class. It has been clearly argued on both sides, but the evidence in the case has been from one side only. That does not at all mean to say that the evidence was at all one way. As Mr. Pilcher pointed out, there were a good many things which pointed in his favour, and that made one feel that the evidence was all the more candid and all the more reliable for the purpose of this court. The evidence was in two affidavits, the first of which was by Mr. M. V. B. McGrath, a member of the firm of Messrs. Escombe, McGrath, and Co., of 13, Fenchurch-avenue, in the City of London. He says that "the East Asiatic Company, the defendants in this action, are a foreign corporation carrying on business at Holgersgade 2, Copenhagen. They have no residence, office, or place of business, registered or otherwise, at 13, Fenchurch-avenue. The firm of Escombe, McGrath, and Co., are ship and insurance brokers, and carry on the business of freight and passenger agents at 13, Fenchurch-avenue. In the course of this business my firm act, and have acted for about thirty years, as agents for the East Asiatic Company. They also act as freight and passenger agents for several other foreign steamship companies. Beyond the ordinary duties of shipbrokers, such as the booking of freight and the issue of passenger tickets, my firm transacts no business and has no authority to transact business or enter into contracts on behalf of the East Asiatic Company or of any other company. The rates of freight and the passenger fares are fixed by the East Asiatic Company. Bills of lading and passenger tickets are supplied to my firm on forms prepared by the East Asiatic Company and printed in Denmark. Such bills of lading and passenger tickets are invariably signed by my firm as agents only, and they constitute or evidence contracts only with the East Asiatic Company. The terms of the bills of lading specifically provide that questions arising thereunder shall be governed by the law of Denmark, and shall be

decided in Copenhagen. . . . The name of my firm is the only name appearing on the doors of the firm's offices at Fenchurch-avenue, but upon the windows of the ground floor the firm's name is exhibited as agents for the East Asiatic Company Limited, together with the names of other foreign shipping companies. Upon a window of the basement the name of the East Asiatic Company is exhibited, together with a copy of that company's house flag, and upon the adjoining windows are the names of other foreign steamship companies for whom my firm act as agents. The letter paper used by my firm when transacting any agency business states thereon the names of the various shipping companies for whom they are agents. Save as hereinbefore set out, my firm are in no way connected with the East Asiatic Company. They have no concern with the management of that company nor any financial interest or share or holding therein. The only remuneration received by my firm from the East Asiatic Company is the customary agent's commission on freights and passage money received, and brokerage. The East Asiatic Company is in no way concerned in the management of my firm's office. The rent of the office is paid by my firm, and the staff employed in it are all the servants of my firm. On the 30th Aug. 1932 I was handed a copy of the writ of summons in this action by a representative of Messrs. Lawrence Jones, and Co., the plaintiffs' solicitors, who stated that the writ was served upon me as representing the East Asiatic Company. I am advised, and verily believe, that neither I nor my firm is the representative of the East Asiatic Company Limited in this country for the purpose of the service of legal process. Neither I nor my firm is the head officer or clerk of the East Asiatic Company, nor is any head officer or clerk of that company resident at 13, Fenchurch-avenue. I respectfully submit that the East Asiatic Company does not reside or carry on business at 13, Fenchurch-avenue, and that the service of the writ upon me was irregular and should be set aside. I further submit that the writ was in itself bad in that the address of the Asiatic Company was not correctly stated therein. The address stated, namely, 13, Fenchurch-avenue, is not the address of the East Asiatic Company but of the firm of Escombe, McGrath, and Co."

This affidavit is supplemented by Mr. Christian Frederik Joachim Schmiegelow of Holbergsgade 2, Copenhagen, a managing director of the East Asiatic Company Limited, in which he says: "The East Asiatic Company Limited is a corporation registered under the laws of the Kingdom of Denmark and carries on business as shipowners, being owners of the motor vessel *Lalandia*. Branch offices are maintained by the company at Singapore and Bangkok. At a number of ports and places the company has established its own agencies. At other ports in the world the company does not have an agency of its own, but employs a local firm or company to act as its agents and to transact agency business on its behalf. The company employs the firm of Escombe, McGrath, and Co. to act as one of its agents in the United Kingdom. That firm is one of the company's agents for the booking of freight, the issue of passenger tickets, and for the ordinary purposes for which ship's brokers are normally employed. For the services rendered by them the said firm receives from the company only the customary agent's commission and brokerage. Save as aforesaid, the East Asiatic Company is in no way connected with the firm, is in no way concerned in its management or in the maintenance of its offices. I have read the affidavit sworn by Mr. McGrath and confirm what is therein stated with regard to the relationship between the East Asiatic Company and Messrs. Escombe, McGrath, and Co. The only business transacted in the United Kingdom on behalf of the East Asiatic Company is the agency business transacted as set out in the affidavit. The East Asiatic Company has no residence, office, or place of business of its own in the United Kingdom. It has no registered address anywhere within the United Kingdom such as provided for by sect. 344 of the Companies Act 1929. It has no employees or servants of its own resident anywhere within the United Kingdom. The East Asiatic Company has never represented that it resides or carries on business in the United Kingdom or that the office of Messrs. Escombe, McGrath, and Co. is its own office. Nor has the company ever held out that Messrs. Escombe, McGrath, and Co. are its representatives except for the purposes described in this affidavit. . . . I submit that the writ in this action is bad, and that the service upon Mr. Myles McGrath was irregular and should be set aside because Mr. McGrath is not the head officer or clerk of the East Asiatic Company Limited, and because the company does not reside or carry on business within the United Kingdom."

It is interesting to note as is shown by the bill of lading exhibited by the East Asiatic Company that that company has offices of three kinds. It has its own head offices and branch offices. It has head offices at Copenhagen with branch offices at Singapore and Bangkok, and a second class of agency in various other parts of the world. Then it has a third class of agents, and it is under this third class that Messrs. Escombe, McGrath, and Co. rank. They are agents for London, Middlesbrough, and Manchester.

Now that is the evidence put forward by these two affidavits, and it is on that evidence that this case falls to be decided. It appears from the result of all the cases of this class that each case is a question of fact to be decided upon the evidence. But both counsel at various times when one tried to press the matter reminded me that I cannot speculate in the matter, but must take the facts and make my decision upon them, and that is what I am endeavouring to do. Now when one comes to look at the various cases quoted for guidance one is a little puzzled because the various authorities to whom one must pay the greatest respect have provided some varied tests. I am not suggesting that those tests are necessarily contradictory, but they are a little puzzling in that they are of a very various nature. There does not appear to be, so to speak, any guiding or acid test of this particular matter. The last thing I want to do is to endeavour to supply a further test which would necessarily have less authority, and would probably have a great deal less clarity, and, therefore, I have endeavoured to read these authorities and apply them as best I can, and make my finding of fact on such guidance as I can find in the application of various tests.

The cases fall into two classes—cases of ships' agents such as this, and cases which are not cases of ships' agents. Taking the second class first, personally, I can get very little guidance at all from the second class. There are two more or less leading cases on the matter, and they are, respectively, the case of the *Saccharin Corporation* v. *Chemische Fabrik Von Heyden A/G* (104 L. T. Rep. 886; (1911) 2 K. B. 516), and the case of *Okura and Co.* v. *Forsbacka Jernverks A/B* (110 L. T. Rep. 464; (1914) 1 K. B. 715).

I get very little guidance for purposes of this case from those two cases, because it seems to me that each of them falls very clearly and decisively upon

one side or the other of the dividing line. In the *Saccharin Corporation* case the defendants were carrying on business through an agent at the agent's office, while the defendants were resident out of the jurisdiction, but I feel very little surprise at the decision, because when one comes to look at the agent we find that he was a gentleman who had no other business at all except the agency for this company and one other, and he had very considerable discretion as far as one can see in dealing with contracts for the company for whom he was acting as agent. Therefore, it was not surprising in the circumstances to find that Lord Moulton and Farwell, L.J. came to the unhesitating view that the company was resident in this country through the agent. Vaughan Williams, L.J. took a somewhat differing view, but it appears to me as a strong case in favour of the majority decision, though Vaughan Williams, L.J. did not really differ from the others. But it is a simple case, and does not give me much assistance. In the *Okura* case, the facts were strongly the other way, and, therefore, it is not surprising that the decision went the other way, because in that case the company that was alleged to be acting as agent had no kind of authority to enter into any contract on behalf of the defendant, but were merely a kind of advance agent who obtained orders and submitted them to the defendants for approval.

In the words of Lord Wrenbury, the agents acted only as agents in the manner indicated, and they had no control over the way the defendants did their business and no authority in making contracts, and so it would have been difficult to say that the foreign corporation in that case was either resident, which is the word in the rule, or "here" as is sometimes said in argument as a way of expressing that the company is resident within the rule. Again, to pursue Lord Wrenbury, who made this subject particularly his own, we have to see whether the foreign corporation are doing their business here by a person or through a person, and that is one of the tests that he applies to this class of case—that they should be doing the business in order to be resident by a person and not through a person. Lord Phillimore says the important distinction between the two cases is that in the *Saccharin Corporation* case, the agent in London had authority to enter into contracts for the foreign corporation without submitting orders to them for approval, whereas in the present case the agents have not that authority, and their duty is simply to submit to the defendants, and until they have signified their approval no contract can be brought into effect at all. There again Lord Phillimore seems to be adopting something of the same test as Lord Wrenbury, and to say that in that particular case the agent was not a company whose work could be said to bring the foreign company within the area of the rule.

Now, passing from this class of case to the shipping agent class, we have first of all a case which seems to me to be helpful and authoritative, and upon which I can rely, and that is the case of *The Princesse Clementine* (8 Asp. Mar. Law Cas. 222; 75 L. T. Rep. 695; (1897) P. 18). In that case the agent had offices in Fenchurch-street which they had taken in their own name and paid rent. Lord Gorell in dealing with that case says this: "In a popular sense no doubt the business of the defendant corporation is carried on by the corporation in England, but not in the eye of the law. It seems to me that the business carried on here is that of an agent for the other corporation, and it follows that the person upon whom the service was made was the servant of the agent and not of the corporation." In that case it appears that the rent of the offices was not charged against the defendants, but the agent received a commission on freights and was paid a fixed annual allowance for doing its business, and if anything it seems to me that the case was a little stronger against the defendants than the case with which I am now dealing. The agents were paid a fixed annual allowance for doing the defendants' business, but that is not the case here. They are only paid the ordinary brokers' commission. However that may be, the case I have mentioned is nearer to this one than any I have been able to find, and Lord Gorell seems to have dealt with the matter with no doubt at all.

The main difficulty of this class of case is to be found in one example much relied upon by Mr. Pilcher, the case of *Thames and Mersey Marine Insurance Company* v. *Societa di Navagazione a Vapore del Lloyd Austriaco* (12 Asp. Mar. Law Cas. 491; 111 L. T. Rep. 97). This action was a case that went to the Court of Appeal, and the judgment was given in a written form by Lord Wrenbury, who made some very lucid observations, and I think made a further attempt to deal with the circumstances from a general point of view, and laid down some guidance for the future. The test so far as one can find it in his judgment is given at p. 98 of 111 L.T. Rep. It is this. He says that the test in each case is to find the answer to the following question: "Does the agent in carrying out the foreign corporation's business make a contract for the corporation or does the agent in carrying out his own business sell a contract for the foreign corporation. In the former case the foreign corporation is, and in the latter case is not, carrying on business at the agent's premises. Messrs. Marcus Samuel and Co. are an example of the former and Messrs. Thomas Cook of the latter." He does not endeavour to lay down a test for every kind of foreign corporation and does not attempt to lay down a rule to apply universally. Mr. Pilcher relied upon that case because he said that Marcus Samuel and Co. were acting in precisely the same way in that case as Messrs. Escombe, McGrath, and Co. were acting here, and there was a good deal to be said for his presentation of the facts. The antithesis noted by Lord Wrenbury is between Messrs. Marcus Samuel and Co. and Messrs. Thomas Cook and Co., and it is based upon these circumstances. Messrs. Marcus Samuel and Co. were the general agents of the company in London, whereas Messrs. Thomas Cook and Co. were only one of several ticket agents who had the right to sell tickets for the shipping line. Therefore, Lord Wrenbury pointed out that you had in one case a corporation that could be called agents, whereas the other was a mere ticket agency. But he says that the antithesis is between an agent who makes the contract and an agent who sells a contract. Messrs. Thomas Cook and Co. fell under the latter class, because they only sold tickets or contracts for the foreign company. But it is a little difficult to follow what exactly Messrs. Marcus Samuel and Co. did. According to the recital of the facts they issued tickets and made contracts for the carriage of passengers and luggage and goods and booked freight for the goods for the defendants' steamships. So far they did nothing much more than Messrs. Thomas Cook except that they booked freight for goods, whereas there is nothing to show that Messrs. Thomas Cook had any activities in that direction. Then the recital goes on to state that, besides receiving commission for freight and tickets, Messrs. Marcus Samuel and Co. received a small sum for postage and a substantial payment per annum

for rent, clerks, and office expenses, and, therefore, it seems to me that they differed largely from the position of Thomas Cook and Co. and also from the position of Messrs. Escombe, McGrath, and Co., in the present case.

It may not be an acid test or an actual test that Lord Wrenbury has laid down as to the making and selling of contracts, but it is important that we find Messrs. Marcus Samuel and Co. receive a salary for rent and clerks and expenses, whereas Messrs. Escombe, McGrath, and Co. receive nothing of the kind and are merely brokers carrying on their own business and receiving a commission for work done from the East Asiatic Company and other companies. To pursue the *Thames and Mersey* case, there were two special desks allotted to the defendants' business, and that is foreign to the present circumstances. The agents were allotted a limited number of berths on the steamer, but apart from this they could not allot berths and take freights without telegraphing to the defendants. Therefore they are not very different from Messrs. Escombe, McGrath, and Co. In the *Thames and Mersey* case special notepaper and forms were used by the agent when transacting the defendants' business, but I do not find that in this case.

Well, now, applying that case as best I can to the present circumstances, and agreeing, as I do, that there are many general features of similarity, I think there are many features of differentiation, and when one comes to apply the test of Lord Wrenbury—making or selling contracts—it appears to me that Messrs. Escombe, McGrath, and Co. are people who sell and do not make contracts on behalf of this company. It may be, of course, that the recital of facts in the *Thames and Mersey* case is somewhat short, and the apparent discrepancy between Lord Wrenbury's test and the facts upon which he based it may be found in the omissions. I notice, for example, that in his judgment Lord Wrenbury says that the letter of appointment of the 29th Oct. 1904 constituted the firm general agents for the company at 5 per cent. commission on tickets sold, and 2 per cent. on tickets sold by other agencies, and that a sum of 480*l.* a year was paid for rent, clerks, and office expenses. Therefore, there was a good deal of evidence in the *Thames and Mersey* case which differed somewhat widely from the evidence in this case.

Now, taking these various tests—the test of making or selling contracts, and the test of Lord Wrenbury in the *Okura* case of whether they are acting by a person or through a person, and the various values that have to be given to whether the rent is paid by the foreign corporation or whether the agent in this country has the right or not to make any independent contract and has any discretion of his own—applying all these various tests as best I can to the present case, it seems to me that Messrs. Escombe, McGrath, and Co. fall upon the side of the line of agents who carry on their own business and not the business of the foreign corporation. I do not pretend that any of the cases are overwhelmingly clear, and one has to do the best one can with the facts as they are, but, so far as I can see the dividing line in cases of this class, I am clear that Messrs. Escombe, McGrath, and Co. fall upon the side of people who have a wide business of their own and who, in the course of it, transact business as agents for a number of foreign firms of which the East Asiatic Company are one. I was informed in the argument that the East Asiatic Company provided a large proportion of this agent's business or a large proportion of their foreign steamship business. That may be the case, and I cannot speculate upon a matter upon which I have no evidence on oath. Nor am I certain that it is a circumstance that ought to weigh strongly. I have to make up my mind whether the foreign corporation is really here, in the sense that it has somebody doing its business here who is not doing primarily his own business, and I think Messrs. Escombe, McGrath, and Co., on the evidence in the case, and upon the facts, are primarily doing their own business, which was only in a secondary sense the business of the East Asiatic company. Therefore, the motion will succeed, and the writ will be set aside and the service of the writ also, with costs.

Solicitors for the plaintiffs, *Lawrence Jones and Co.*

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

PRIZE COURT.

July 19, 20, *and Oct.* 20, 1932.

(Before Lord MERRIVALE, P.)

The Bathori. (*a*)

Prize—International law—Enemy vessel captured and sunk whilst proceeding under safe conduct—Hungarian owners carrying on business at Fiume—Status of Fiume—"Nationals of former Kingdom of Hungary"—Treaty of Trianon, arts. 53, 232.

The plaintiffs, an Italian company, claimed damages in respect of the loss of their steamship B., *which was captured and subsequently sunk in the Atlantic on the* 1st *Sept.* 1914 *by one of His Majesty's ships, whilst sailing under a safe conduct granted by the French and countersigned by the Great Britain authorities.*

In Sept. 1914 *the plaintiffs were an Hungarian company registered in Budapesth and carrying on business at Fiume, then, and until* 1918, *a Hungarian port. In* 1920 *the plaintiffs had become domiciled in Fiume, which at the date when the Treaty of Trianon between the Allied Powers and Hungary was signed in* 1920 *was in the occupation of Gabriele d'Annunzio, who had proclaimed himself dictator. Subsequently, Fiume was declared by the Italian and Yugo-Slavian Governments to be a free and independent port. It was later formally annexed to Italy.*

By art. 232 *of the Treaty of Trianon the Powers reserved "the right to retain and liquidate all property rights and interests" which belonged at the date of the coming into force of the Treaty to "nationals of the former Kingdom of Hungary or companies controlled by them" within the territories or under the control of those Powers.*

Held, (1) *that the* B. *having been granted immunity was sunk by an act of war contrary to the terms of the grant of safe conduct, and that therefore a claim resulted to the owners to recover her value as soon as their disability to sue by reason of the state of war had been removed; but* (2) *that the Hungarian Government had*

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

power to bind the citizens of Fiume by the Treaty of Trianon; that the plaintiffs were "nationals of the former Kingdom of Hungary" or a company controlled by such nationals, and that their claim was within the scope of art. 232 of the Treaty, and therefore failed.

ACTION in prize.

The plaintiffs, Adria Società Anonima di Navigazione Marittima, an Italian company, and the master and crew of the steamship *Bathori*, claimed from H.M. Postmaster-General and Captain Percival Henry Warleigh, R.N., damages occasioned by reason of the wrongful capture, seizure, loss, and destruction on the high seas on the 1st Sept. 1914 of the *Bathori* by H.M.S. *Minerva*, under command of the defendant, Captain Warleigh, whilst the *Bathori* with the licence of the British, French, American, and Spanish Government authorities was proceeding from Havre to Vigo.

The plaintiffs by their petition alleged that whilst the *Bathori*, then owned by a Hungarian company, was sailing to Vigo under a safe conduct granted by the French authorities and countersigned by the British Consul-General at Rouen, she was wrongfully and without probable cause captured and sunk by H.M.S. *Minerva*. It was alleged by the defendants in their answer that the sinking of the *Bathori* was justified by her suspicious conduct. At the trial this defence was not argued, and it was admitted that the *Bathori* had not forfeited her safe conduct. It was, however, contended that the sinking of the *Bathori* was an independent act of the commander of H.M.S. *Minerva*, giving no right of redress; and that by reason of the provisions of the Treaty of Trianon, between the Allied and Associated Powers and Hungary, signed on the 4th June 1920, any right to the relief claimed by the plaintiffs was, in any case, barred.

The facts and arguments of counsel fully appear from the judgment of Lord Merrivale, P.

Stuart Bevan, K.C. and Sir *R. Aske*, for the plaintiffs.

Sir *Boyd Merriman*, K.C. (S.-G.), and *Hubert Hull*, for the defendants.

The following authorities were referred to by counsel during their arguments (*Rothschild* v. *Administrator of Austrian Property*, 130 L. T. Rep. 175; (1923) 2 Ch. 542; *Groedel* v. *Administrator of Hungarian Property*, 1927, 44 Times L. Rep. 65; *The Acteon*, 1815, 2 Dods, 48; *The Blonde*, 15 Asp. Mar. Law Cas. 461; 126 L. T. Rep. 769; (1922) 1 A. C. 313; and *Austin Friars Steam Shipping Company* v. *Strack*, 10 Asp. Mar. Law Cas. 70; 93 L. T. Rep. 169; (1905) 2 K. B. 315).

Cur. adv. vult.

Lord Merrivale, P., read the following judgment:

The plaintiffs respectively sue as the owners and the master and crew of a cargo vessel, the steamship *Bathori*, which, on the 1st Sept. 1914—in the early days of the Great War—was captured and sunk at sea as an act of war in the Atlantic some thirty miles off Vigo by H.M.S. *Minerva*, under the command of the defendant, Captain Percival Henry Warleigh, R.N.

By consent the hearing before me was limited to two specific matters, with which I shall presently deal.

The case presents various remarkable features, apart from the fact that it comes here as a case in prize commenced in 1930 in respect of an alleged wrong suffered in Sept. 1914.

The vessel in question, when she was captured and sunk, was an enemy ship proceeding in ballast on a voyage from Havre to Vigo under a grant of safe conduct made by the French Naval authorities and countersigned and confirmed on behalf of, among other Powers, Great Britain—France and Great Britain being then at war with Austria-Hungary.

It is admitted on behalf of the defendants that, contrary to the view then taken by the defendant, Captain Warleigh, the safe conduct had not been forfeited and was in force at the time the *Bathori* was sunk.

The *Bathori* was a ship of 2223 tons gross register English built in 1892, the property of Hungarian owners, a società anonima, incorporated and duly registered in 1881 at Budapest as a company carrying on its business at and from Fiume, then a Hungarian port. At the time when the *Bathori* was sunk, and until 1920, her owners remained so incorporated and registered. The plaintiffs say in their petition that "on the 8th Dec. 1919 by resolution of the shareholders the name of the società was changed . . . the registration of the società at Budapest was cancelled and the società was and still is registered at Fiume only"; but this statement is qualified, as follows, in the agreed statement of facts: "From the 28th Dec. 1918 until the 20th April 1920, the domicile of the principal offices of the società was at Budapest and Fiume, and from and after the 20th April 1920 the domicile of the principal office . . . was at Fiume only."

An outstanding question in the arguments at the hearing of the case was that of the national and international status of Fiume at various periods, during and after the War, and the effect of such status upon the position and claims of the claimant società.

From an early period in the War Fiume was marked out by the Allied and Associated Powers as territory of which Austria-Hungary would be deprived in the event of the defeat of that Power. and its disposal was ultimately decided after various hostile occupations by a complex series of international compacts which have had as their ultimate result the incorporation of Fiume in the Kingdom of Italy.

Under the War Treaty of 1915, to which the Allied and Associated Powers were parties, it had been agreed that Fiume, if taken from Hungary, would be handed over to "Crotia-Serbia and Montenegro," then apparently conceived of as an autonomous sovereignty to be established by process of war. By the Treaty of Trianon, which restored peace between Hungary and the Powers, and bears the date the 4th June 1920, Hungary renounced all right and title over "Fiume and the adjoining territories," and undertook "to accept the dispositions made in regard to these territories, particularly in so far as concerns the nationality of the inhabitants, in the treaties concluded for the purpose of completing the present settlement." These last-mentioned treaties are manifestly those described in certain articles of the Treaty of Trianon as "to be concluded."

At the date of the Treaty of Trianon Fiume was not occupied or governed by any of the Powers who were signatories of the Treaty. In Nov. 1918 certain denizens of the territory of Fiume who asserted Yugoslav nationality had declared themselves a Yugoslav Council for its administration. In Dec. 1918 an Italian Council contesting this control had declared Fiume an independent political

unit. In Sept. 1919 a belligerent force under the command of Gabriele d'Annunzio had taken control, without sanction of the Italian Government. D'Annunzio declared himself Dictator, and he remained in control at the date of the Treaty of Trianon and until after the conclusion of the Treaty of Rapallo, whereby in July 1921 Italy and Yugoslavia with the concurrence of the Powers declared Fiume to be "a State having full liberty and independence." Great Britain, Italy, Hungary, and Yugoslavia were among the Powers which ratified this treaty. Ultimately in Jan. 1924 the Italian Government and the Yugoslav Government concluded an agreement whereby Yugoslavia recognised "the full and entire sovereignty of Italy over Fiume," and as a consequence on the 16th March 1924, H.M. the King of Italy conducted the ceremonial act of annexation whereby Fiume definitely became Italian territory.

A convention to which Italy and Yugoslavia were parties was signed in July 1925 and duly ratified, framed with a view to the settlements of the rights of denizens of Fiume, as affected by the War and the consequent series of treaties, and the matter is dealt with in the following article :

"Natural or juridical persons who have acquired within six months from the date of the entry into force of the present agreement the nationality of either of the high contracting parties shall be granted all the rights conferred by art. 249 of the Treaty of St. Germaine-en-Laye and art. 232 of the Treaty of Trianon respectively on nationals of the former Austrian Empire and nationals of the former Kingdom of Hungary who have acquired a nationality of an Allied or Associated State in accordance with the provisions and within the time limits laid down by the said Treaties."

By an Italian royal decree signed in May 1927 it had been declared that "bodies with legal personality including commercial companies having their head offices in Fiume, and the incorporation of which is registered with the competent authorities at Fiume, are considered to be Italian." This, of course, applies to the plaintiff corporation, and, in view of the admission of the parties that from and after the 20th April 1920, the "domicile of the principal office" of the plaintiff società was at Fiume several years before the commencement of this action, the società was, therefore, as it is now, an Italian corporation entitled to assert all rights conferred by art. 232 of the Treaty of Trianon on "naturals of the former Austrian Empire who have acquired the nationality of an Allied or Associate State."

No reference was made before me to the terms of the Treaty of St. Germain-en-Laye.

The relevant provisions of the Treaty of Trianon include arts. 49, 53, 61, 63 ; arts. 161, 162 ; Part VIII., Annex III. ; art. 232, art. 233, Annex II. ; art. 246 and art. 360.

By art. 49 Hungary renounces in favour of Czecho-Slovakia certain rights over Austria-Hungarian territory.

By art. 53 she renounces all right and title over Fiume and the adjoining territories, and undertakes to accept disposition to be made in regard thereto in consequential treaties, particularly in regard to the nationality of the inhabitants.

By arts. 61 and 63 citizens of the renounced territories are able to obtain citizenship under the changed sovereignty subject to certain options.

Art. 162 founds a right in the Allied or Associated Governments (and their nationals) to reparations for the loss and damage to which they have been subjected as a consequence of the War, and arts. 163–169 with Annex III. set forth the process by which compensation shall be obtained. Under Annex III. (1) the Hungarian Government agree on behalf of themselves and so as to bind all other persons interested to cede to the Allied or Associated Governments the property in "all merchant ships . . . belonging to nationals of the former Kingdom of Hungary" ; (7) and under III. (7) "waive all claims of any description against the Allied or Associated Governments and their nationals in respect of the detention, employment, loss or damage of any Hungarian ships or boats."

Art. 232 of the Treaty, which is mentioned in the paragraph before cited of the Fiume Convention signed on behalf of Italy and Yugoslavia in July 1925, declares that subject to certain reservations "the Powers reserve the right to retain and liquidate all property, rights, and interests which belong at the date of coming into force of the present Treaty to nationals of the former Kingdom of Hungary or companies controlled by them, and are within the territories . . . of such Powers . . . or under the control of those Powers."

Art. 233, Annex II., provides that "no claim or action shall be made or brought against any Allied or Associated Power or against any person acting on behalf of or under the direction of any legal authority or department of the Government of such a Power by Hungary or by any Hungarian national or by any national of the former Kingdom of Hungary wherever resident in respect of any act or omission with regard to his property, rights, or interests during the war."

Art. 246 defines meanings for the terms "Hungarian national" and "national of the former Kingdom of Hungary."

Under art. 360 Hungary undertakes "not to put forward directly or indirectly against any Allied or Associated Power signatory to the present Treaty, any pecuniary claim based on events which occurred at any time before the coming into force of the present Treaty" and the article contains this provision : "The present stipulation will bar completely and finally all claims of this nature, which will be thenceforward extinguished, whichever may be the parties in interest."

So far as regards the provisions of all the cited articles of the Treaty of Trianon it is proper to add that by an agreement concluded at The Hague in 1930 the Allied and Associated Powers undertook as from the coming in force thereof to cease to exercise under the Treaty of Trianon rights of retention and liquidation of property, rights, and interests of nationals of the former Kingdom of Hungary in so far as such property, rights, and interests had not already been finally disposed of. The consideration for this is a limited annual payment by the Hungarian State.

Having referred to the tenor of the arguments raised at the hearing, I have considered all the provisions of the Treaty of Trianon to which I have referred. As to most of them, however, it may, I think, be said they have less direct bearing on the questions here at issue than upon the general scope, intent, and applicability of the Treaty as regards the rights and claims of the plaintiff società.

Two specific questions have to be determined on the present occasion. First, was the sinking of the *Bathori*, an act contrary to an accepted obligation of the British State which entitled the

owners, whenever they might again become competent suitors before a British tribunal, to come to this court having jurisdiction on prize and claim restitution in the value of the vessel, with or without further compensation; or was it simply an act of war warranted by international law in respect whereof neither the British officer who sank the vessel, nor the State whose commission he held, could be called in question by legal process? Secondly, assuming that the sinking of the *Bathori* was a wrongful act, actionable in this court, by reason of the terms, as regards Great Britain, on which she was making her voyage, can an action in prize be now maintained in view of the terms of the Treaty of Trianon whereby peace was concluded between Great Britain and Hungary.

As to the question whether the sinking of the *Bathori* as an act of war while she was under safe conduct gave the owners a right of suit to recover her value under a writ in prize, the terms of the Hague Convention No. VI. of 1907, were mainly considered at the hearing. It must not be forgotten though, as long ago as the American War of 1812, Lord Stowell, then Sir William Scott, held that the unjustifiable sinking of an enemy ship which was sailing under safe conduct was an act in respect whereof restitution in value with damages must be awarded under the jurisdiction in prize: (*The Acteon*, 2 Dods. 48, 51). The learned judge said this: "The natural rule is, that if a party be unjustly deprived of his property he ought to be put as nearly as possible in the same state as he was before the deprivation took place." Again, after the Russian War of 1854, Dr. Lushington, as a judge of the Court of Admiralty, sitting in prize, examined various cases (*The Troija*, 1854, 1 Spink, 342; *The Phœnix*, 1854, 1 Spink 306), where the seizing or sinking of enemy ships was alleged to have taken place contrary to the terms of an Order in Council of H.M. Queen Victoria which granted a limited period of safe conduct to enemy ships found in British ports at the date of the declaration of war. Dr. Lushington in these cases recognised the effective force of safe conduct so given, and declared that a liberal construction ought to be put upon a public document which declared the security of belligerent rights. In the present case there was safe conduct, and the enemy owner was entitled for the time being to have it observed.

As to the more general question of the effect of The Hague Convention No. VI., arts. 1 and 3 of that Convention were particularly relied upon by Mr. Bevan for the plaintiffs. He supported his argument by reference to the judgment of the Privy Council in *The Blonde* (15 Asp. Mar. Law Cas. 461; 126 L. T. Rep. 769; (1922) 1 A. C. 313). The Solicitor-General contended, on the other hand, as to the articles so relied on, that they plainly do not in their express terms apply to the sinking of the *Bathori*. She was, he said, "allowed to depart freely" and "to proceed to" a designated port, and subsequently was sunk on the high seas by "the independent act" of one of his Majesty's ships of war. He, moreover, relied on some passages in the judgment in *The Blonde* as tending to establish the case of the Procurator-General under the second question which I have stated.

Art. 2 of the Convention clearly does not apply to the *Bathori*, which never was requisitioned and is not within the terms of the judgment in the case of *The Blonde*.

Art. 1, taken literally, would appear merely to enunciate a principle—that when a merchant ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that she should be allowed to depart freely either immediately or after a reasonable number of days of grace, and to proceed after being furnished with a pass direct to her port of destination or any other port indicated to her.

His Majesty's Government in dealing with the *Bathori* purported to act upon the principle so enunciated and "allowed the vessel to proceed after being furnished with a pass" on a voyage to a "port indicated to it." As to the act of war which sank the *Bathori*, it may have been an "independent act" of a naval officer acting within his commission, but in my opinion it was an act of war, not of piracy, and not of mere civil strife, and as an act of war committed by one of the commissioned officers of the State it was a breach of the obligation accepted by the State.

The case of *The Blonde*, it must further be pointed out, arose under circumstances essentially different from those of the present case. She was an enemy ship—of German ownership when seized and duly requisitioned under the terms of art. 2 of the Convention—and the judgment decided that having been so requisitioned and lost at sea while so requisitioned her appraised value was *primâ facie* payable. Then arose the question whether, under the Treaty of Versailles, whereby Germany made peace with the Allied and Associated Powers, the sum representing this appraised value had been effectually made over by Germany to Great Britain so as to be irrecoverable, notwithstanding that between the events in question and the ratification of the Treaty the owners of the vessel had become citizens of the free city of Dantzig.

Whether the "safe conduct" or "pass" under which the *Bathori* sailed be regarded as an act of a sovereign State independently of the Convention, or as an act of the State on the footing of the Convention, the result practically seems to me to be that the *Bathori*, having been granted immunity, was sunk contrary to the terms of the grant of safe conduct, and that, therefore, a claim resulted to the owners to recover her value as soon as their disability to sue by reason of the state of war had been removed.

The second question raised for determination here, as I have said, is whether the owners of the *Bathori* have cause of action in prize now, notwithstanding the provisions of the Treaty of Trianon.

By Annex III. of the Treaty the Hungarian Government agree "on behalf of themselves and so as to bind all other persons interested" to cede "the property in all merchant ships belonging to the former Kingdom of Hungary"; Annex III. (7) waives "all claims against the Allied and Associated Governments and their nationals in respect of the detention, employment, loss, or damage of any Hungarian ships or boats"; art. 232 reserved to the Powers "the right to retain and liquidate all property, rights, and interests" which belonged at the date of the coming into force of the Treaty to nationals of the former Kingdom of Hungary or companies controlled by them and "which are within the territories . . . of such Powers . . . or under the control of those Powers"; art. 233, Annex II., precludes all claims against an Allied or Associated Power, or any person acting on behalf of or under the direction of any legal authority or department of the Government of such a Power, by any Hungarian national or by "any national of the former Kingdom of Hungary" in respect of "any act of omission with regard to his property, rights, or interests during the War"; and by art. 360 Hungary undertakes not to put forward

"any pecuniary claim based on events which occurred at any time before the coming into force of the Treaty," such stipulations to bar completely and finally all claims of this nature "whoever may be the parties in interest."

Mr. Bevan and Sir Robert Aske contended that upon a strict construction of Annex III. (1) the *Bathori* was not at the date of the Treaty a merchant ship and so would not pass, and that the claim of the plaintiffs is not a claim within the terms of Annex III. (7) in respect of the "detention, employment, loss, or damage of any Hungarian ships or boats." On the latter point they relied on the decision in *Austin Friars Steam Shipping Company* v. *Strack* (10 Asp. Mar. Law Cas. 70; 93 L. T. Rep. 169; (1905) 2 K. B. 315). As to art. 232, they argued that the right of the plaintiffs in respect of the *Bathori* does not come within the description "property, rights, or interests . . . within the territory . . . or under the control" of Great Britain. As to the whole matter, they asserted that the Treaty of Trianon could not and does not bind the plaintiffs; that they were not Hungarian nationals when the Treaty was concluded or indeed at any time after October (or alternatively December) 1918; that they were not within the scope of the term "nationals of the former Kingdom of Hungary"; and that, at any rate, upon the proper construction of the various clauses, a corporation such as the plaintiffs could not be held to fall within the terms of the Treaty.

The Solicitor-General did not press under Annex III. (1) for a decision that the *Bathori* was within the terms of the Treaty "a merchant ship" to be ceded by Hungary. Under Annex III. (7) he submitted that the present claim is a claim arising out of "loss" of a ship and so a waived claim. Under art. 232 he contended that the plaintiffs' claim in prize—the cause of action now presented—falls within the term "property, rights, and interests," and therefore had passed from the plaintiffs when these proceedings began. He insisted also that under art. 360 the claim is a pecuniary claim of nationals of the former Kingdom of Hungary which can no longer be put forward by reason that at the time of the Treaty the plaintiff società was in contemplation of international law a party as to whose rights Hungary might effectually agree. The last-mentioned submission raises the whole question of the status of Fiume and its denizens during the transitional period which ended, as before mentioned, with its incorporation in the Kingdom of Italy; and in particular the power of Hungary to deal with the rights of the plaintiff società, as is said to have been done under the Treaty of Trianon.

To identify the sovereign authority which, according to international law and usage, could effect or sanction changes in the status of Fiume and its denizens subsequently to the time when the last Austria-Hungarian Governor departed is manifestly a serious task. This, I think, may be safely premised—sovereign authority is involved in the existence of a civilised community whether such community is a separate national entity or forms part of a wider State. It is undisputed and seems to me indisputable, that until late in 1918 the Hungarian State was sovereign over Fiume. Neither party asserts any other sovereignty down to the time when the Hungarian authorities left Fiume toward the end of 1918. The Yugoslav Council which asserted authority in 1918 had only a transitory existence. The Italian Council which in Dec. 1918 declared the independence of Fiume, whatever the character or intent of its temporary power, was in Sept. 1919 displaced by force of arms by d'Annunzio, whose forcible occupation of the area continued at the date of the Treaty of Trianon and until the subsequent Treaty of Rapallo. It was under the latter Treaty that in July 1921 Fiume became under international sanction a State having "full liberty and independence."

What is now in question is whether at the date of the Treaty of Trianon Hungary was entitled, under recognised principles of international law, to bind citizens and denizens of Fiume by the terms of that Treaty, so that the articles now called in question must be regarded as valid.

Authoritative legal decisions directly bearing on the matter thus brought under consideration are, naturally enough, hard to find. Lord Stowell in *The Fama* (1804, 5 C. Rob. 106) recognised that to change the national character of a place surrendered during war by an enemy something more than possession is required, and in various American cases this principle is clearly enunciated.

The American cases are authority for the view that a territory conquered by an enemy is not to be considered as incorporated into the dominions of the conqueror without a renunciation or a treaty of peace or a long and permanent possession: (*United States* v. *Hayward* (1815), 2 Gall. 485, 501; *United States* v. *Rice*, 1819, 4 Wheat. 246).

United States v. *Hayward* (*sup.*) is distinguished by one of the well-known judgments of Story, J. It raised a question during the Anglo-American War of 1812–15 as to whether United States law as to the landing of certain classes of goods at American ports was operative at the port of Castine in Massachusetts. The port, with the surrounding district, had been captured and was being held by forces of the British Government, and it was proclaimed by the Governor of Nova Scotia to be British territory. The judgment on appeal from the State Court of Massachusetts delivered in the United States court by Story, J. contains a passage relevant to the present inquiry. "By the conquest and occupation of Castine," the learned judge said, "the sovereignty of the United States over the territory was, of course, suspended. . . . Castine, therefore, could not, strictly speaking, be deemed a port of the United States; for its sovereignty no longer extended over the place. Nor, on the other hand, could it strictly speaking be deemed a port within the dominions of Great Britain, for it had not permanently passed under her sovereignty. . . . It could only be by a renunciation in a treaty of peace, or by a possession so long and permanent, as should afford conclusive proof, that the territory was altogether abandoned by its sovereign, or had been irretrievably subdued, that it could be considered as incorporated into the dominions of the British sovereign."

There could not, I think, be clearer proof in point of fact of the status of Fiume in 1920 than that which is afforded by the Treaty of Trianon itself. Great Britain, Italy, the Serb-Croat-Slovene State, and Czecho-Slovakia required from Hungary and accepted as a condition of peace Hungary's solemn renunciation of all right and title over Fiume and the adjoining territories, and her undertaking to accept the dispositions to be made in regard to these territories in treaties to be thereafter concluded for the purpose of completing the settlement.

No new sovereignty *de facto* or *de jure* had come into being in Fiume when the Treaty of Trianon was concluded on the 4th June 1920. Down to the 28th Dec. 1918 the plaintiff società was a Hungarian corporation pure and simple. Thence, till April 1920, the corporation had principal offices

in Budapest and in Fiume. From April 1920 it had its seat in Fiume only. Fiume, however, had no independent civil entity until July 1921, when by virtue of the powers reserved under the Treaty of Trianon, Italy and Czecho-Slovakia established it as a Free State.

All that is necessary to establish in favour of the Procurator-General the first of the contested propositions, namely, that the plaintiff owners of the Bathori are within the terms of the Treaty of Trianon, is to show that they, at the date of the Treaty, were within the prescribed category "nationals of the former Kingdom of Hungary or companies controlled by them," as to whose possessions under the control of the Allied and Associated Powers Hungary and the Powers could make agreements of valid dispositive effect.

The judgment delivered by Lord Sumner in *The Blonde* (15 Asp. Mar. Law Cas. 461; 126 L. T. Rep. 769; (1922) 1 A. C. 313, 338) contains a passage which seems to me to be in point. There the claimants were citizens of the newly created Free City of Dantzig, and the matter in question was that part of the Treaty of Versailles which rendered their ships liable to be appropriated toward satisfaction of the treaty obligations of Germany to the Allied and Associated Powers. "It was urged," Lord Sumner says, "that a Court of Prize can condemn only as against an enemy subject. Conceding that the power is exercisable after the conclusion of peace, it was said only to apply to those whose allegiance or citizenship is the same as it was before that time, though peace has converted enmity into amity; hence as against the subject of a newly constituted State, though formerly they were German, the right to condemn has ceased. The contention was not rested on any authority, nor was it explained why proceedings which were regular from the beginning should be frustrated as against the captors by a stipulation in the Treaty which does not deal with their rights but is directed to another and very different object."

The plaintiff società being found, as I find them to be, within the class of persons described in the Treaty, it becomes necessary to determine whether the suspended right to claim compensation in respect of the sinking of the *Bathori*, which they had in 1914, comes within the words in art. 232 of the Treaty: "Property, rights, and interests within the territories . . . or under the control" of Great Britain. Whether a claim in prize can quite accurately be described as a chose in action I need not pause to consider. As a chose in action, and in the legal sense "property" it would have its locality in the State where the chose in action could be enforced. The "right," so long as it subsisted, was a right in respect of an injury suffered on the high seas to recover money in this court which was irrecoverable elsewhere. It seems to me clear that the claim of the plaintiff società in respect to the sinking of the *Bathori* falls within the definition in question and within the operative words of art. 232.

On these findings it is conceded that the claim for damages fails.

Solicitors for the plaintiffs, *Swepstone, Stone, Barber*, and *Ellis*.

Solicitors for the defendants, *The Treasury Solicitor*.

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Thursday, Nov. 17, 1932.

(Before ROCHE, J.)

Owners of Steamship Anastasia v. Ugleexport Charkow. (*a*)

Charter-party—Provision of ice-breakers—Duty of charterers — Ice-breakers provided and subsequently withdrawn—Claim for demurrage —Onus of proof.

A charter-party provided that in the event of the loading port being inaccessible by reason of ice the charterers undertook, on the vessel's arrival at the edge of the ice, to provide ice-breaker assistance to enable her to reach the loading port.

Held, that the obligation on the charterers was to provide such ice-breaker assistance as was needed to enable the ship to reach port and to continue to provide such assistance as long as might be necessary.

The shipowners proved that after the arrival of the ship at the ice edge an ice-breaker was provided but was subsequently withdrawn for a period of seventeen days.

Held, that on proof of these facts the onus probandi *shifted to the charterers, and that, in the absence of any explanation by them of the withdrawal of the ice-breaker, they must be treated as having broken the contract.*

SPECIAL case stated by an arbitrator. The steamship *Anastasia* was a Greek vessel trading at Russian ports. She was chartered to the respondents by a charter-party dated the 20th Nov. 1930, which contained a clause dealing with delay caused by ice. That clause was as follows: "In the event of the loading port being inaccessible by reason of ice on vessel's arrival at the edge of the ice or in case frost sets in after vessel's arrival at port of loading, the charterers undertake to provide ice-breaker assistance to enable steamer to reach, load at, and leave loading port, steamer being free of expense for ice-breaker assistance." The charter-party further provided for payments for demurrage.

The *Anastasia* arrived at the port of Mariupol on the 30th Jan. 1931, and found that port inaccessible by reason of ice. She remained there waiting for assistance until the 7th Feb., when an ice-breaker was provided, but it was subsequently withdrawn for a period of seventeen days, and in consequence the steamer was delayed. The arbitrator decided that the delay was caused by a breach on the part of the charterers of their obligation to provide ice-breakers, and he made an award in favour of the shipowners.

The charterers submitted that they had discharged their obligation by providing an ice-breaker on the arrival of the ship at the ice edge, and that the subsequent withdrawal for seventeen days was

(*a*) Reported by V. R. ARONSON, Esq., Barrister-at-Law.

not a breach of contract. The owners contended that the obligation of the charterers was continuous, and that their duty was to provide an ice-breaker which would remain in attendance on the ship until she reached port.

Le Quesne, K.C. and Sir *Robert Aske* for the appellants.

Sir *William Jowitt*, K.C. and *Atkins* for the respondents.

Roche, J.—This matter comes before me as an award in the form of a special case stated by an umpire. The dispute in respect of which the award was made was one between the Greek shipowners and the Russian charterers who were parties to a charter-party dated the 20th Nov. 1930. The charter provided that the vessel in question, the *Anastasia*, should proceed to a port in the Sea of Azov and there load a cargo of coal and (or) anthracite for a Turkish or Greek or Italian port. The charter-party contained what is known as the ice clause, and it is upon the construction of that clause that the present case is stated. That clause provided, and I leave out immaterial words, as follows: "In the event of the loading port being inaccessible by reason of ice on vessel's arrival at the edge of ice . . . the charterers undertake to provide ice-breaker assistance to enable steamer to reach . . . loading port."

Now what happened, as found by the umpire, was that before the ship, which had been ordered to proceed to Mariupol, one of the ports included in the charter, arrived there there was ice, and she had to wait some time before ice-breaker assistance could arrive, and after it had arrived it was insufficient, and the ice-breakers were not alongside the ship for some seventeen days, between the 11th Feb. and the 28th Feb., and their absence was entirely unexplained. The umpire asks the court two questions, one of which may be quite shortly disposed of. The first question appears to be whether he rightly admitted certain evidence tendered by the respondents, the charterers. I can give a short answer to that question, which is in substance this, that I think the evidence was rightly admitted to explain what was done pursuant to the contract, but that I doubt very much whether it was admissible for the reason given to the umpire for its admission. It appears to have been ruled by the umpire that the respondents were entitled to give such evidence to show the meaning the words "ice-breaker assistance to enable steamer to reach loading port" bore. It seems to me an instance of a course being taken which was right, but where the reasons given are open to criticism. But inasmuch as the evidence was properly admissible for some reason, the second and main question falls for decision. That question is whether the umpire was right in holding that the charterers "have broken their contract to provide ice-breaker assistance to enable the steamer to reach loading port and are liable in damages."

Now the difficulty here is that I am informed that there is another case for decision next week upon this same clause, and I am desirous of doing nothing without the fullest information which may hinder or anticipate the adequate and proper hearing of that, and other, cases. Accordingly, I must refrain from any exposition of the possible meanings and extent of this clause, and must confine myself to a decision whether the contentions put forward on behalf of the charterers in this case, and overruled by the umpire, are right or wrong.

Those contentions are set out in par. 14 of the case, and the two which are really the material contentions and which have been forcibly argued here are Nos. 4 and 6. No. 4 is, "that the respondents' only obligation was to give ice-breaker assistance at the edge of the ice, and that therefore they had no further continuing obligation," and No. 6 is "that the respondents had in accordance with the general practice requested the port authority to provide ice-breaker assistance and that they were under no further obligation." Those contentions were overruled by the umpire, and I am of opinion that he came to a right decision. The contrary contention is that the obligation which arose at the time of the vessel's arrival at the edge of the ice was fulfilled in that ice-breakers were sent then, however long or short a time they stayed and however little they did. That contention was rightly overruled. It seems to me to put far too much weight on the word "on" in the clause and far too little weight on the other and more important words. The proper construction of that clause, so far as regards the force and effect of the word "on," might be well illustrated by reading it as "when," thus "In the event of the loading port being inaccessible by reason of ice when vessel arrives at the edge of ice," then certain obligations accrue, and the word "on" throws little or no light upon the scope and extent of the obligation; still less does it, in my judgment, confine the obligation to the moment of time when the vessel first arrives at the edge of the ice. The contention, in my view, puts too little weight and attaches too little importance to the main and operative words which express the obligation. They are these: "The charterers undertake to provide ice-breaker assistance to enable steamer to reach loading port." That may be paraphrased thus: "The charterers undertake to provide such ice-breaker assistance as is required to enable steamer to reach loading port." For these reasons the charterers' contention fails.

The argument for the charterers sought enforcement from the words of the other sub-clauses of the ice clause. The effect of that argument was that no provision or stipulation was made in any of those sub-clauses providing what was to be done with regard to time which was lost if ice-breaker assistance was not provided during the subsequent course of the vessel's transit through the ice after she had first arrived at the ice. I think that that is attaching too much weight to the absence of such a stipulation and that it cannot militate, and ought not to militate, against what I regard as the true construction of the clause. The real reason, I opine, why loss of time in that transit is not provided for is the very reason that the clause itself contemplates, that once ice-breaker assistance is rendered at the edge of the ice, whatever delay there may have been up to that time, it will be consecutive and continuously available.

One other point remains. I do not decide—it is unnecessary for me to do so—whether the undertaking which I hold to continue so long as it is necessary for the vessel to reach the loading port is an absolute undertaking to provide ice-breaker assistance, or whether it is an undertaking which may be discharged by the charterers doing their best to provide ice-breaker assistance. I do not decide, for example, what might be the effect if it were proved that there were an accident or breakdown to an ice-breaker or a strike on the part of the crew or any matter of that sort. But I must decide for the determination of this case a point about the onus of proof. This clause, as I have construed it, is at the lowest an obligation on the charterers to do their best during that continuing period. The question is where does the onus of

proof lie? I have no doubts that it rests, in circumstance such as these, upon the charterers. The shipowners have proved that there was ice, that ice-breakers having come, went away and were not present for seventeen days. That bare fact, in my judgment, makes a *primâ facie* case of failure to do what was necessary and reasonable, and the finding of the umpire upon that point is sufficient to carry the shipowners to a conclusion. That finding is this: "I do not draw the inference from the facts set out above that the respondents could not have taken, or were under no obligation to take, any further steps to provide, or induce the port authority to provide, more satisfactory ice-breaker assistance." So far as that is part of the matters upon which the umpire has arrived at his finding, and upon which he asks the decision of the court, I think that was a conclusion which in law he was entitled to draw.

For these reasons I answer the question submitted to me by declaring that the umpire was right in holding that which he has held in par. 15 of the special case.

Solicitors for the appellants, *Holman, Fenwick*, and *Willan*.

Solicitors for the respondents, *Pettite* and *Kennedy*.

Monday, Nov. 21, 1932.

(Before Roche, J.)

Dampskibsselskabet Heimdal v. Russian Wood Agency Limited. (*a*)

Charter-party—"Enabling ship to leave port"—Ship detained in ice beyond geographical limits of port—Provision of ice-breakers—Claim by owners for damages for delay and for injury to ship.

A charter-party provided that the charterers were to supply the ship with ice-breaker assistance to enable her to enter or leave port if required by the captain to do so. Such assistance was to be rendered within forty-eight hours after steamer's arrival at the ice edge or readiness to leave port of loading.

Held, first, that the obligation of the charterers was to provide an ice-breaker which would be as continuously as possible in attendance on an outward-bound ship until she was clear of the port. Secondly, that the assistance must be provided up to the point where the ship would be clear of the ice, even if that point were geographically outside the port.

In this action the owners of the steamship *Asko* claimed from the charterers damages sustained through detention by ice at the port of Leningrad. In Jan. 1930 the parties entered into a freight agreement by which the plaintiffs undertook to carry timber from Leningrad to certain named ports, a separate charter to be drawn up for each steamer employed In pursuance of that agreement a charter-party for the employment of the *Asko* was entered into on the 26th Nov. 1930, under which that ship was to proceed to Leningrad, load a cargo of timber and carry it to Hull. Clause 35 of the charter-party provided as follows: Charterers to supply the steamer with ice-breaker assistance if required by the captain to enable her to enter or leave port of loading free of all expense to the owners. . . . Ice-breaker assistance to be rendered within forty-eight hours after steamer's arrival at the ice edge or readiness to leave the port of loading. Any time lost in waiting ice-breaker beyond forty-eight hours after readiness to proceed to be for charterer's account."

The *Asko* was ready to leave Leningrad on the 31st Dec. 1930, but owing to detention by ice she did not reach open water until the 12th Jan. 1931. It appeared that an ice-breaker was ordered at 12.30 p.m. on the 31st Dec., and she came and towed the *Asko* until 9 p.m. on that day, and then left her in the ice. She lay there until the 5th Jan., when she was towed as far as Kronstadt Roads. At that point she was outside the limits of the port of Leningrad, but she was still in the ice. On the 9th Jan. a convoy was formed of a number of vessels including the *Asko*. The convoy reached the ice-edge on the 12th Jan., and the *Asko* then proceeded on her voyage to Hull.

The plaintiff argued that the defendants were under an absolute obligation to get the steamer away from the port. It was too narrow a construction of clause 35 to say that the words "to enable her to leave the port" meant merely to get beyond its geographical boundary. They claimed demurrage and also damages for the physical injury sustained by the ship whilst detained in the ice. The defendants contended that their duty was ended when they had taken the ship beyond the limits of the port.

Raeburn, K.C. and Sir *Robert Aske* for the plaintiffs.

Miller, K.C. and *Willink* for the defendants.

Roche, J.—This is a claim by shipowners against the English representatives of charterers who are sued by agreement between the parties, and the claim is for damage partly for loss of time on a voyage and partly for damage sustained upon the voyage. The voyage was a voyage to Leningrad, there to load timber, and thence to proceed to Hull. That voyage was performed in Dec. 1930 and Jan. 1931. The question between the parties is partly one of construction of what is known as the ice clause in the charter-party and partly a question of fact. So far as questions of fact are involved, the parties have quite naturally sought to avoid the expense of bringing oral evidence from abroad, and have asked the court to decide the questions of fact on the basis of certain logs of the steamship in question, and of certain ice-breakers which assisted her, and upon certain certificates and written material. The evidence, though contemporary, is in parts vague and in other parts conflicting, and the parties have agreed that they are willing to take my decision on the facts on the material available and not to complain of it elsewhere.

Now the main questions I think are questions of construction. What happened was that the ship in question, the Danish steamship *Asko*, got to Leningrad when there was ice in the port, or, at any rate, when she was ready to leave there was ice in the port. She was some time getting out of the port, and it is said, and I find as a fact, that she did sustain some damage in getting out of the port by reason of the ice. Clause 35 of the charter-party provided as follows, leaving out immaterial words: "Charterers to supply the steamer with ice-breaker assistance if required by the captain to enable her to enter or leave the port of loading free of all expenses to the owners." Then, leaving out

(*a*) Reported by V. R. Aronson, Esq., Barrister-at-Law.

one sentence which is immaterial for the present purpose, the clause goes on: "Ice-breaker assistance to be rendered within forty-eight hours after steamer's arrival at the ice-edge or readiness to leave the port of loading. Any time lost in waiting ice-breaker beyond forty-eight hours after readiness to proceed to be for charterers' account." Now the material dates are as follows: The *Asko* was ready to proceed after loading at 12.30 p.m. on the 31st Dec., and an ice-breaker called the *October* came to her at 7 p.m. on the 31st, and, having regard to the last sentence of clause 35, the time counts not from 12.30 p.m., but from 7.30 p.m. on that day. Now the vessel was assisted by an ice-breaker between that time and the 6th Jan. for a period of between nine and ten hours, and no more. Then she had got to Kronstadt Roads, and for some three days she lay there unassisted by ice-breakers, with ice beyond her preventing her from reaching the open sea. On the 9th Jan. she was formed into a convoy with some other vessels and was slowly assisted to sea, and she reached open water on the 12th Jan. at 12.30 noon.

Now the plaintiffs say that was far too long a time, and that she took twelve days to reach the open sea because the charterers broke their contract and did not provide with sufficient assistance to enable her to leave the port of loading. They say in effect that for the major portion of those twelve days the ice-breaker assistance was entirely lacking and absent. The charterers opposed that contention upon several grounds; but they have not argued here that having once provided the ice-breaker assistance on the 31st Dec. their obligation had ceased. That contention, or a similar contention, was argued before me last week in the case of the steamship *Anastasia* (*ante*, p. 360; 148 L.T.Rep. 139). In that case there was a similar contention which I decided was not well founded. I held that the obligation in the case then in question was one which began when the vessel reached the ice edge, and continued thenceforward until she arrived at the port of loading. I hold in this case that the obligation began when the vessel was ready to leave, counting the time from 7.30 p.m. on the 31st Dec., and continued until the vessel was free of the ice. I will expand that last sentence in a moment in order to deal with one specific contention of the defendants'. That is the extent, or the scope, of the obligation.

The first question really argued was as to what was the nature of the obligation; was it an obligation on the charterers to do their best to provide ice-breaker assistance, or was it an obligation that ice-breaker assistance would be provided which would do its best? I hold that it was an obligation to provide ice-breaker assistance continuously which would do its best to get the vessel out of the port. But I do not decide that ice-breaker assistance which has to do its best involves that the ice-breaker should be working every day of twenty-four hours. That would depend upon circumstances and upon evidence. It might be that an inevitable breakdown occurred, or that this or that happened, which would prevent the operations of breaking ice from being continuous. I hold that, at all events, there had to be an ice-breaker in attendance on this vessel continuously to do its best. I do not decide that it was wrong to assist this vessel in convoy with other vessels, which was what was done in this case. What I do decide with reference to the facts of the case is as follows: I have already held in the case of the steamship *Anastasia* (*sup.*), that where there is an absence of ice-breaker assistance through a period of time, that the onus is upon the shipowners, and upon proof of that they made a *primâ facie* case of a breach of this term in the charter-party, or a similar term, as in the case of the steamship *Anastasia*. In that case I held the shipowners had made out a *primâ facie* case of breach of this clause. Then it was for the charterers to explain why ice-breaker assistance was unavailable. Now here the evidence of the log-books of the ice-breaker entirely fails to satisfy me on that point. It looks as if there were too many vessels there at that time for the ice-breakers to deal with. Now that is a matter for the charterers concerned, and is not a matter for the shipowners. Therefore, the charterers have failed to, disprove the case which the shipowners have established by evidence of the long absence of the ice-breakers and I hold, subject to what I have to say in a moment about one other contention of the defendants', that the clause was broken.

The other contention with which I have to deal is a contention as to the geographical extent of the charterers' obligation. It is said that it is limited to the post itself, and that those limits are reached when you get just inside the fortress of Kronstadt, and that accordingly as the *Asko* reached Kronstadt on the 6th Jan., the charterers' obligation ceased as from that time. That contention I hold to be wrong. It is a matter primarily of the construction of clause 35, and I am clearly of opinion that, on the true construction of that clause, the obligation to render assistance upon arrival at or off the port of loading begins when the vessel is on the ice edge, wherever that may be. It is open sea there, and there is no evidence that the open sea is frozen, and what the parties are dealing with is an ice edge, which may be within reach of the port, within the sphere in which notice could be given to those in the port when ice-breaker assistance was required. Now that being the place at which the obligation begins on arrival, I am satisfied that the true meaning and intent of the clause is the same with regard to the departure of a ship from the port, and that the obligation to supply ice-breaker assistance, which begins when the vessel is ready to leave her loading berth, extends until she is out of the ice, or in other words, on the ice edge. I am fortified in that conclusion by reference to the port regulations for ice-breakers which have been made part of their evidence by the defendants. Clause 2 deals with the state of equipment which is required by the regulations, the equipment of the vessel which is to be convoyed by an ice-breaker, and it provides that in case of non-fulfilment of those conditions and certain other conditions, the master of the ice-breaker has the right to refuse to convoy the vessel to open sea. Now that makes abundantly clear what is the business of the ice-breakers, and is in harmony with what I have held to be the true construction of the clause of the charter-party itself.

It only remains for me to deal with the questions of fact as to the delay and the damage. As to the construction of the charter-party with regard to the claim for damage to the ship, it seems to follow, as a matter of law, that if the ship had sustained damage to her structure or hull because she had not ice-breaker assistance or because she was kept too long in the ice, or had not the protection of ice-breakers during that time to prevent floes from damaging her, that the plaintiffs are entitled to recover damages for that item of loss as well as for the item of loss consisting of lost time. I therefore hold that the plaintiffs are entitled, if there was such physical loss in the way of damage to the ship, in law to recover for that damage also.

Now as to the question of fact. Time began to count from 7.30 p.m. on the 31st Dec. Between that date and the 9th Jan. at 1 p.m., a period of eight-and-a-half days, there were only ten hours

during which ice-breakers were actually at work upon the vessel. There is no explanation of that. Some allowance must be made for necessary stoppages, and I think it would be fair to call that period seven days. Now the question arises as to the period from the 9th to the 12th Jan. Most of that time the vessel seems to have been under convoy, and to have been assisted by ice-breakers, but there is a quite unexplained period of three or four hours on the 10th and other times during that period which are of importance, as it looks as if damage were done to the cargo during that time, which damage, had an ice-breaker been present, would, at any rate, have been minimised, even if it had occurred at all. Speaking broadly, which is all I can do on the materials before me, with regard to the three days from the 9th to the 12th Jan., I am not satisfied that that time, had the contract been performed, ought to have been more than two days. Accordingly, I hold that there was a loss of time which ought not to have occurred had the contract been fulfilled of some eight days in all, and in respect of those eight days the plaintiffs are entitled to recover such damages as they may agree, or as may be ascertained elsewhere or as I may direct. I think that expresses the agreement with regard to the damages for delay at which the parties have arrived. With regard to the damage to the hull I am not even asked to decide that matter. What I was asked to decide, and what I do decide, is this, that if whoever determines this matter for the parties finds that there was damage caused by the absence of ice-breaker assistance and the prolongation of the voyage, then the plaintiffs are entitled to recover in respect of that damage to the ship, and also, if whoever determines the questions finds that on the 10th Jan. the *Asko* sustained damage which she would not have sustained had she been proceeding with an ice-breaker in attendance and assisting her, then they are to recover in respect of that.

There will therefore be judgment for the plaintiffs for an amount to be ascertained in the manner I have already mentioned.

Solicitors for the plaintiffs, *Bottcrell* and *Roche*, for *Sanderson* and *Co.*, Hull.

Solicitors for the defendants, *Wynne-Baxter* and *Keeble*.

Nov. 24, 25, 1932.

(Before Roche, J.)

Fitzgerald v. Owners of Steamship Lona. (*a*)

Charter-party—Discharge of cargo—Consignees to select method of discharge—Selected method frustrated by strike—Duty to select alternative method—Provision of lighters without crew—Discharge by ship by only available method.

A charter-party provided for various alternative methods of discharging cargo, the consignees having the right to select any one or more of these methods if customary and available at the time of discharge. The consignees selected discharge into lighters and sent lighters alongside the ship to take delivery. Before delivery could be made this method of discharge was rendered impossible by a strike of lightermen, and the shipowners discharged on the quay, which was the only other method customary at the port in question. In an action by the consignees to recover loss they had sustained by the adoption of this method of discharge,

Held, first, that if lighters were available at first and then ceased to be available, the consignees' right to insist on discharge into lighters ceased. Secondly, that the consignees were bound to supply both lighters and crew. It was not sufficient to supply lighters without men or with men who were unwilling to perform the work. Thirdly, that, as one of the only two customary methods of discharge was not available, the ship was entitled to adopt the only other customary method without notifying the consignees.

The plaintiffs in this action were the owners of a quantity of timber shipped from the Baltic to London on the defendants' ship *Lona*. The claim was for damages for an alleged breach of contract caused by the defendants having discharged the cargo in a manner differing from that provided for in the charter-party.

The plaintiffs held five bills of lading in respect of their goods. The bills of lading incorporated the terms of the charter-party, which was in "Baltwood" form and contained the following clause (clause 15):

> "The cargo shall . . . be discharged by the vessel in the customary manner as fast as the vessel can deliver during the ordinary working hours of the port on to the quay, and (or) into lighters and (or) craft, and (or) rafts, and (or) wagons, and (or) on to bogies, and thereon stowed and (or) stacked as customary at the port of discharge, the consignees having the right to select any one or more of these alternatives if customary or available at the time of discharge."

The *Lona* arrived at the Surrey Commercial Docks on the 1st Jan. 1932. At that date a strike of lightermen was in progress at the Port of London, the position being that there were two unions of lightermen, one of which, known as the "white ticket" union, had settled their dispute with the owners and had returned to work; whilst the other, the "blue ticket" union, was still on strike.

The plaintiffs selected as the method of discharge delivery into lighters, which they said were available when the ship arrived at the docks, and their complaint was that the defendants ignored this selection and delivered on the quay, whereby extra charges were incurred. Having made their selection at a time when lighters were available, they contended that they were not obliged to make a fresh selection if that method became unavailable during the progress of the discharging. The defendants said that at the material date the method of discharge into lighters was not available. They admitted that the plaintiffs had provided lighters, but they were manned by members of the "blue ticket" union, and the stevedores, acting on the instructions of their union not to become involved in the lighterman's dispute, refused to discharge into them. The defendants had therefore no alternative but to land the goods on the quay, which they accordingly did.

Dickinson, K.C. and *Stranger* for the plaintiffs. The terms of the charter-party require the consignees to make their selection before discharge begins. The main dispute between the lightermen and their employers had been settled at the date

(*a*) Reported by V. R. Aronson, Esq., Barrister-at-Law.

when the selection was made, and the strike of the "blue ticket" men did not begin until later. Discharge into lighters was therefore possible when the selection was made. Once a consignee has selected his method of discharge he cannot be compelled to change it. The true construction of the clause is that discharge may be suspended, but at the cost of the ship. If that contention is wrong and the method must be selected each time a parcel comes up from the hold, what is meant by a selection of lighters? If that means that the consignee must provide both barges and men to work them, then the plaintiffs have not discharged their duty. But we submit that all the plaintiffs had to do was to supply barges, and in fact there were barges close to the ship all the time. Further, the defendants should not have adopted a method of discharge on their own responsibility, but should have given us an opportunity of making a fresh selection.

Le Quesne, K.C. and *McNair* for the defendants.—The plaintiffs never exercised an option at all. The time contemplated for exercise of the option was the time when the particular parcels of cargo were ready for discharge, and by that time discharge by lighter had become impossible, and the only possible method was by discharge on to the quay. At this dock there were only two customary methods of discharge, into lighters and on to quay, and as only one was available at the material time there was no option which was capable of being exercised.

Dickinson, K.C. replied.

Roche, J.—This action raises an interesting point upon the construction and effect of a charter-party used for the importation of timber into this country, and upon the methods of discharge adopted for the delivery of timber cargoes in the Port of London. The action is between the plaintiffs, who were the holders of five bills of lading, and the defendants, owners of a foreign steamship called the *Lona*. The plaintiffs' claim is that they shall be repaid certain landing and other charges they have incurred, and expenses they have been put to, in respect of the cargo covered by their bills of lading. The grounds upon which the plaintiffs seek to recover the sums of money in question are that they, the plaintiffs, allege that the shipowners have broken their contract with them, inasmuch as they have discharged on the quay and have thereby given rise to the extra expense, whereas they ought either to have discharged into lighters, or to have given the plaintiffs notice before they did what they, in fact, did do, namely, discharge on the quay.

Now the facts are as follows. The *Lona*, having loaded a cargo of timber at Norsundet, in Scandinavia, arrived with that cargo in London, and was ready to discharge by the 1st Jan. 1932. At that time there had been an agreement between the employers in the Port of London and most of the unions which represent various grades of dock and port labour for a reduction in wages. One of the two unions in which lightermen, one of the classes of labour concerned, are enrolled was not a party to the agreement. During the discharge those men, who are described as "blue ticket" men, struck work. The plaintiffs were desirous of securing the discharge into lighters and had made arrangements to that effect. They sent three firms of lightermen to take delivery of the goods, and some of the men in charge of those lighters were "blue ticket" men, and, of course, they struck. The lightermen belonging to the other union were instructed not to strike, as was natural, since those in the executive office of their union had agreed to the reduction; but, nevertheless, as is not infrequently the case, some of these men struck also, partly out of sympathy with the "blue ticket" men, and partly, I suppose, out of a natural disinclination to accept a reduction in their pay. Further, the men who were engaged on board the ship, the stevedores, became involved to a certain extent. For some time they were unwilling to work, and at a later stage they were told not to involve themselves in this very confused dispute, and only to discharge into lighters where there was a union man, a man with a "white ticket," in charge.

In those circumstances the cargo which the plaintiffs would have got into the various craft of the three firms of lightermen, was put on to the quay, it being possible to discharge on to the quay when it was impossible to discharge into lighters; and thereby the landing charges were incurred, which are the matters complained of in this action.

Before examining the documents upon which the solution of this controversy depends, I think my judgment will be more intelligible if I mention quite broadly what the contractual position was, and what the contention of the plaintiffs is in this matter. Broadly speaking, the contractual position was that the consignees had the right of choice between various methods of discharge and that the shipowners were obliged to discharge by that method if it was available. The contentions of the plaintiffs with regard to the matter are threefold. They say, first, that the charter-party meant that if lighters were available then the method of discharge by lighters was available, and that the question of the men who manned the lighters was not really material to the question of the availability of the lighters. That last question, in regard to men and the effect of their absence, was a matter not covered by the discharge clause, but by the strike clause. Secondly, the plaintiffs say that the material clause, clause 15 of the charter-party, contemplated selection or election by the consignees, and that it contemplated that that should take place before the discharge began; or, at all events, that the consignees might make it before the discharge began, and if they made it they were not obliged to change it. Of course, it was conceded that at the time they made their choice the chosen method had to be available, but it was said that if it was so chosen then the choice was within the rights of the consigness, and it was irrevocable in the sense that they were not obliged to change it afterwards. Thirdly, the plaintiffs say that the shipowners had no right when the circumstances arose which did arise on the 4th Jan., suddenly to change without notice into discharging on to the quay, and that they ought to have given both notice and opportunity sufficient to allow the consignees to change their plans for themselves.

Now in the light of these contentions I can turn to the charter-party, which is for this purpose the material document. The contract between the parties is contained in the bills of lading, but inasmuch as the bills of lading incorporated all the terms and conditions of the charter-party, it is sufficient to deal with the matter as if it fell under the charter-party itself. Clause 1 of the charter-party provides for the carriage and for the payment of freight and other charges, and it provides, partly in express words and partly by reference to a schedule, for the incidence and payment of other and further charges if a more expensive method of discharge is chosen than discharge on to a quay. The next material clause is clause 15, which provides for discharge by the shipowner and for discharge in the customary

manner in ordinary working hours. Then follow these words: "On to the quay and (or) into lighters and (or) craft and (or) rafts . . . and thereon stowed and (or) stacked as customary at the port of discharge, the consignees having the right to select any one or more of these alternatives if customary or available at the time of discharge."

Then there follow further stipulations as to the payment of expenses and another reference to the schedule of apportionment, which deals with the various ports and provides what is to be done if the ship is discharged by hand or by ship's tackle. It provides for it being roughly stacked on the quay and for it being stowed if it is discharged into lighters. Then it stipulates what is to be paid in respect of these various operations.

The last clause which I think is relevant to this matter, clause 20, is one on which much reliance was placed by the plaintiffs. That clause provides for the payment of freight and charges in various proportions, or percentages, which involve, so it is said, the charges and the amounts being accurately known at the time when the discharge begins, or before it begins. The importance of that is that it involves the selection or election of the method of discharge before it begins; otherwise, it could not be known how much the charges would be and it could not be known how much a given percentage of the freight and charges would amount to.

Those being the relevant clauses of the charter-party and the contentions of the plaintiffs, I now proceed to deal with them. I think my judgment will be most easily understood if I deal with the last of them first, namely, the question whether the shipowner could act as he did without further notice than was given in this case and without allowing further time for the consignees to act for themselves. In my view, this charter-party provides for the doing of all the work of discharging by the shipowners and not by the consignees, and it was not merely the right but the duty of the shipowner to incur these charges, and to land the goods, if that was the proper way of dealing with them. Therefore no question arises of allowing the consignees the opportunity of themselves doing that which in fact the shipowner did.

That being the scheme of this charter-party, I have to consider the main contention, namely, that the consignees had a right to select their method of discharge, had a right to make their selection before the discharge began, and had neither right nor obligation to change it afterwards. I think that that is a mistaken view of clause 15. In my opinion, this is not a matter of election at all and the principles which govern election do not apply to it. I do not suppose the parties meant to exclude this doctrine by an inadvertent use of the word "select," but I think that word is well chosen. In my judgment the right or the duty of the consignees was not to declare an election at any specified time. No doubt there might be business necessity and there may have been implications in the charter-party that reasonable notice should be given as to what course it was proposed to adopt in order that the shipowner on his part might make appropriate preparations; but so far as the clause itself is concerned, the right of the consignees was to have the cargo discharged in such method as was available at the time when it had to be discharged. In my opinion, if the discharge occupied a fortnight and the method of discharge into lighters was available during the first week and then ceased to be available, the right of the consignees to insist upon discharge into lighters would cease and their right would then be limited to discharge in the method which was in fact available. The words "at the time of discharge" and the fact that obviously the method to be adopted is at the choice of the consignees, point in the direction of the conclusion which I have adopted. I think the defendants' argument as to the effect of conferring the choice upon the consignees points very strongly in that direction. As to the argument of the plaintiffs based upon clause 20, I think that clause is quite capable of being both read and carried out without involving the necessity that there should be an irrevocable fixing of the amount of charges to be incurred before the discharge began. No doubt the payments on account of freight and charges would have to be made, as to the earlier of them, upon the basis of the charges which would accrue due if the method of discharge then contemplated and declared were adopted and followed throughout, but there is nothing in clause 20 to prevent an adjustment at the end of the discharge in respect of any change in the amount of charges, any more than there is to prevent an adjustment of a matter which is expressly dealt with in clause 20 itself, namely, an adjustment as to the amount of cargo in respect of which freight had to be paid.

That being the construction I adopt of clause 15, it remains for me to deal with one other matter of construction and possibly one or two questions of fact which I have not dealt with hitherto. The point of construction is whether, if lighters are available but men are not available, clause 15 allows the consignee to claim discharge by means of lighters. The answer to that question is, in my judgment, emphatically in the negative. The clause reads "the consignees having the right to elect any one or more of these alternatives." Now, the alternatives are not lighters, but the method of discharge into lighters, and that method is not available inasmuch as the lighter is not equipped and furnished with the necessary crew.

Now I can pass to consider the outstanding questions of fact which arise out of the contention that the lighters, or some of them, were in fact equipped with a crew. As to two of the three firms which had sent lighters for the plaintiff to the ship, the men who were sent with them were in the "blue ticket" union, which had never agreed to the reduction of wages, and its men were officially on strike. Those lighters were not equipped with men and were not available. The lighters had to be taken to the ship and away from the ship, and if some of them were near enough to the ship so as to be properly dealt with by the shipworkers and not by the lightermen, they were yet not equipped as lighters available unless they had lightermen available to take them away from the ship. [His Lordship then dealt with some questions of detail which are not material to this report, and continued:] For these reasons I hold that at the material times the consignees did not afford an available method of discharge and that therefore the shipowners were entitled to discharge by the only method which was available, namely, on to the quay. Accordingly the shipowners have not committed any such breach of contract as is alleged against them, and the claim for damages fails.

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

Solicitors for the defendants, *Botterell and Roche.*

Tuesday, Dec. 20, 1932.

(Before MacKinnon, J.)

White Sea Timber Trust Limited v. W. W. North Limited. (*a*)

Sale of goods—Conditions in contract—Provision against rejection of goods specified—Goods to be carried " under deck "—Portion carried as deck cargo—Buyers' right to reject.

By a written contract sellers sold to buyers a quantity of timber for shipment from Archangel to Hull. It was a term of the contract that the whole of the goods were to be shipped under deck. About one-quarter of the whole quantity were in fact shipped as deck cargo, in breach of the above term. The contract further provided that " the buyers shall not reject the goods herein specified, but shall accept or pay for them in terms of the contract against shipping documents."

Held, that the words " herein specified " meant " herein described." Part of the description of the goods was that they were to be carried on deck. As a portion of them had been carried as deck cargo, they did not tally with the description, and the buyers were therefore entitled to reject the whole.

Meyer v. Kivisto (142 *L. T. Rep.* 480) *followed.*

Special case stated by an umpire. By a written contract dated the 17th June 1932 White Sea Timber Trust Limited sold to W. W. North Limited a quantity of timber for shipment from Archangel. It was a term of the contract that the whole of the timber should be shipped " under deck." The contract contained an arbitration clause (clause 15) which, after providing that all disputes should be settled by arbitration, continued : " Buyers shall not reject the goods herein specified, but shall accept or pay for them in terms of contract against shipping documents." The timber was shipped in due course from Archangel to Hull, part of it being carried as deck cargo in breach of the abovementioned condition. The sellers tendered four separate bills of lading, three for the goods carried under deck and one for the goods carried as deck cargo. The buyers refused to accept any of the bills of lading and claimed to reject the whole shipment. They contended that goods carried on deck were not of the contract description, and that as part of the goods tendered were not of the description of the goods sold they were entitled to reject the whole. The sellers contended that under the terms of the contract the buyers were not entitled to reject, but could only claim damages for any loss which they could prove they had suffered.

Van den Berg, K.C., and *Knight*, for the sellers.

Le Quesne, K.C., and *McNair*, for the buyers.

The arguments sufficiently appear from the judgment.

MacKinnon, J.—In this case White Sea Timber Trust Limited sold certain goods on a contract of sale in c.i.f. terms to W. W. North Limited, of Hull. In pursuance of that contract the sellers tendered to the buyers four bills of lading for four separate parcels shipped from Archangel in the steamship *Horden*. The buyers refused to accept these bills of lading on the ground that one of the four parcels, specified in one of the bills of lading, was expressed to be shipped " under deck." It was part of the terms of the contract between the parties, not written out in the form of contract, but contained in a contemporaneous letter addressed by the sellers to the buyers and admittedly forming part of the contract, that the goods sold were to be shipped from Archangel under deck. The sellers contested the right of the buyers to reject these goods, and the matter comes before me on a special case stated by an umpire.

The buyers under the ordinary law of the sale of goods would clearly be entitled to reject these bills of lading, because they were not in accordance with the contract which calls for shipment under deck, and one of the bills tendered was for shipment on deck. But the sellers contended that that common law right of the buyers is taken away from them by reason of the provisions of clause 15, which reads as follows :

> " The buyers shall not reject the goods herein specified but shall accept or pay for them in terms of the contract against shipping documents."

The real question here is whether these goods, tendered on these documents, were goods " herein specified." In the first place I think the suggestion of Mr. van den Bergh that " herein specified " refers to that part of the written matter which is put in the form of contract under the word " specification " and that part only, is too narrow. I do not think " herein specified " refers as a matter of location to that printed word " specification " in the contract form, but that it has an adequate and wider meaning. " The goods herein specified " can be described as specified not only in the specification, but also in other parts of the contract, and I think that in this case they were described in the attached letter and not upon any part of the form of contract. If in the upper part of this form of contract there had been written in " to be shipped under deck," then I think that would become part of the description of the goods which were to be sold.

In the result, inasmuch as one part of these goods—one-quarter of the whole parcel—were on deck and were shipped under a bill of lading specifying that they were on deck, I think they were not in accordance with the contract, that they were not the goods " herein specified " and that the buyers had the right to reject. It is not necessary to say any more than that. In so deciding I am following the principles laid down by the Court of Appeal in *Meyer Limited* v. *Kivisto* (142 L. T. Rep. 480), and the case cannot be distinguished from *Meyer Limited* v. *Travaru A./B.H. Cornelius of Gamleby* (74 S. J. 466). There was a possible point for argument in the latter case which does not arise here, because apparently in that case, although the goods were on deck, the bill of lading described them as under deck, and from that I conceive an argument might have been put forward (which I am told was not) that, as a bill of lading for goods under deck had been tendered, the contract had been fulfilled, and that the buyers had in a c.i.f. contract a right of action for the non-delivery of goods under deck by the shipowners. That does not arise in this case because, as appears in the award, the bill of lading for this

(*a*) Reported by V. R. Aronson Esq., Barrister-at-Law.

one parcel out of four expressly specified that the goods were on deck.

The result is that the award must be upheld in the terms of the special case, and the sellers must pay the costs of the arbitration and of the hearing in this court.

Solicitors for the sellers, *Wynne-Baxter* and *Keeble.*

Solicitors for the buyers, *Pritchard* and *Sons,* for *Andrew M. Jackson* and *Co.*, Hull.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Dec. 13, 14 *and* 15, 1932.

(Before LANGTON, J. and Elder Brethren.)

H.M. Submarine Rainbow. (*a*)

Collision—Portland Harbour—Dockyard Regulations—Vessel "about to enter" from seaward one of the channels between the breakwaters"—Order in Council as to the Dockyard Port of Portland, Sched. II., reg. 5 (1931, *No.* 176).

By the regulations for the navigation of Portland Harbour contained in the Order in Council as to the Dockyard Port of Portland (No. 176 *of* 1931), *Sched. II., reg.* 5, *it is provided that when any vessel is "about to enter from seaward any of the channels between the breakwaters, any vessel proceeding outward by the same channel shall not enter the same channel until the before mentioned vessel, or vessels, shall have passed in." The Dockyard Regulations further provide that all vessels shall observe the steering and sailing rules set forth in the Regulations for Preventing Collisions at Sea except so far as they are affected by the Dockyard Regulations.*

Held, that reg. 5 *was not limited in its application to vessels approaching the entrance in such a manner as to indicate clearly and definitely an intention to enter, and that an out-going vessel was not excused from acting under the regulation because the incoming vessel was approaching the entrance at so fine an angle that her intention to enter the harbour might not be clearly manifest.*

Held, further, that the duty of an in-coming vessel was not limited to keeping her course and speed, but that she was bound, if necessary, to keep a look-out for out-going vessels.

COLLISION ACTION.

The plaintiffs, owners of the paddle steamship *Premier*, claimed for damages occasioned by a collision between the *Premier* and His Majesty's submarine *Rainbow*, under the command of the defendant, Lieut.-Commander Thomas Yeoman, R.N. The collision took place in the North Ship Channel entrance to Portland Harbour on the afternoon of the 28th June 1932 in fine clear weather.

The facts and contentions of the parties in so far as material to this report appear from the judgment of Langton, J.

E. Aylmer Digby, K.C. and *Hayward* for the plaintiffs.

Alfred Bucknill, K.C. and *Carpmael* for the defendants.

Langton, J.—This case arises out of a collision which took place on the 28th June 1932 between a very ancient paddle steamer constructed before 1850, the *Premier*, and H.M. submarine *Rainbow*.

That a collision of this sort should have occurred in broad daylight, in a place where one would imagine everyone would be specially on the alert, is a circumstance which excites some surprise, and the first matter for determination is as to the rules applicable to the place where the collision occurred. [His Lordship dealt in detail with the evidence as to the place of collision, and said that he thought it happened in the North Ship Channel entrance to Portland Harbour, "slightly to the southward of mid-channel about 200ft. to 300ft. outside of a line drawn between the breakwaters, if heads 'B' and 'C' are taken as the terminals of the line."]

Having arrived at this determination I have to see what are the rules applicable. Under the Dockyard Ports Regulation Act 1865, Orders in Council are from time to time made, and in 1931 an Order, No. 176, was issued, laying down in a schedule certain rules with regard to the navigation of the Dockyard Port. Summarising the rules applicable to this case, No. 1 provides that "all vessels shall observe the steering and sailing rules set forth in the Regulations for Preventing Collisions at Sea, except so far as they are affected by the regulations hereinafter contained." It is important, therefore, to notice that, although the Sea Regulations are to a certain extent superseded, they are only superseded to the extent mentioned in the Order, and are otherwise preserved in force. Rule 5 of the Dockyard Regulations is in these terms, again citing only the material part: "When any vessel or vessels are about to enter from seaward any of the channels between the breakwaters, any vessel proceeding outward by the same channel shall not enter the same channel until the before-mentioned vessel, or vessels, shall have passed in." There are also a series of signals which have to be used and displayed if one of H.M. ships desires to take advantage of a priority which is granted to H.M. ships to pass out ahead of other vessels. It suffices to say that in this case the submarine was displaying no such signals.

I have, therefore, to construe rule 5 in connection with the ordinary Rules for Preventing Collisions at Sea, and, as laid down by the Order in Council, it seems to me that rule 5 is an overriding rule, assuming, of course, that it applies at all in the circumstances of this case.

The *Premier* was coming from Weymouth on a course of S. by E. with some 150 passengers, and seeking to enter the North Ship Channel. The *Rainbow*, which had been at anchor in the north-west corner of the harbour, had left her anchorage and had got upon a course of 90 degrees true to go out of the same channel. In these circumstances, the vessels are found in collision at the place I have indicated, a large hole being made in the starboard side of the *Premier*, commencing some 25ft. from her stem. Very fortunately no lives were lost, but as the hole was only some 5in. or 6in. forward of

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

the only bulkhead with which this old vessel was provided, it is apparent that the margin of safety was small. The *Premier* makes this trip two or three times a day in the summer-time laden with passengers, and if, therefore, there is anything in the way in which she carries out her work which calls for criticism, or if there is any doubt as to what rules apply in the user of this channel, it is of the highest importance that that doubt should be removed and that her duty should be carried out differently.

There is a great conflict of evidence, but broadly the cases are these. The plaintiffs say that the *Premier* came down as she always came ; that she had the right of way ; that she came down to within two to two-and-a-half ship's lengths of " C " head—the head of the northern arm of the breakwater—and that she was about to alter her helm, as she always did, to make her turn to enter the harbour. The turn which she would have to make coming upon that course was something between five and six points.

The case for the *Rainbow* is that she was going out to practise torpedo firing and that a vessel's mast was seen over the northern arm of the breakwater, that it was not thought she was coming in, but that she was going either to the north-eastern breakwater or to the East Ship Channel, or possibly to sea, so the *Rainbow* held on her way. A long warning blast was blown, and then, when, to the surprise of those on board the *Rainbow*, it was seen that the *Premier* was coming in, three short blasts were blown, the engines were put full speed astern, and afterwards the helm was put hard-a-port to try to avoid the collision. The officer in charge of the *Rainbow* put his case as high as this. He claimed that the *Premier* had no right to come into the harbour in the way she did ; that it was unseamanlike and not the proper way to approach the narrow space between the breakwaters. The proper way, he said—if she must come upon that course—was to come up to a distance of, say, two cables from " C " head, and then to " shape up properly," as he called it, so that she could enter on her right side. Really, Lieut.-Commander Yeoman's case was " I am not to blame for this ; the *Premier* misled me ; she had no right to come in that way, and is to blame because she attempted to make her entrance in a thoroughly unseamanlike way." In support of that contention Mr. Bucknill framed an argument upon the construction of rule 5, which he contended did not apply. He argued that a vessel " about to enter " from seaward of the channels meant a vessel going to enter the water which might reasonably be taken to be included in the word " channels " ; and that the *Premier*, coming in the way she did, was never in a position of " about to enter." The word " about," he contended, must mean that the ship shall approach so as to indicate clearly and definitely her intention to enter, and that the *Rainbow* was under no duty to act until the intention of the *Premier* was made manifest. " Channels," he said, " ought not to be limited to the water between the heads, but must be taken to include so much of the water as lies on either side of the imaginary line as a vessel properly navigated can be reasonably expected to use." In support of this argument Mr. Bucknill cited *The Kaiser Wilhelm der Grosse* (10 Asp. Mar. Law Cas. 361, 504 ; 96 L. T. Rep. 238 ; 97 L. T. Rep. 366 ; (1907) P. 36, 259) and *The Harvest* (5 Asp. Mar. Law Cas. 546 ; 54 L. T. Rep. 274 ; 11 Prob. Div. 14, 90). Both these cases are authorities for the proposition that a vessel entering a narrow channel is not to run across it close to pier-heads or other objects which define the channel, but must get on to her right side. But in this case the *Premier* was not seeking to run across the pier-heads in order to get on to her right side ; she was passing, as she says, within two to two-and-a-half lengths of " C " head, but " C " head was on her right side, if one construes this entrance—as I have no doubt it should be construed—as a narrow channel. I do not think, therefore, that either of these decisions assist very much in elucidating the meaning of what seems to be a somewhat fine-drawn regulation.

To my mind, the plain meaning of rule 5 is that a vessel leaving the harbour is to hold back and not get into the waterway between the piers, whether that waterway is considered as an imaginary line, or as two cables one side of the line or both sides of the line, until any vessel which is seeking to enter the harbour has passed in. I think Mr. Bucknill's argument gives too literal a meaning to the words " channel between the breakwaters," and ignores the later words of the sentence : " Vessel, or vessels, shall have passed in." It seems to me obvious, if one takes the whole of that sentence, that the rule is not purporting to lay down how vessels shall, or shall not, approach the channel for the harbour, but is purporting to lay down in the clearest language that the outgoing vessel shall be the give-way vessel, and that the vessel coming in shall have the right of way. Mr. Digby, for the plaintiffs, put the case still higher, for he was disposed to claim that the incoming vessel was in the same position as a stand-on vessel under the crossing rule. That view does not commend itself to me. A stand-on vessel under the crossing rule has a duty to keep her course and speed. I do not think that a vessel entering Portland Harbour between the breakwaters has any duty to keep her course and speed. Indeed, before I have finished giving my judgment, it will be quite clear that my view is very different to that. I think the interpretation which Mr. Bucknill seeks to give the rule is much too narrow, and that the broad sense of the rule is that the vessel coming out must keep back and keep out of the way of the vessel that is coming in.

The *Rainbow* was the vessel coming out and the *Premier* was coming in. A collision took place in what may fairly be called one of " the channels between the breakwaters," and when one reads this rule and finds an outgoing vessel in such a place in collision with a vessel coming in, it seems to me that there can be no doubt that, up to a point at least, the outgoing vessel must be to blame. When I add that it is agreed that at the moment of collision the *Premier* was stationary and the *Rainbow* had some speed, varying in estimate from four to five knots on the one side and two knots on the other, it is clear that the *Rainbow*, if my view of the rule is correct, must be held to blame.

[The learned judge then considered the navigation of the two vessels, and held that each vessel was to blame for bad look-out. He apportioned as to two-thirds to H.M.S. *Rainbow* and as to one-third to the *Premier*.]

Solicitors : *Waltons* and *Co.* ; *The Treasury Solicitor*.

Judicial Committee of the Privy Council.

July 5, 7, 8 and 28, 1932.

(Present: Lords Tomlin, Thankerton, Macmillan and Wright, and Sir George Lowndes.)

Croft v. Dunphy. (*a*)

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Constitutional law—Shipping—Customs—Seizure of vessel hovering within twelve marine miles of coast of Canada—Customs Act (R. S. Can. 1927, c. 42, as amended by 18 & 19 Geo. 5, c. 16), ss. 151, 207—British North America Act 1867 (30 & 31 Vict. c. 3), s. 91.

The Imperial Parliament, in conferring powers on the Dominion Parliament by sect. 91 of the British North America Act 1867, to legislate as to customs, cannot be supposed to have withheld from it power to enact provisions similar in scope to those which have long been part of Imperial customs legislation and presumably are regarded as necessary to its efficacy, therefore sect. 151, sub-sect. (7), of the Customs Act, R. S. Can. 1927, c. 42, as amended (1928) c. 16, in so far as it enacts that "territorial waters of Canada" shall, for the purposes of sects. 151 and 207 of the Act as so amended (examination and seizure in respect of vessels hovering in territorial waters of Canada) include in the case of any vessel registered in Canada, the waters within twelve marine miles of Canada, is intra vires.

Decision of the Supreme Court of Canada (1931) *S.C.R.* 531, *reversed.*

Appeal by the defendant, by special leave, from a judgment of the Supreme Court of Canada (Duff, Rinfret, and Lamont, JJ.—Newcombe and Cannon, JJ. dissenting) dated the 30th June 1931, reversing the unanimous judgment of the Supreme Court of Nova Scotia, *in banco*, dated the 10th May 1930, affirming the decision at the trial (Paton, J. with a jury), whereby the respondent's action had been dismissed.

The action was commenced in the Supreme Court of Nova Scotia by the respondent, a resident of North Sydney, in Nova Scotia, as owner of the schooner *Dorothy M. Smart* and her cargo, against the appellant, the commander of Patrol Boat No. 4, in the employ of the Department of National Revenue of Canada, for the return of the said vessel and her cargo, which had been seized by the appellant as master of said patrol boat eleven and a half miles from the coast of Nova Scotia, for an alleged violation of the Customs Act of Canada, or in the alternative for payment of the value of the vessel and cargo and damages for their detention.

The question raised on this appeal related to the validity of sects. 151 and 207 of the Customs Act of Canada (R. S. Can. 1927, c. 42), as amended by 18 & 19 Geo. 5, c. 16, 1928, an Act to amend the Customs Act, ss. 1 and 3, which authorised, *inter alia*, the seizure of any vessel registered in Canada in the circumstances provided for in the sections within twelve marine miles of the territory of the Dominion of Canada.

The provisions of the sections in question are as follows:

"151. (1) If any vessel is hovering in territorial waters of Canada, any officer may go aboard such vessel and examine her cargo and may also examine the Master or person in command upon oath touching the cargo and voyage and may bring the vessel into port. . . . (6) The evidence of the officer that the vessel was within territorial waters of Canada, shall be *primâ facie* evidence of the fact. (7) For the purposes of this section and section two hundred and seven of this Act, 'Territorial waters of Canada' shall mean the waters forming part of the territory of the Dominion of Canada and the waters adjacent to the Dominion within three marine miles thereof, in the case of any vessel, and within twelve marine miles thereof, in the case of any vessel registered in Canada.

"207. (1) If upon the examination by any officer of the cargo of any vessel hovering in territorial waters of Canada, any dutiable goods or any goods the importation of which into Canada is prohibited are found on board such vessel with her apparel, rigging, tackle, furniture, stores and cargo, shall be seized and forfeited . . . ."

The Supreme Court of Canada (Duff, Rinfret, and Lamont, JJ.; Newcombe and Cannon, JJ. dissenting) held that the sections in question were *ultra vires*.

The case is reported (1931) S. C. R. 531.

J. McG. Stewart, K.C. and *Frank Gahan* for the appellant.

D. A. Cameron, K.C. and *Horace Douglas* for the respondent.

The considered opinion of their Lordships was delivered by

Lord Macmillan.—On the 10th June 1929 the schooner *Dorothy M. Smart* sailed for "the high seas" from the French island of St. Pierre with a cargo on board of rum and other liquors, which are dutiable under Canadian law. The vessel was registered in Nova Scotia, and with her cargo was the property of the respondent, who is resident in Nova Scotia.

On the 13th June 1929 the schooner, when at a distance of eleven and a half miles from the coast of Nova Scotia, was boarded by the appellant, an officer in the customs service of the Canadian Government. The cargo having been found to consist of dutiable goods, the vessel and cargo were seized and taken into port.

The validity of the seizure, which was effected in pursuance of powers conferred by the Customs Act of Canada (R. S. Can. 1927, c. 42), as amended by 18 & 19 Geo. 5, c. 16, is challenged in the present proceedings on the broad ground that the Parliament of the Dominion in conferring the powers in question exceeded its legislative competence.

The enactments impugned are contained in sects. 151 and 207 of the statute as amended.

Sect. 151 provides as follows:

"(1) If any vessel is hovering in territorial waters of Canada any officer may go on board such vessel and examine her cargo and may also examine the master or person in command upon oath touching the cargo and voyage and bring the

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

vessel into port. . . . (7) For the purposes of this section and section two hundred and seven of this Act 'Territorial waters of Canada' shall mean the waters forming part of the territory of the Dominion of Canada and the waters adjacent to the Dominion within three marine miles thereof in case of any vessel and within twelve marine miles thereof in the case of any vessel registered in Canada."

Sect. 207 enacts as follows:

"(1) If upon the examination of any officer of the cargo of any vessel hovering in territorial waters of Canada any dutiable goods or any goods the importation of which into Canada is prohibited are found on board such vessel with her . . . cargo shall be seized and forfeited. . . ."

The question accordingly is whether it was within the power of the Dominion Parliament to pass such legislation purporting to operate to a distance of twelve miles from the coast of Canada. To test this question the respondent as plaintiff below initiated proceedings in the Supreme Court of Nova Scotia against the customs officer who had seized his vessel and cargo, claiming their return and damages for their detention on the ground of the illegality of the seizure. The trial judge upheld the validity of the legislation and consequently of the seizure, and his decision was affirmed by five judges of the Supreme Court of Nova Scotia *in banco*. On an appeal being taken to the Supreme Court of Canada this judgment was reversed by a majority consisting of Duff, Rinfret and Lamont, JJ.; Newcombe and Cannon, JJ. dissenting. The matter now comes before their Lordships on the defendant's appeal.

It may be accepted as a general principle that States can legislate effectively only for their own territories. To what distance seaward the territory of a State is to be taken as extending is a question of international law upon which their Lordships do not deem it necessary or proper to pronounce. But whatever be the limits of territorial waters in the international sense, it has long been recognised that for certain purposes, notably those of police, revenue, public health, and fisheries, a State may enact laws affecting the seas surrounding its coasts to a distance seaward which exceeds the ordinary limits of its territory. There is the weighty authority to this effect of Lord Stowell, who, when Sir William Scott, said in the case of *Le Louis* (2 Dodson 210, at p. 245): "Maritime states have claimed a right of visitation and enquiry within those parts of the ocean adjoining to their shores, which the common courtesy of nations has for their common convenience allowed to be considered as parts of their dominions for various domestic purposes, and particularly for fiscal or defensive regulations more immediately affecting their safety and welfare. Such are our hovering laws, which within certain limited distances more or less moderately assigned, subject foreign vessels to such examination."

The special latitude of legislation in such matters is a familiar topic in the textbooks on international law. Thus Sir Travers Twiss, in his treatise on International Law in the volume dealing with Peace, says, at p. 265, that a State in matters of revenue and health "exercises a permissive jurisdiction the extent of which does not appear to be limited within any certain marked boundaries further than that . . . it can only be exercised over her own vessels and other such foreign vessels as are bound to her ports."

In Halleck's International Law, 3rd edit., vol. 1, p. 157, it is pointed out that beyond the generally accepted limits of territorial waters "States may exercise a qualified jurisdiction for fiscal and defence purposes—that is, for the execution of their revenue laws and to prevent 'hovering on their coasts.'"

Again, in Hall's Foreign Powers and Jurisdiction of the British Crown, it is stated in par. 108 that "the justice and necessity of taking precautionary measures outside territorial waters, in order that infractions of revenue laws shall not occur upon the territory itself, is in principle uncontested." Without further multiplying quotations it may be sufficient to add references to Phillimore's International Law, par. 198, and Wheaton's International Law, 6th edit., vol. 1, p. 367.

But while the Imperial Parliament may be conceded to possess such powers of legislation under international law and usage, the respondent contends that the Parliament of Canada has no such powers. It is not contested that under the British North America Act the Dominion Legislature has full power to enact customs laws for Canada, but it is maintained that it is debarred from introducing into such legislation any provisions designed to operate beyond its shores or, at any rate, beyond a marine league from the coast.

In their Lordships' opinion the Parliament of Canada is not under any such disability. Once it is found that a particular topic of legislation is among those upon which the Dominion Parliament may competently legislate as being for the peace, order and good government of Canada or as being one of the specific subjects enumerated in sect. 91 of the British North America Act, their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully Sovereign State.

In the well-known case of *Reg.* v. *Burah* (3 App. Cas. 889), Lord Selborne, in expressing the views of the board in the comparable instance of India, uses, at p. 904, this very significant language: "The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe those powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation as large, and of the same nature, as those of Parliament itself." Again, speaking of the Provincial Legislature of Ontario, Sir Barnes Peacock, in giving the judgment of this board in *Hodge* v. *The Queen* (9 App. Cas. 117, at p. 132; 50 L. T. Rep. 301, at p. 304), said: "When the British North America Act enacted that there should be a Legislature for Ontario, that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in sect. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow." To the Dominion Parliament these words apply *a fortiori*, with the substitution of sect. 91 for sect. 92. Their Lordships also recall the language used by Lord Halsbury, L.C., in expressing the views of the board on the power of the Dominion Parliament to legislate for the peace, order, and good government of Canada, in the case of *Reg.* v. *Riel* (10 App. Cas. 675, at p. 678; 54 L. T. Rep. 339): "The words of the statute," said his Lordship, "are apt to authorise the utmost discretion of enactment for the attainment of the objects pointed to."

Legislation of the Imperial Parliament, even in contravention of generally acknowledged principles of international law, is binding upon and must be enforced by the courts of this country, for in these courts the legislation of the Imperial Parliament cannot be challenged as *ultra vires* (per Dunedin, L. J.-G. in *Mortensen* v. *Peters*, 1906, 8 F. (J. C.) 93, at p. 101). It may be that legislation of the Dominion Parliament may be challenged as *ultra vires* on the ground that it is contrary to the principle of international law, but that must be because it must be assumed that the British North America Act has not conferred power on the Dominion Parliament to legislate contrary to these principles. In the present case, however, there is no question of international law involved, for legislation of the kind here challenged is recognised as legitimate by international law, and in any event the provision impugned has no application to foreign vessels. The sole question is whether the Imperial Parliament, in conferring upon Canada, as it admittedly has done, full power to enact customs legislation, bestowed or withheld the power to enact the provisions now challenged. No question of any infraction of international law arises. The question is a domestic one between the Imperial Parliament and the Dominion Parliament.

When in the course of the hearing it became clear that this was the nature of the controversy, their Lordships deemed it proper that intimation should be made to His Majesty's Attorney-General in order that he might, if so advised, intervene on behalf of the Imperial Government. The Attorney-General attended at their Lordships' bar and stated that, having considered the issue raised in the case, he did not deem it his duty to offer any argument on the matter. It may, therefore, be taken that the appellant's contention in support of the validity of this Canadian legislation is not regarded as contrary to any Imperial interest. This, of course, does not affect in any way the pure question of law arising on the interpretation of the British North America Act, as that question has been defined above.

When a power is conferred to legislate on a particular topic it is important, in determining the scope of the power, to have regard to what is ordinarily treated as embraced within that topic in legislative practice and particularly in the legislative practice of the state which has conferred the power. Thus in considering what might be appropriately and legitimately enacted by the Dominion Parliament under its power to legislate in relation to "bankruptcy and insolvency," it was considered relevant to discuss the usual contents of bankruptcy statutes (*Royal Bank of Canada* v. *Larue*, 138 L. T. Rep. 562; (1928) A. C. 187). Now from early times the customs legislation of the Imperial Parliament has contained anti-smuggling provisions authorising the seizure of vessels having dutiable goods on board when found "hovering" off the coast within distances substantially in excess of the ordinary territorial limits. So far back as 1736 there is to be found in the statute 9 Geo. 3, c. 9, s. 22, legislation authorising the forfeiture of dutiable goods found in vessels "hovering" within two marine leagues of the shore. There are numerous subsequent enactments of a similar character, and legislation of this nature has been extended as far as to twenty-four miles from the coast. So familiar, indeed, are such provisions in the history of British customs legislation that the series of measures embodying them have come to be known compendiously as the "Hovering Acts." Although these Acts have now all been repealed, the Customs Consolidation Act of 1876, by sect. 179, authorised the forfeiture of any ship belonging wholly or in part to British subjects, or having half the persons on board subjects of Her Majesty, if found with prohibited goods on board within three leagues of the coast of the United Kingdom. In the case of other vessels not British the limit is fixed at one league from the coast. The previous Imperial Act of 1853 (16 & 17 Vict. c. 107), which was in force when the British North America Act was passed, dealt, in sect. 212, with even greater distances from the coast. It is not without interest to note as a matter of history that the risk of illicit trade between the French island of St. Pierre and His Majesty's North American possessions was the subject of special legislation in a statute of 1763, 4 Geo. 4, c. 15, by sect. 35, of which any British ship "hovering" within two leagues of St. Pierre and Miquelon might be seized and forfeited.

It will thus be seen that when the Imperial Parliament in 1867 conferred on the Parliament of Canada full power to legislate regarding customs, it had long been the practice to include in Imperial statutes relating to this branch of law executive provisions to take effect outside ordinary territorial limits. The measures against "hovering" were no doubt enacted by the Imperial Parliament because they were deemed necessary to render anti-smuggling legislation effective. In these circumstances it is difficult to conceive that the Imperial Parliament in bestowing plenary powers on the Dominion Parliament to legislate in relation to customs should have withheld from it the power to enact provisions similar in scope to those which had long been an integral part of Imperial customs legislation and which presumably were regarded as necessary to its efficacy (cf. *Attorney-General for Canada* v. *Cain*, 95 L. T. Rep. 314; (1906) A. C. 542). The British North America Act imposed no such restriction in terms, and their Lordships see no justification for inferring it, nor do they find themselves constrained to import it by any of the cases to which they were referred by the respondent, for these cases are not *in pari materia*.

Their Lordships' attention was drawn to sect. 3 of the Statute of Westminster 1931, by which it is "declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation," and it was suggested that this section had retrospective effect. In the view which their Lordships have taken of the present case it is not necessary to say anything on this point beyond observing that the question of the validity of extra-territorial legislation by the Dominion cannot at least arise in the future.

The result is that their Lordships will humbly advise His Majesty that the appeal be allowed, the judgment of the Supreme Court of Canada reversed, and the judgment of the Supreme Court of Nova Scotia restored. The appellant will have the costs of the appeal and in the Supreme Court of Canada.

Appeal allowed.

Solicitors for the appellant, *Charles Russell* and *Co.*

Solicitors for the respondent, *Lawrence Jones* and *Co.*

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Jan. 24 *and* 25, 1933.

(Before BATESON, J.)

The Mabel Vera; The Humourous. (*a*)

Mortgage — Fishing vessel — Nets and fishing gear—Whether appropriated to the vessel at the date of mortgage so as to form part of mortgage security.

The plaintiffs as mortgagees of the steam drifters M. V. *and* H. *and their appurtenances claimed payment of sums outstanding upon their mortgages, and a declaration that they were entitled as part of their mortgage security to certain nets and fishing gear.*

In the case of the M. V. *at the time of the mortgage there were on board the drifter a number of nets which had been bought for her use. At the time when the mortgagees took possession the nets on board were not identical with the nets which were on board at the time of the mortgage.*

Held, that the nets on board at the time when the mortgagees took possession were merely substitutes for those on board at the time of the mortgage, and that they formed part of the mortgagee's security.

In the case of the H. *no nets were on board at the time of the mortgage, but nets were subsequently brought on board and were on board at the time when the mortgagees took possession, though it appeared doubtful how far they had been appropriated to the exclusive use of the drifter.*

Held, that the nets did not form part of the mortgagee's security.

In both cases there were in store on shore nets marked with the appropriate numeral of each drifter, but it appeared that these nets were available for use by the owners on whichever drifter they chose, or for hiring to other drifters.

Held, that in the circumstances the fact that these nets were marked with the numeral of a particular drifter was not sufficient to show that they were appropriated thereto.

MORTGAGE ACTIONS.

The plaintiffs, Messrs. Peacock and Co. (Lowestoft) Limited, claimed under mortgages upon the defendants' steam drifters *Humourous* and *Mabel Vera* declarations pronouncing for the validity of the mortgages, repayment of the sums advanced with arrears of interest, and a declaration that certain nets and fishing gear were comprised in the mortgage security. The actions were defended by the liquidator of the Hollinghurst Fishing Company Limited, the owners of the *Mabel Vera* and *Humourous.*

The Hollinghurst Fishing Company Limited was formed in 1926, when they mortgaged the *Humourous* to the plaintiffs. At that time the company did not own any nets, and there were none belonging to them on board the *Humourous.* In 1928 they mortgaged the *Mabel Vera* to the plaintiffs. There were at that time certain nets on board the *Mabel Vera.* Subsequently the mortgagees took possession of the drifters. There were then certain nets on board the *Mabel Vera,* but these nets were not identical with those which were on board when the vessel was mortgaged. There were also at that time certain other nets and gear in store on shore which were marked with the port numbers of the *Mabel Vera* and the *Humourous.*

It was admitted that nets and fishing gear might form part of the appurtenances so as to be comprised in the mortgage security, but it was contended that in the circumstances the nets and gear in question were not so appropriated to the two drifters as to make them part of the mortgagee's security.

Bucknill, K.C. and *Willmer* for the plaintiffs.

Raeburn, K.C. and *Holman* for the defendant.

Bateson, J.—These two cases have been tried together and the facts seem to me to be these. The company which owned the two vessels—the *Humourous* and the *Mabel Vera*—was formed in Jan. 1926 by Mr. George Breach, whose son, Mr. George A. Breach, gave evidence before me. Mr. Breach, the father, has died since the purchase of these vessels, but he apparently owned some fishing vessel, or vessels, and a quantity of nets. The father—Mr. Breach, senior—bought the *Humourous* in 1925. She was a drifter trawler, and had her trawl gear upon her, but no fishing nets for drifting purposes. She cost 2240*l.*, and her number was L.T. 691. The company, when it was formed, owned no nets for drift fishing at all. The vessel was bought with the intention of turning her over to the company which was formed later—in Jan. 1926, and, in fact, very soon after she was purchased—namely, in February —she was mortgaged to the plaintiffs.

There has been a good deal of discussion as to whether, at the time of the mortgage, the vessel had any nets on board her at all, and whether such nets as she had were appropriated to her. She may have had some on board which belonged to Mr. Breach, the father, who had lent them, or hired them, to her for a possible net drift voyage about that time, but that she had any nets at all on her which belonged, or were appropriated, to the vessel I am satisfied is not the case. Therefore, the mortgage to the plaintiffs of the *Humourous* was only a mortgage which covered the vessel herself and her trawl gear, which was undoubtedly on board her, and I think that if the mortgagees had wanted to cover any nets at all they would have ascertained the facts before advancing their money—which they did not do.

The books have been referred to in the course of the case, and, as far as the evidence goes, the first nets that were bought by the company were bought on the 6th March 1928. On the 14th March 1928 the *Mabel Vera* was bought, and she was only a drifter. She was not a trawler drifter.

She was bought at auction for 1600*l.*, without nets. On the 5th April the company bought nets—some 220 secondhand nets—at a cost of 870*l.*, and

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

they were marked, for some reason, "G. B.," the initials of Mr. Breach, the father. Of those nets 120 were stored and 100 were put on board the *Mabel Vera,* and I think that those nets were appropriated to the *Mabel Vera.* On the 7th April—that is, two days after Mr. Breach's nets were transferred—the mortgage for the *Mabel Vera* was made—the mortgages for both ships were in statutory form and covered 64-64th shares in the ship and her appurtenances, and I am satisfied that, in the case of the *Mabel Vera* she had 100 nets appropriated to her at the time of the mortgage.

Various nets were bought from time to time—new nets—as appears from the accounts that have been put in, and the number bought varied in the different years. In Dec. 1931 a liquidator for the company was appointed, and on the 14th Dec. the mortgagees took possession of both vessels under their mortgages and they took the gear that they found on both of them and stored it in their store.

The gear that was found on board the two ships is set out in an inventory. In the case of the *Mabel Vera* (whose number was 1185) there were found ninety-three nets marked with the number 1185 with other gear attached to the vessel, including ropes and trunks—the latter marked with the number 1185—and also a number of warps. The buoys which she had on board were a miscellaneous lot, the most of them marked "H," which, I understand, represents the name of the company, because the company's name is the Hollinghurst Fishing Company Limited, and the few different odd ones had different marks, only one having the figure 1185 on it. It seems to be pretty clear that the *Mabel Vera* had her own nets and the company's buoys and trunks, and the other gear obviously appropriated to her.

The *Humourous,* on the other hand, had a miscellaneous lot. Her number was 691. She only had thirty-four nets with that number; she had twenty-four nets with the mark "G. B." (which indicated Mr. George Breach). Some were those which were purchased in April 1928 probably. There were twelve with the *Mabel Vera's* mark 1185. There were fourteen of another vessel called the *Kipper,* which belonged to Mr. George Breach, marked 1111; there was no mark on one. It seems to me pretty clear that the *Humourous* was furnished from the store which contained some of Mr. Breach's property and some of the Hollinghurst Company's property (Mr. Breach's property being realised after his death for the benefit of his estate), and her buoys bore the company's mark "H" mostly, but some were without any marks at all. Of course, there were the necessary warps and ropes which could not be marked. It looks to me that that supports the view that the *Humourous* was supplied from store with what she might want for any particular voyage, and that she had not any gear at all really appropriated to her. I think the mortgagees took possession of the two vessels, I said, on the 14th Dec., but I think one was taken possession of on the 14th (the *Mabel Vera*) and the *Humourous* on the 15th. Then writs were issued on the 6th April 1932, and the lists were obtained, which appear on pp. 41 and 43 of the correspondence. Since then the gear has all been sold and has realised 162*l.* in the case of the *Humourous* and 170*l.* in the case of the *Mabel Vera*—these are round figures. In addition to this gear that was taken off the ship, as I said, there was a good deal of gear in the store—gear I gathered with all sorts of marks on it, and Mr. Bucknill, for the mortgagees, claims all gear that was on the ships when they were seized, as well as all gear with the specific mark of the particular ships which was in the store. I do not think that he is entitled to all that. I think he is entitled to the ships, and the gear that was on board in substitution of the gear that was there originally when the vessel was mortgaged.

There is no doubt about the law in this case, because Mr. Raeburn and Mr. Bucknill between them have agreed that the real result of the cases is that the nets which can be said to be appropriated passed under the mortgage as "ship or appurtenances," and anything substituted and appropriated for maintaining the position of the original gear. The cases that have been cited were *The Dundee* (1 Hagg. 109), *Gale* v. *Laurie* (5 B. & G., p. 156), *Armstrong and McGregor* (2 Sess. Cas. (4th series) 339), and *Salmon and Woods* (2 Mor. Bankruptcy Cases, 137); and I have been furnished with a transcript of the judgments, which is more extensive than the actual judgments, in *Hull Rope Company* v. *Adams* (73 L. T. Rep. 446; 65 L. J. Q. B. (N. S.) 114); *Coltman* v. *Chamberlain* in (25 Q. B. Div. 329).

Now in my view, although the marking of a lot of this gear has the same number as have the ships, I think the real effect of the evidence—on my mind, at any rate—is that they marked indiscriminately when they were renewing some gear on one ship or some gear on another ship the number of that particular ship with the gear attached. It did not necessarily mean that that gear was to go to that ship, because very often one ship wants particular gear and another ship wants other gear, and it does not follow in the least that that gear is earmarked specially to that ship.

In the case of the *Humourous* I am satisfied that she took what she got out of the general store from time to time—that is to say, she was given out of the general store from time to time what she required, without anything really being appropriated specially to her.

I think in the case of the *Mabel Vera* it was rather different. She had a better master, who looked after things better; and, I dare say, the master kept his eye on his own particular gear; but, inasmuch as in the case of the *Humourous* she never had any nets appropriated to her at the time when the mortgage was entered into, I do not see, even if there was any appropriation of any special gear to her, how that would pass under a mortgage made before the gear was ever allotted to her; nor do I see how you can mortgage property which does not belong to you or that you have not got. So that that disposes of the claim with regard to the *Humourous.*

With regard to the *Mabel Vera,* I think things are quite different. She had, at the time of the mortgage, a set of nets of 100 on board her which were meant for her—I think which were bought for her. And what she had when she was taken possession of by the mortgagees were merely nets in substitution for those nets, and, therefore, they pass under the mortgage. What was in the store I think did not belong to any particular ship and could be given out to whichever ship they chose or could be hired out to any other ship. What the quantity was in the store I am not so sure about, but it is said there were 252 nets belonging to, or marked for, the *Mabel Vera,* and 102 for the *Humourous*—again pointing to the fact that the *Humourous* was not by any means a fully-equipped drifter vessel, if they all were appropriated to her—I do not think that they were.

In addition to those nets there were a good many others I gather with altogether different marks, so that it is quite obvious the company had a great deal more gear than was necessary for two

ships. The truth is the company owned ships and they owned nets and gear, and what they mortgaged were the ships, and only such appurtenances as were actually appropriated to the ships.

That leaves, to my mind, this position, that anything in store did not belong specially, was not appropriated, to any particular vessel, and, therefore, Mr. Bucknill fails upon that point.

Judgment for the plaintiffs pronouncing for the validity of the mortgages on the Mabel Vera *and the* Humourous *for the sum of 2706l., and for appraisement and sale, and for the further sum of 177l. 18s. 6d. under the mortgage on the* Mabel Vera *in respect of the value of her gear on board, which had already been sold.*

Solicitors, for the plaintiffs, *Botterell* and *Roche*, agents for *Norton*, *Peskett*, and *Forward*, Lowestoft.

Solicitors for the defendants, *Pritchard* and *Sons*, agents for *Wiltshire*, *Sons*, and *Jordan*, Lowestoft.

Feb. 10, 13, *and* 28, 1933.

(Before BATESON, J.)

The St. Joseph. (a)

Bill of lading — Damage to cargo—Conflict of laws—Hague Rules—Belgian Code de Commerce, art. 91.

The plaintiffs, the Government of Guatemala, purchased certain aeroplanes and other goods from French sellers. By the terms of the contract of sale the purchase price was to be paid as to 34 per cent. cash with order, and as to 66 per cent. by an irrevocable bank credit to be opened within five days of signing the contract, one-half of which was to be released on taking away the goods against a certificate of acceptance, and one-half payable at Guatemala City against shipping documents not later than eight days after the arrival of the goods. It was further agreed that the French sellers should pack and insure the goods, discharge them at Puerto Barrios, and arrange for their conveyance to Guatemala City.

In pursuance of these arrangements the French sellers by their agents at Antwerp entered into a charter-party at Antwerp for the carriage of the plaintiffs' goods to Puerto Barrios in the Norwegian steamship St. J., *belonging to the defendants. The goods were duly shipped at Antwerp and bills of lading issued in which the goods were consigned to the plaintiffs at Puerto Barrios. Before shipment it was arranged between the plaintiffs and the sellers that bills of lading covering the shipment should be made out direct to the order of the plaintiffs, and that one set of documents should be sent to the bank in Paris, and a second set, including the bill of lading, entrusted to the master of the* St. J., *to be delivered by him to the branch of the bank at Guatemala City on arrival of the vessel at Puerto Barrios, so as to enable the bank to hand them to the plaintiffs. The bills of lading did not contain any declaration as to the value of the goods. In due course the bills of lading were duly presented by the plaintiffs at Puerto Barrios. On delivery it was found that the goods had been damaged on the voyage.*

Liability for the damage was admitted by the defendants, but it was contended that the contract of affreightment was to be construed in accordance with the Belgian law, which embodies the Hague Rules, and that the liability of the defendants was limited in accordance with art. 91 of the Belgian Code de Commerce, which provides that a negotiable bill of lading issued for the transport of goods by any ship of any nationality departing from a Belgian port shall be subject to certain rules, namely, that neither the ship nor the carrier shall be liable beyond a specified sum unless the nature and value of the goods is declared before shipment and inserted in the bill of lading.

Held, that the property in the goods did not pass to the plaintiffs by consignment of the bill of lading, which was a mere receipt, but upon acceptance of the goods in France, and that the contract between the plaintiffs and the defendants which was made when the plaintiffs presented the bills of lading at Puerto Barrios, was not governed by Belgian law.

The Torni (18 *Asp. Mar. Law Cas.* 315 ; 147 *L. T. Rep.* 208 ; (1932) *P.* 78, *distinguished.*

DAMAGE to cargo.

The plaintiffs, the Government of the Republic Guatemala, claimed for damage sustained by a cargo consisting of aeroplanes and munitions of war carried by the Norwegian steamship *St. Joseph*, belonging to the defendants, from Antwerp to Puerto Barrios. The case was tried upon the following agreed statement of facts :

The plaintiffs, the Government of the Republic of Guatemala, by a contract dated the 15th Jan. 1929, and made between the plaintiffs and a French firm of aeroplane and munition manufacturers, styled the Office General de l'Air, agreed to buy, and the latter agreed to sell, certain aeroplanes, equipment and munitions of war. By a supplemental contract dated the 26th Feb. 1929 the Office General de l'Air undertook, in consideration of the payment by the plaintiffs of a lump sum over and above the contract price, to pack and insure the goods, to obtain the necessary permits from interested Governments, and to carry out all the operations of loading, discharging at Puerto Barrios and conveyance to Guatemala City.

On the 30th April 1929 a charter-party was entered into at Antwerp between the defendants, the owners of the steamship *St. Joseph*, and the Agence Maritime Jean Smeets, of Antwerp, as agents for the sellers, for the conveyance of the aeroplanes, &c., by the *St. Joseph* from Antwerp to Puerto Barrios. The plaintiffs' goods were duly shipped at Antwerp by the sellers' agents under a bill of lading issued at Antwerp, dated the 19th May 1929, and consigned to the plaintiffs at Puerto Barrios. The bill of lading gave particulars of the contents of the cases loaded but did not specify their value, nor was such value declared by the shippers to the defendants before shipment.

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

The *St. Joseph* left Antwerp on the 19th May and, after loading patent fuel at Swansea, reached Puerto Barrios on the 2nd July 1929. The discharge of the plaintiffs' goods was completed on the 5th July, and on examination by the plaintiffs' agents the goods were found to be seriously damaged owing to the bad stowage of the part cargo of patent fuel at Swansea.

Before the goods were shipped on board the *St. Joseph* it was agreed between the sellers, the Anglo-South American Bank, and the Minister for Guatemala in Paris, as agent for the plaintiffs, that the bills of lading covering the shipment should be made out direct to the order of the plaintiffs. Three sets of shipping documents were made out, and two of them were forwarded by the sellers to the Paris branch of the Anglo-South American Bank with instructions that on the arrival of the *St. Joseph* at Puerto Barrios one set should be handed to the plaintiffs. A third set was handed on behalf of the sellers to the master of the *St. Joseph* in a sealed envelope addressed to the Guatemala City Branch of the Anglo-South American Bank, with instructions to forward it to the addressees as soon as the *St. Joseph* arrived at Puerto Barrios. The object of this arrangement was to ensure that the bank, with whom the plaintiffs had opened a credit to provide payment for the goods, might be in a position, on the arrival of the *St. Joseph,* to hand one complete set of documents to the plaintiffs. It was further arranged between the sellers and the bank that, on delivery of the goods to the plaintiffs at Puerto Barrios, the bank should, out of the credit opened by the plaintiffs with them, pay to the sellers the balance of the sum due for the goods under the contracts less a sum of $550, the estimated cost of forwarding the goods from Puerto Barrios to Guatemala City. On arrival of the *St. Joseph* at Puerto Barrios the bank handed to the plaintiffs one set of the shipping documents, including the bill of lading. The plaintiffs presented the bill of lading at Puerto Barrios and took delivery of the goods at Puerto Barrios thereunder.

The shipowners admitted liability for the damage, but contended that the amount of their liability was limited by Belgian law, which embodied the Hague Rules in art. 91 of the Code de Commerce, an article of the 21st Aug. 1879, replaced by the following provisions made on the 28th Nov. 1928 : "(A) A negotiable bill of lading issued for the transport of goods by any ship of any nationality soever departing from or destined to a port of the Kingdom or the Colony is governed by the following rules : Article IV. (5) Neither the carrier nor the ship shall in any event be held responsible for loss or damage caused to or in connection with goods for a sum exceeding 3500 belgas or 17,500 francs per package or unit unless the nature and the value of such goods has been declared by the shipper before shipment and this declaration has been inserted in the bill of lading." Art. I. (B) provided that "contract of carriage applies only to a contract of carriage evidenced by a bill of lading or by any similar document of title for the carriage of goods by sea ; it applies also to a bill of lading or similar document issued by virtue of a charter-party from the moment when this document governs the relations between the carrier and the holder of the bill of lading." Under (B) it is provided that "any bill of lading issued under the above conditions shall contain a statement that it is governed by the Rules of Art. 91."

On behalf of the defendants it was contended that Belgian law applied, and that the liability of the shipowners was limited in accordance with the above-mentioned articles.

Sir *Robert Aske* for the defendants.

Raeburn, K.C., and *Pilcher* for the plaintiffs.

[Reference was made to the following authorities : *The Torni* (18 Asp. Mar. Law Cas. 315 ; 147 L. T. Rep. 208 ; (1932) P. 78), *Brandt* v. *Liverpool, Brazil and River Plate Steam Navigation Company* (16 Asp. Mar. Law Cas. 262 ; 130 L. T. Rep. 392 ; (1924) 1 K. B. 575), *The Kronprinsessen Margareta* (15 Asp. Mar. Law Cas. 170 ; 124 L. T. Rep. 609 ; (1921) A. C. 486), and *The Annie Johnson* (14 Asp. Mar. Law Cas. 301 ; 118 L. T. Rep. 721 ; (1918) P. 154).]

Cur. adv. vult.

Feb. 28, 1933.—**Bateson, J.**—In my judgment the plaintiffs are right in this case. The plaintiffs are the Government of Guatemala. The defendants are Norwegian shipowners. The action is brought by the plaintiffs to recover for damage done to certain cargo carried by the defendants in the steamship *St. Joseph.* The defendants admit liability, but say that their liability is limited by Belgian law to some 100*l.* a package. The only questions are (i.) what was the contract between the plaintiffs and the defendants ? (ii.) Does Belgian law apply to it ?

The facts are set out in an agreed statement of fact, and I need not repeat them in detail. Shortly, they are that on the 15th Jan. 1929 the Government of Guatemala, through their Minister in Paris, bought certain aeroplane goods from the French suppliers in Paris under a contract of sale which was entered into between them. Under sect. 1, sub-sect. (*b*), of the contract the goods were to be accepted by the Government of Guatemala before departure from the sellers' works after being passed by Bureau Veritas or an expert. Under sect. 1, sub-sect. (*c*), of the contract payment was to be made as to 34 per cent. cash with the order and the balance, 66 per cent., by a confirmed irrevocable credit with a first-class bank within five days of the signing of the contract.

The 66 per cent. was releasable to sellers as to 33 per cent. on taking away the goods against a certificate of acceptance and the other 33 per cent. was payable at Guatemala City by the bank's correspondents against the shipping documents not later than eight days after the arrival of the goods at Guatemala City. The Anglo-South American Bank was the bank with which the credit was opened.

The sellers undertook the transport by rail and the affreightment to Guatemala City via Puerto Barrios. They also undertook to contract for the account of the Government of Guatemala the insurance against all risks. The transport and insurance was the subject of a supplemental contract of the 26th Feb. 1929. By this latter contract the insurance was to be from eight days after the acceptance of the goods in the works until eight days after arrival at Guatemala City. The transport was to be effected by the sellers, who had to arrange for the loading of the goods, the discharge at Puerto Barrios, and the forwarding to Guatemala City. From a perusal of the chart and map Puerto Barrios is some 100 miles or so from Guatemala City.

The sellers also undertook to send a specially qualified representative who should receive the goods at Puerto Barrios, forward them to Guatemala City, and effect delivery to the Government.

The Government of Guatemala for these transport services agreed to pay a lump sum of $80,520 in

four sums, two of 30 per cent. and two of 20 per cent., the last payment being after forwarding the remainder of the supply.

The French sellers, by their agents in Antwerp, chartered the *St. Joseph* from her owners in Oslo through the owners' agents in Antwerp, for the transport of a part of the goods. The charter was dated the 30th April 1929, it was in English, and under it the vessel was to load these goods at Antwerp. The freight of 800*l.* was payable in advance, and the goods were to be delivered to Puerto Barrios in Guatemala. The ship loaded the goods at Antwerp and sailed on the 19th May 1929. Bills of lading dated the 19th May 1929 were made out mostly in English, except that the description of the goods and details of them were in French. The shippers were Messrs. Valcke and Co., a French firm in Paris, according to a stamp on the bill of lading. The goods were to be delivered unto the Government of Guatemala and the words "Gouvernement de Guatemala" are in French—"or to his/their assigns"—"paying freight for the said goods as per charter-party dated Antwerp the 30th April 1929." The bill of lading was initialed "J. C.," which I understand are the initials of the master, and the only bill of lading that I have seen has printed on it in large type "Copy not negotiable." The bill of lading ends with "In witness whereof the undersigned master or agents of the said ship hath affirmed to three bills of lading, all of this tenor and date, the one of which being accomplished, the others to stand void."

The bill of lading, which is with the agreed statement of facts, is not indorsed. The purchaser's name was inserted in the bill of lading as being the consignee. The making out of the bill of lading direct to the order of the plaintiffs was done in accordance with an arrangement between the Minister of Guatemala, the sellers and the bank. This arrangement is referred to in a letter dated the 24th May 1929 from the sellers to the bank, and says that on arrival of the goods at Puerto Barrios the bank should remit them to the Government of Guatemala and should pay over the balance due less a sum for transport to Guatemala City as soon as the goods were delivered at Guatemala City.

The sentence in that letter: "It is understood that immediately after the arrival of the goods at Puerto Barrios you will remit these to the Government of Guatemala" means "You, the bank, will remit these goods," the gender of the French words in the original making it clear that the word "these" refers to goods, and not to the bill of lading.

The documents consisting of detailed lists of the consignment, the invoice relating to the goods loaded, the certificate of insurance, and the bills of lading were made out in triplicate.

On the 24th May two complete sets were sent by the sellers to the Paris branch of the bank with instructions to forward the documents to the Guatemala branch urgently to avoid delay in delivery of goods. One set was handed to the master of the *St. Joseph* in a sealed envelope addressed to the bank at Guatemala City, the master being directed to get it to the bank as soon as he arrived at Puerto Barrios, so that the bank might remit the goods to the Government of Guatemala, stopping out of the credit $550 in order to pay the cost of the railway freight from Puerto Barrios to Guatemala City.

The bill of lading contained no reference to the Hague Rules or to Art. 91 of the Belgian Code which embodies those rules.

The ship after leaving Antwerp went to Swansea and loaded the remainder of her space with patent fuel. She then went to La Guaira, delivered the patent fuel, and thence to Puerto Barrios, where she arrived on the 2nd July and delivered the cargo loaded at Antwerp. This cargo was found to be damaged by the bad stowage of the patent fuel to the extent of some 5000*l.*

The plaintiffs who had been given a bill of lading by the bank at Guatemala City, obtained the goods from the ship, and they were sent by rail to Guatemala City. The agreed statement says that the bank handed to the plaintiffs one complete set of documents including a bill of lading. The plaintiffs presented the bill of lading to the ship and obtained delivery of the goods thereunder. The bill of lading has no indorsement on it.

The main question debated before me was whether Belgian law applies to the relations between the Government of Guatemala and the Norwegian shipowner.

Mr. Raeburn says "No." Sir Robert Aske says "Yes." I agree with Mr. Raeburn.

Sir Robert Aske says the property in the goods passed to the plaintiffs under the bill of lading by reason of the consignment; that the bill of lading was made in Belgium by a Belgian shipper under a charter-party between Belgians and, therefore, the place where the contract by bill of lading was made was Belgium and Belgian law governs it. Under Belgian law, which includes the Hague Rules, the shipowners' liability is limited.

Mr. Raeburn says the property did not pass by reason of the consignment. It was the plaintiffs' property before it was shipped. The plaintiffs' only contract with the defendants was in the express terms of the bill of lading which they got in Guatemala and contains nothing about Belgian law. The law of that country has nothing to do with it. Neither charter-party or bill of lading was made by Belgians, nor were the shippers Belgians.

The first question to be considered seems to me to be what is the contract between the plaintiffs and defendants. It is made by the plaintiff offering the bill of lading to the defendants and getting delivery of the goods covered by the bill of lading. That is the only contract. It is a contract between the Government of Guatemala and the Norwegian shipowner and made in Guatemala. No Belgian had anything to do with the business except as agents. The charter-party was between a Frenchman and a Norwegian; the bill of lading related to a shipment by a Paris firm as agents for a Frenchman and was initialed by the master of the Norwegian ship. The only thing Belgian about it was the word "Anvers" and the shipment in Antwerp. The Government of Guatemala are not consignees or indorsees within the Bills of Lading Act because they got no property by the consignment or by any indorsement. The goods were their property by reason of their contract with the French sellers; the sellers had to deliver the goods at Guatemala City. The Government of Guatemala merely presented the bill of lading and got delivery, and by it are bound by the terms contained in it, and no more: (***Brandt* v. *Liverpool, Brazil and River Plate Steam Navigation Company***, 16 Asp. Mar. Law Cas. 262; 130 L. T. Rep. 392; (1924) 1 K. B. 575). I do not think you can import into such a contract between such parties a term of Belgian law in a case where no reference is made to Belgian law in the contract, and where there is nothing to show that either party intended or contemplated that Belgian law had anything to do with the contract.

The Guatemalian Government never agreed to the Belgian law being a term. It cannot be implied in Guatemala. It will not do to say that the bill

of lading in its inception was governed by Belgian law. In its inception it was not a contract, it was a mere receipt. The contract of carriage was contained in the charter-party made between a Frenchman and a Norwegian in which Belgian law is not a term. So even if the Guatemalian Government were bound by the bill of lading at its inception by reason of asking for delivery, the shipowner cannot import Belgian law into it. I know of no authority for saying that you can insert a term of some foreign law into the contract (by bill of lading) which, if it is to govern the rights of the parties, when first issued contains no such term, and if, at some later period, it contains no such term either.

How can it be said that the plaintiffs made any contract which is governed by Belgian law? The only way it can be said is to say that the contract was the bill of lading under which the property passed by consignment under the Bills of Lading Act 1855, and that that bill of lading was governed by Belgian law. The Bills of Lading Act only makes the Guatemalian Government a party to such a contract if they are a consignee to whom the property in the goods passed upon or by reason of such consignment. In this case the Guatemalian Government were owners of the goods by virtue of having accepted and paid their sellers for them, and not by virtue of the bill of lading. They did not buy the bill of lading. The bill of lading was only a receipt.

It would be strange if a foreign shipowner who fails to comply with the foreign law supposed to govern his bill of lading can say that the foreign law is an implied term in it, and take advantage of it when he omits any reference to this law from his bill of lading.

The real position is this, that the Guatemalian Government says, "Give me my goods and I will be bound by the terms of the document I am presenting to you and no more," as was the case in *Brandt* v. *Liverpool, Brazil and River Plate Company* (*sup.*). The important passages in that case are in the judgments of Bankes, L.J. (16 Asp. Mar. Law Cas. at p. 263; 130 L. T. Rep. at pp. 393, 394; (1924) 1 K. B. at p. 589) and Scrutton, L.J. (16 Asp. Mar. Law Cas. at pp. 265, 266; 130 L. T. Rep. at p. 396; (1924) 1 K. B. at pp. 595, 596). Atkin, L.J. sums up this point (16 Asp. Mar. Law Cas. at p. 267; 130 L. T. Rep. at p. 398; (1924) 1 K. B. 600): "It follows that the contract to be inferred in cases such as this is that the holder of the bill of lading and the shipowner make a contract for the delivery and acceptance of the goods on the terms of the bill of lading, so far as they are applicable to discharge at the port of discharge."

Sir Robert Aske says the plaintiffs took the bill of lading, which was a Belgian bill of lading, made out in Belgium, and, although at the time it was made out it was only a receipt, nevertheless as soon as it changed hands it became the operative document in regard to the goods and was governed by Belgian law, and was subject, therefore, to The Hague Rules. The answer to this is that at the time it was handed to the shippers it was only a receipt, and sect. 91 of the Belgian Code has no application to it. The maker of the bill of lading had no intention otherwise; and he never said a word about Belgian law and it could not be implied. The person he handed it to was the charterer and the contract with him was in the charter-party. The place where the contract was made was Guatemala City. Further, the argument based on the transfer of the bill of lading presupposes that the Belgian law applies.

Even if the plaintiffs by taking delivery incurred the same liabilities as the shipper who took it, they only incurred a liability to which sect. 91 of the Belgian Code had no application. So whether one regards the contract between plaintiffs and defendants as that made at Puerto Barrios, which in my opinion is the right view, or that made in Antwerp, the result is the same. It cannot be that a document which in its inception had nothing to do with and was not subject to Belgian law could afterwards become subject to it.

In my judgment Belgian law had nothing to do with this case. The argument for the plaintiffs was, however, based on it and I must deal with it.

First of all, what is the Belgian law? It is contained in art. 91 of the code which was intended to bring into force The Hague Rules.

These rules are the outcome of a convention by some of the maritime powers held in 1923 at Brussels: (see Temperley's Carriage of Goods by Sea Act 1924, 3rd edit., p. 99). The English Carriage of Goods by Sea Act 1924 embodied the rules in a schedule to the Act and by Order in Council of the 9th Oct. 1924 the rules were applied as from the 1st Jan. 1925. It is to be noted that the English Act confines its application to outward bills of lading only. Other foreign countries, including Belgium and France, signed the convention on the 25th Aug. 1924. Guatemala was not a party to the convention and never signed it. The Scandinavian countries were not parties to the convention and did not sign it, but by 1932 Norway appeared to be contemplating legislation on these lines: (see Temperley, 3rd edit., p. 99, and 4th edit., p. 105). No foreign country brought the rules into force by enactment except Belgium and possibly to some extent the Netherlands. The Belgian Code is different to the British Act notably in that the code applies to both outward and inward bills of lading.

The operative words in the English Act are that the rules "are to have effect" in relation to carriage under bills of lading to which the rules apply. Every such bill of lading is to contain an express statement that it is to have effect subject to the rules.

The operative part of the Belgian Code in art. 91 says: "(A) A negotiable bill of lading is governed by the following rules. (B) Any bill of lading (issued under the rules) shall contain a statement that it is governed by the rules." One of the rules, sect. 1 (*b*), says that the rules apply to a bill of lading issued by virtue of a charter-party from the moment when the document governs the relations between the carrier and the holder of the bill of lading. In the English Rules the word "regulates" is used instead of the word "govern." Monsieur Frank, who gave evidence before me, says by Belgian law this means from the moment the bill of lading is remitted to a third party who is not a party to the charter-party. He says that the provisions apply by reason of the fact that the bill of lading is remitted and the rules apply retroactively from the time of shipment. He further says that if the shipper is the charterer and he sends the bill of lading to an agent, and the agent presents himself as agent, art. 91 does not apply. He says that if the bill of lading is negotiated the third person is bound, for art. 91 applies as soon as the bill of lading gets into the hands of a person who is not a party to the charter-party.

I understand this evidence (as to the getting into the hands of a third party and so forth) to mean that when the bill gets into the hands of a third party by negotiation on a transfer of property the rules come into operation and that they do not do so when there is a mere handing of the bill to someone to collect the goods for him.

It seems to me that if the argument of counsel for the defendants is to succeed he must satisfy me: (1) That the bill of lading was a negotiable bill and was negotiated. (2) That a bill of lading which leaves out any statement that it is governed by the rules as required by the code has such a term implied in it.

Sir Robert Aske has not succeeded in satisfying me on those points. The only bill of lading in the agreed statement of facts says in terms it is not negotiable. In this case the shipper took good care never to let the bill of lading out of his hands and control except for the purpose of getting the goods from the port of discharge to their final destination, namely, Guatemala City, which work he had undertaken to do under his contract. It is true that he allowed the representative of the Guatemalian Government to get the goods from the ship, but only for the shipper's purpose of forwarding them to their final destination. There is no evidence that the bill of lading was negotiated or of any payment for it or of any indorsement of it.

The goods did not pass to the Guatemalian Government by reason of the consignment.

Further, it seems to me that a bill of lading which by the law of Belgium must contain a statement that it is governed by the rules and does not, cannot be held to have the same effect as if it had. What, then, is the position of the parties? The Government of Guatemala are the owners of goods by reason of their contract with the French sellers from the time of acceptance at the sellers' works. They do not come within sect. 1 of the Bills of Lading Act: Scrutton on Charter-parties and Bills of Lading, 13th edit., p. 476, especially note (*b*) and art. 18, p. 53, and art. 3, p. 10. The bill of lading is a mere receipt. The bank held the documents all the time for the shipper, and till the goods got to Guatemala City, not later than eight days after arrival at Guatemala City, they were not free to pay over the balance of the money to the shippers. The clause as to payment of the last 33 per cent. at Guatemala City against shipping documents could not apply to a bill of lading which had to be presented to the ship at Puerto Barrios. The Government of Guatemala never bought or paid for the documents. The goods became theirs by acceptance after inspection at the works in France. It was not a c.i.f. contract. The sellers undertook to get the goods transported and to see to the insurance to Guatemala City, the latter running from the date of acceptance of the goods till eight days after arrival at Guatemala City. The sellers having undertaken to do the whole transport to Guatemala City had originally intended their representative to go to Puerto Barrios to receive the goods and rail them to Guatemala City. Later it was arranged that the bank or the Guatemalian Government should do it for them.

It is said that *The Torni* (18 Asp. Mar. Law Cas. 315; 147 L. T. Rep. 208; (1932) P. 78) governs this case. If I thought the facts were the same I should hesitate long before differing from it, but the facts in that case are quite different. In that case the indorsees of the bills of lading, which were the only contracts of carriage—there being no charter-party—presented the bills of lading to the ship. They took the bills of lading as to which the Palestine Ordinance was deemed to apply, whether so stated in the bills of lading or not. In their inception they were deemed to have the ordinance included as a term, and the indorsees who took the bills of lading issued in those circumstances were held by the terms of the ordinance. The position of the other people in that case, who merely presented the bills of lading, the circumstances as to their position not being clear on the evidence before the court, was left undetermined. It is true that Langton, J. held them equally bound, but that is not this case, and the Court of Appeal said without further facts it could not be determined. It seems to me that this case which I am deciding illustrates the wisdom of the Court of Appeal in so doing. Moreover, in that case carrier and shipper knew all about the Palestine Ordinance. The judgment of Langton, J. on p. 43 (18 Asp. Mar. Law Cas. at p. 319; 147 L. T. Rep. at pp. 212, 213) in dealing with the persons who are not the indorsees of the bills of lading says this: "In other words, when once they present the bills of lading and it has been ascertained what was the original contract between the shipowners and the shippers, it is for the shipowners to show that something has occurred to alter that original contract in the hands of the new holder. In the present state of commerce it is not difficult to conceive a case in which the shipowner could show such circumstances. Having arrived at the port of discharge an insolvent consignee or assignee is unable to pay the freight and take delivery of the goods. A new bargain is thereupon entered into by the shipowners with a person who is neither consignee nor assignee. The contract in the bill of lading might then become of no importance, although the goods had been shipped and carried under the contract contained therein. But, in the absence of any evidence of circumstances which would or might change the original terms of the bills of lading, I do not think that upon any known principle the shipowner can be heard to say that a contract which meant one thing in its inception meant something else when it had passed into the hands of a fresh holder."

Here the shipowner either knew of the Belgian law, and as his country had not agreed to the convention or adopted its provisions, choose to disregard it, or he did not know of the Belgian law and never gave it a thought and had no regard to it. He does not prove which of these positions he occupied, and he cannot now turn round and say it was an implied term of the contract. The nations have not adopted a uniform system of applying the Hague Rules. Most nations have not embodied them in their law at all, others differ in the way they have adopted them. The Belgian Code, in adopting the convention, enacts that the rules should apply to both inward and outward bills of lading. The English Act applies the rules to outward bills of lading only. The Belgian law says that bills of lading are "governed by" the rules; the law in force in Palestine says the rules are to be deemed to be inserted. It is somewhat alarming to contemplate how many doors to confusion in mercantile business are opened by these attempts to legislate for the whole world.

In my view these rules cannot be considered to be a part of the contract contained in the bill of lading unless the parties to it have clearly agreed that they shall apply, and if it is desired to make the rules part of the contract contained in the bill of lading, that intention should be expressed in clear terms.

The result is that the plaintiffs' right to recover damages is not limited to the sum of 3500 belgas per package. The plaintiffs, therefore, succeed and are entitled to their costs subject to the usual reference.

Solicitors: for the plaintiffs, Messrs. *Wm. A. Crump* and *Son*; for the defendants, Messrs. *Ince*, *Roscoe*, *Wilson*, and *Glover*.

House of Lords.

Jan. 26, 27, *and Feb.* 28, 1933.

(Before Lords Buckmaster, Warrington, Tomlin, Russell and Wright.)

The Edison. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision — Damages — Loss of use — Dredger totally lost — Dredger engaged at time of loss in connection with performance by her owners of contract to execute harbour works—Loss and expense incurred by owners owing to their inability through lack of financial resources to replace dredger—Loss of profits and incidental losses on contract—Natural consequence of collision—Measure of damages.

The plaintiffs' dredger, the Liesbosch, *was sunk in a collision with the defendants' steamship, for which the defendants admitted liability. At the time of the loss the plaintiffs were performing certain works in the harbour at Patras, under contract with the Harbour Commissioners, and the dredger was employed in certain essential dredging operations connected with the performance of the contract. After the collision the plaintiffs were unable, owing to their lack of financial resources, to purchase another dredger, and in consequence various delays involving loss and expense were incurred. Subsequently the plaintiffs hired another dredger, which they ultimately purchased. The registrar, in his report, allowed a sum for the value of the dredger, and also sums for the losses and expenses incurred during the delay, including the cost of hire of the substituted dredger, the extra cost of dredging with the substituted dredger as compared with the lost dredger, and loss of profit and incidental losses, such as salaries, rent, and interest, incurred during the period when the contract could not be performed owing to the loss of the dredger. Langton, J. affirmed the report.*

Held, that the plaintiffs were entitled to the value of the Liesbosch *at Patras as a going concern at the time and place of the loss, together with interest at 5 per cent. as from the date of the loss until payment, and that value must be assessed by taking into account* (1) *the market price of a comparable dredger in substitution ;* (2) *costs of adaptation, transport, insurance, &c., to Patras ; and* (3) *compensation for disturbance and loss in carrying out their contract over the period of delay between the loss of the* Liesbosch *and the time at which the substituted dredger could reasonably have been available for use in Patras, including in that loss such items as overhead charges, expenses of staff, and equipment thrown away, but neglecting any special loss due to the appellants' financial position.*

Order of the Court of Appeal (ante, *p.* 276 ; 147 *L. T. Rep.* 141 ; (1932) *P.* 52) *varied.*

Appeal from the decision of the Court of Appeal (Scrutton, Greer, and Slesser, L.JJ.) reported *ante*, p. 276 ; 147 L. T. Rep. 141 ; (1932) P. 52.

The plaintiffs, owners of the dredger *Liesbosch*, claimed damages for the loss of the *Liesbosch* as the result of a collision with the defendants' steamship *Edison*, which took place in the harbour of Patras on the 26th Nov. 1928. In consequence of the collision the *Liesbosch* was lost. The defendants admitted liability for the collision. At the time of the collision the owners of the *Liesbosch* had entered into a contract with the Harbour Commissioners at Patras for the excavation of the basin of the harbour and for a trench for the laying of foundations of new moles, together with the construction of piers, &c., and other work. The contract was for the sum of 36,540,000 drachmas, and one of the terms of the contract was that the work should be completed within three years. The contract was subsequently enlarged to 68,000,000 drachmas, covering a period of five years. The plaintiffs, owing to lack of financial resources, as appeared from the evidence, were unable to purchase a dredger to take the place of the *Liesbosch*, but they ultimately hired the Italian dredger *Adria*, which arrived at Patras on the 16th June 1929. The *Adria* was on hire to the plaintiffs until the 3rd July 1930, when the plaintiffs purchased her for 3,442,320 drachmas, which the registrar allowed in full. Under Part II. they claimed expenses incurred between the 26th Nov. 1928 and the 16th June 1929, which was the period from the date when the *Liesbosch* was lost until the *Adria* was obtained, during which work was suspended. The amount claimed in respect of these expenses, which represented salaries, wages, rent, insurance, and interest on capital, amounted to 4,626,314.35 drachmas, of which the registrar allowed 4,007,476.45 drachmas. Under Part III. the plaintiffs claimed expenses of hiring the *Adria*, *i.e.*, cost of transporting, travelling expenses, &c., amounting to 7,606,257.30 drachmas, of which the registrar allowed 6,888,790.45 drachmas. Under Part IV. the cost of operating the *Adria* as compared with the *Liesbosch*, amounting to 157,037.50 drachmas, was claimed and allowed in full. Under Part V. the plaintiffs claimed 882,568 drachmas for loss of profit owing to cessation of all work under the contract from the 26th Nov. 1928 to the 16th June 1929. The registrar allowed 294,189.33 drachmas. Langton, J. affirmed the report.

The Court of Appeal held that Langton, J. and the registrar had adopted the wrong measure of damages. The damages recoverable were those which were the direct and natural consequences of the collision, and did not include losses and expenses which were attributable to the lack of financial resources of the plaintiffs, or profits which were uncertain or speculative. The plaintiffs having been awarded the value of the dredger at the time and place of the loss, together with interest from the date of the loss, which represented the true measure of damage, were not entitled to recover anything further for loss of profits or the additional costs of obtaining another dredger. The plaintiffs appealed.

W. N. Raeburn, K.C. and *Lewis Noad*, K.C. for the appellants.

James Dickinson, K.C. and *G. H. Main Thompson* for the respondents.

The House took time for consideration.

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

Lord Wright.—On the 26th Nov. 1928 the respondents' steamship *Edison*, in proceeding to sea from the port of Patras, fouled the moorings of the appellants' dredger *Liesbosch* and did not free them until she had carried the *Liesbosch* into the open sea, where the *Liesbosch*, being without crew on board, filled with water in the heavy sea which was running, sank, and became a total loss. The appellants issued a writ in the Admiralty Division, and when the respondents admitted sole liability for the collision and loss (which they did not do until the 7th May 1930) the claim was referred to the registrar and merchants to assess the damages. The appellants, who are civil engineers, had entered into a contract, dated the 4th March 1927, with the harbour board of Patras for the construction, under heavy penalties, of piers and quay walls at Patras; the work involved among other things a considerable amount of dredging; for this work at the date of the accident the appellants were using the *Liesbosch*, which they had purchased in Oct. 1927, in Holland, for 4000*l*., to which must be added as part of the cost the sum of 2000*l*. expended in fitting her out and transporting her to Patras. She was insured for 5520*l*. There was evidence that in Holland there were available for purchase by the appellants in and about Dec. 1928 one or more dredgers by which the *Liesbosch* might have been replaced, but the appellants did not then take steps to purchase a dredger in substitution for the *Liesbosch*; all their liquid resources were engaged in the contract undertaking and in the deposit which under the contract they had made. In Jan. 1929 the Patras harbour authorities threatened to cancel the contract and forfeit the deposit unless the *Liesbosch* were replaced within a certain time. The appellants, owing to their financial embarrassments being unable to buy a dredger, decided to hire one in the Mediterranean, and on the 11th May 1929 hired from Ancona, in Italy, a dredger called the *Adria*, at a high rate of hire; the *Adria* was somewhat larger than the *Liesbosch*, but more expensive to work, and in order to obtain her the appellants were compelled along with her also to take on hire a tug and two hopper barges. On the 17th June 1929 the *Adria* and her attendant fleet arrived at Patras and commenced to work on the contract; until then work had been suspended since the date when the *Liesbosch* was lost, as the harbour board would not let the appellants do other work until dredging was resumed. The monthly rate of hire of the *Adria* proved so burdensome to the appellants that the harbour board, in order to help them, purchased the *Adria*, under a contract dated the 30th June 1930, from the Italian owners for a sum in cash, and resold her to the appellants for the same sum, payable in 48 monthly instalments at 6 per cent. interest. The amended claim of the appellants before the registrar and merchants was filed on the 14th Nov. 1930. It was presented in five parts, which were as follows: Part I. was for the price paid for the substituted *Adria*, namely, 9,177*l*. 3*s*. 4*d*., and 882*l*. 7*s*. 2*d*. for expenses connected with the purchase. Part II. was for 2922*l*. 1*s*. 2*d*. for overhead charges and interest on capital invested, as being thrown away during the period when work was stopped—that is, from the date when the *Liesbosch* was lost until the *Adria* commenced work. Part III. was for 6836*l*. 9*s*. 8*d*., being for hire paid for the *Adria* and her satellites from the 4th May 1929 to the 3rd July 1930. Part IV. was for 1078*l*. 16*s*. 1*d*., being for the extra expense in working the *Adria* while on hire over what would have been the cost of working the *Liesbosch*. Part VI. was for 2353*l*. 10*s*. 3*d*. or for profit alleged to have been lost owing to the stoppage of work under the contract between the date of the loss of the *Liesbosch* and the date when the *Adria* recommenced work. On this claim the registrar made his report on the 7th May 1931. In substance he admitted the appellants' claim, though he reduced it from 23,514*l*. to 19,820*l*.; he reduced certain items, and in particular under Part V. he held that as the appellants were able, after the *Adria* arrived, to resume the contract, there was no loss of profit during the period of delay, but merely a loss of interest, which he put at rather over 700*l*. The claim was put forward in drachmas, but I have taken the agreed rate of exchange. He made no finding as to the value of the *Liesbosch* at the date of the collision, but held in effect that: "Having regard to all the existing circumstances, such as the severe terms of their contract in regard to penalties and their want of liquid resources," they had acted reasonably and that the hiring of the *Adria* to complete an important contract with a public body was a direct and natural result of the collision. He did not in terms find that but for financial reasons the *Liesbosch* could have been replaced by purchasing an equivalent dredger, say, in Holland, at a reasonable price and with little delay, but his finding that it was admitted by the appellants that they had not then the means to purchase a dredger does not contradict the evidence led by the respondents that there were in Holland at the date of the collision suitable dredgers for sale, On objections being taken to the registrar's report. Langton, J., before whom the matter came, disallowed the respondents' objections that the damages claimed were too remote and confirmed the report, with a trifling variation. On appeal, the Court of Appeal allowed the appeal, with costs, holding that the registrar had proceeded on a wrong basis in allowing damages which were too remote in law, and ordered judgment to be entered for 9177*l*. 3*s*. 4*d*., with interest, from the 26th Nov. 1928 to the date of their order, at 5 per cent. From this order the matter comes before your Lordships' House.

The substantial issue is what in such a case as the present is the true measure of damage. It is not questioned that when a vessel is lost by collision due to the sole negligence of the wrong-doing vessel the owners of the former vessel are entitled to what is called *restitutio in integrum*, which means that they should recover such a sum as will replace them so far as can be done by compensation in money, in the same position as if the loss had not been inflicted on them, subject to the rules of law as to remoteness of damage. The respondents contend that all that is recoverable as damages is the true value to the owners of the lost vessel, as at the time and place of loss. Before considering what is involved in this contention, I think it desirable to examine the claim made by the appellants, which found favour with the registrar and Langton, J., and which in effect is that all their circumstances, in particular their want of means, must be taken into account, and hence the damages must be based on their actual loss, provided only that, as the registrar and the judge have found, they acted reasonably in the unfortunate predicament in which they were placed, even though but for their financial embarrassment they could have replaced the *Liesbosch* at a moderate price and with comparatively short delay. In my judgment, the appellants are not entitled to recover damages on this basis. The respondents' tortious act involved the physical loss of the dredger; that loss must somehow be reduced to terms of money. But the appellants' actual loss in so far as it was due to their

impecuniosity arose from that impecuniosity as a separate and concurrent cause, extraneous to and distinct in character from the tort; the impecuniosity was not traceable to the respondents' acts, and, in my opinion, was outside the legal purview of the consequences of these acts. The law cannot take account of everything that follows a wrongful act; it regards some subsequent matters as outside the scope of its selection, because "it were infinite to trace the cause of causes," or consequences of consequences. Thus the loss of a ship by collision due to the other vessel's sole fault may force the shipowner into bankruptcy, and that again may involve his family in suffering, loss of education, or opportunities, in life, but no such loss could be recovered from the wrongdoer. In the varied web of affairs the law must abstract some consequences as relevant, not perhaps on grounds of pure logic but simply for practical reasons. In the present case, if the appellants' financial embarrassment is to be regarded as a consequence of the respondents' tort, I think it is too remote, but I prefer to regard it as an independent cause, though its operative effect was conditioned by the loss of the dredger. The question of remoteness of damage has been considered in many authorities and from many aspects, but no case has been cited to your Lordships which would justify the appellants' claim. A dictum was quoted by Mr. Raeburn from the speech of Lord Collins in *Clippens Oil Company Limited* v. *Edinburgh and District Water Trustees* (1907, A. C. 291, at p. 303): "It was contended that this implied that the defenders were entitled to measure the damages on the footing that it was the duty of the company to do all that was reasonably possible to mitigate the loss, and that if, through lack of funds, they were unable to incur the necessary expense of such remedial measures the defenders ought not to suffer for it. If this were the true construction to put upon the passage cited, I think there would be force in the observation, for, in my opinion, the wrongdoer must take his victim *talem qualem*, and if the position of the latter is aggravated because he is without the means of mitigating it, so much the worse for the wrongdoer, who has got to be answerable for the consequences flowing from his tortious act." But as I think it is clear that Lord Collins is here dealing not with measure of damage, but with the victim's duty to minimise damage, which is quite a different matter, the dictum is not in point.

The case of *Polemis* v. *Furness, Withy, and Co.* (15 Asp. Mar. Law Cas. 398; 126 L. T. Rep. 154; (1921) 3 K. B. 560), a case in tort of negligence, was cited as illustrating the wide scope possible in damages for tort; that case, however, was concerned with the immediate physical consequences of the negligent act, and not with the co-operation of an extraneous matter such as the plaintiffs' want of means. I think, therefore, that it is not material further to consider that case here. Nor is the appellants' financial disability to be compared with that physical delicacy or weakness which may aggravate the damage in the case of personal injuries, or with the possibility that the injured man in such a case may be either a poor labourer or a highly paid professional man. The former class of circumstances goes to the extent of actual physical damage, and the latter consideration goes to interference with profit-earning capacity; whereas the appellants' want of means was, as already stated, extrinsic.

I agree with the conclusion of the Court of Appeal that the registrar and Langton, J. proceeded on a wrong basis, and that the damages must be assessed as if the appellants had been able to go into the market and buy a dredger to replace the *Liesbosch*. On that basis it is necessary to decide between the conflicting views put forward, on the one hand by the respondents, that all that is recoverable is the market price of the dredger, together with cost of transport to Patras, and interest, and on the other hand by the appellants, that they are also entitled to damages in addition for loss during the period of inevitable delay before the substituted dredger could arrive and start work at Patras. The respondents in support of their contention, relied on *The Columbus* (3 W. Rob. 158), in which Dr. Lushington refused in respect of a fishing vessel any compensation save on the basis of the smack's market value, with interest; he gave as an illustration of the same principle the case of an East Indiaman with a valuable freight on board, sunk in collision by a wrong-doing vessel; in that case as in the case of the humble fishing vessel, the compensation would, in his opinion, be thus limited. He said: "The true rule of law in such a case would, I conceive, be this, namely, to calculate the value of the property destroyed at the time of the loss and to pay it to the owners as full indemnity to them for all that may have happened, without entering for a moment into any other consideration. If the principle contended for by the owners of the smack were once admitted, I see no limit in its application to the difficulties which would be imposed upon the court. It would extend to almost endless ramifications, and in every case I might be called upon to determine, not only the value of the ship but the profits to be derived on the voyage in which she might be engaged, and, indeed, even to those of the return voyage, which might be said to have been defeated by the collision."

But, for all the eminence of Dr. Lushington, the simple but arbitrary rule which he thus enunciated has not prevailed, at least as regards ships under profitable freight engagement. Perhaps it was felt that, in the words afterwards used by Lord Sumner in *The Chekiang* (17 Asp. Mar. Law Cas. 74; 135 L. T. Rep. 450, at p. 452; (1926) A. C. 637, at p. 643), "The measure of damages ought never to be governed by mere rules of practice, nor can such rules override the principles of the law on this subject." Lord Sumner also distinguishes "a rule of thumb" from what is binding law. In these cases the dominant rule of law is the principle of *restitutio in integrum*, and subsidiary rules can be justified only if they give effect to that rule. A view of the practice of the Admiralty Court differing from that of Dr. Lushington was stated by Sir Robert Phillimore in *The Northumbria* (21 L. T. Rep. 681; L. Rep. 3 A. & E. 6), and in *The Kate* (8 Asp. Mar. Law Cas. 539; 80 L. T. Rep. 423; (1899) P. 165) it was expressly held that in the case of a vessel being totally lost by collision, while on her way in ballast to load under a charter, the proper measure of damages against the vessel solely liable for the collision was the value of the vessel at the end of her voyage, plus the profits lost under the charter-party. The same principle was extended in *The Racine* (10 Asp. Mar. Law Cas. 300; 95 L. T. Rep. 597; (1906) P. 273) to a vessel sunk while on her voyage under charter from her home port to a foreign port, from which port she was chartered to proceed to another port, from which again she was chartered back to her home port; it was held that the owner was entitled to recover the presumed net loss of freight on all three charters, less 10 per cent. for contingencies and her value on her return to the home port at the end of the three charters. But in *The Philadelphia* (14 Asp. Mar. Law Cas. 68; 116 L. T. Rep. 794; (1917)

P. 101) it was decided that the value must be determined as at the time of the loss (the market had in that case risen between the date of the loss and the presumed date of her arrival at the end of the voyage), together with the proper net sum in respect of her existing charters, subject to allowance for contingencies. It is now clear, accordingly, that the arbitrary rule suggested by Dr. Lushington is not law, though the decisions just cited, however just in the result, cannot be regarded as logical or complete. The true rule seems to be that the measure of damages in such cases is the value of the ship to her owner as a going concern at the time and place of the loss. In assessing that value regard must naturally be had to her pending engagements, either profitable or unprofitable. The rule, however, obviously requires some care in its application ; the figure of damage is to represent the capitalised value of the vessel as a profit-earning machine, not in the abstract but in view of the actual circumstances. The value of prospective freights cannot simply be added to the market value, but ought to be taken into account in order to ascertain the total value for purpose of the damage, since if it is merely added to the market value of a free ship the owner will be getting *pro tanto* his damages twice over. The vessel cannot be earning in the open market, while fulfilling the pending charter or charters. Again, the present valuation of a future charter becomes a matter of difficulty in the case even of successive charters, still more in the case of long charters, such, for instance, as that in *Lord Strathcona Steamship Company Limited* v. *Dominion Coal Company Limited* (16 Asp. Mar. Law Cas. 585 ; 134 L. T. Rep. 227 ; (1926) A. C. 108), which was for ten St. Lawrence seasons, with extension at the charterers' option for further eight seasons. The assessment of the value of such a vessel at the time of loss, with her engagements, may seem to present an extremely complicated and speculative problem. But different considerations apply to the simple case of a ship sunk by collision when free of all engagements, either being laid up in port or being a seeking ship in ballast, though intended for employment, if it can be obtained, under charter or otherwise. In such a case the fair measure of damage will be simply the market value, on which will be calculated interest, at and from the date of loss, to compensate for delay in paying for the loss. But the contrasted cases of a tramp under charter or a seeking tramp do not exhaust all the possible problems in which must be sought an answer to the question what is involved in the principle *restitutio in integrum.* I have only here mentioned such cases as the step to considering the problem in the present case. Many, varied, and complex are the types of vessels and the modes of employment in which their owners may use them. Hence the difficulties constantly felt in defining rules as to the measure of damages. I think it impossible to lay down any universal formula. A ship of war, a supply ship, a lightship, a dredger employed by a public authority, a passenger liner, a trawler, a cable ship, a tug boat (to take a few instances), all may raise quite different questions before their true value can be ascertained. The question here under consideration is again different ; the Liesbosch was not under charter nor intended to be chartered, but, in fact, was being employed by the owners in the normal course of their business as civil engineers, as an essential part of the plant which they were using in performance of their contract at Patras. Just as, in the other cases considered, what must be ascertained is the real value to the owner as part of his working plant and ignoring remote considerations at the time of loss; if it were possible without delay to replace a comparable dredger exactly as and where the *Liesbosch* was at the market price, the appellants would have suffered no damage save the cost of doing so—that is, in such an assumed case the market price, the position being analogous to that of the loss of goods for which there is a presently available market But that is in this case a merely fanciful idea Apart from any consideration of the appellants' lack of means, some substantial period was necessary to procure at Patras a substituted dredger ; hence, I think, the appellants cannot be restored to their position before the accident unless they are compensated, if I may apply the words of Lord Herschell in *The Greta Holme* (8 Asp. Mar. Law Cas 317 ; 77 L. T. Rep. 231, at p. 234 ; (1897) A. C. 596, at p. 605) : " In respect of the delay and prejudice caused to them in carrying out the works entrusted to them." He adds : " It is true these damages cannot be measured by any scale." Lord Herschell was there dealing with damages in the case of a dredger which was out of use during repairs, but in the present case I do not think the court is any the more entitled to refuse, on the ground that there is difficulty in calculation, to consider as an element in the value of the dredger to the appellants the delay and prejudice in which its loss involved them ; nor is it enough to take the market value —that is, the purchase price (say, in Holland), even increased by the cost of transport—and add to that 5 per cent. interest as an arbitrary measure. It is true that the dredger was not named in the contract with the Patras harbour authority, nor appropriated to it ; but it was actually being used, and was intended to be used, by the appellants for the contract work. I am not clear if that view is what is meant by Scrutton, L.J. in his judgment in this case when he quotes the words of Gorell Barnes, J. in *The Harmonides* (9 Asp. Mar. Law Cas. 354 ; 87 L. T. Rep. 448 ; (1903) P. 1) : " The real test is : what is the value of the vessel to the owners as a going concern at the time the vessel was sunk ? " and continues : " I should add at that place, for if the vessel had to be replaced at Patras expense and time might have been added to the cost of the vessel replaced." In *The Harmonides* (*sup.*) Gorell Barnes, J. had to consider in the case of an Atlantic passenger liner not her mere value in the general market, but her actual value to her owneri n a business sense ; he refused to confirm the registrar's report putting her value in the market at 18,000*l.*, but heard fresh evidence and fixed the value at 31,000*l.*, as being the real value to the owners. The problem there was in principle the same as the problem in this case. A nearer parallel is afforded by *Clyde Navigation Trustees* v. *Bowring Steamship Co.* (1929, S. C. 715) ; 32 Ll. L. 35 ; 34 Ll. L. 319), in which the Court of Session in Scotland, affirming Lord Morison, held that the plaintiffs, whose dredger had been rendered a total loss by the negligent navigation of the defendants' vessel, were entitled, if they were to be placed in the same position as if the injury had not been done them, to have a value placed on their dredger as the value to them, based on three elements : (1) The cost of procuring a comparable dredger ; (2) the cost of adapting it to their requirements ; (3) compensation for loss of user. The court rejected the contention that there was any absolute rule fixing the compensation at the market value, with interest, from the date of the collision. The late Mr. Registrar Roscoe, in his valuable work on Damages in Maritime Collision, cites at p. 42 of the third edition the case of *The Pacaure*, a lightship which was sunk in collision ;

the owners, the Mersey Docks Harbour Board, were allowed, in addition to the value of the sunken vessel, the cost of a substituted vessel for 366 days. I should prefer to state that such extra cost was an element in assessing the loss of value to the owners of the lightship. though it may be that no different result would follow from the difference in statement.

In my judgment, similar principles are applicable to the present case; the difficulty in applying them is that the evidence called before and the findings made by the registrar and merchants were directed, as explained above, to a different measure of damage. Scrutton, L.J. thus sums up the position: "But what the owners have lost is their dredger. If the court gives them their dredger at the time and place of loss as a profit-earning dredger, and gives them interest on that value from the time of the loss to the judgment, I do not see any room for a further award of profits"; and he goes on to describe the indirect losses which they claim in expense thrown away over the whole period they were without a dredger, and the heavy outlay incurred in hiring and working the *Adria*, and for loss of profits. What Scrutton, L.J., in fact, awards as the value of the dredger to the appellants at the time and place of loss is 9177*l*., which was what was paid for the *Adria* in Sept. 1930, but, as the Lord Justice points out, that fact is not evidence of the market value of the *Liesbosch* in Nov. 1928, when the *Liesbosch* was lost, any more than is the cost to them of the *Liesbosch* when they bought her or the amount for which she was insured. It might seem to follow that Scrutton, L.J. is intending to give some compensation, beyond the actual cost of replacing the *Liesbosch*, for delay and prejudice in the contract work; if not I do not see how he is giving the value of the dredger to the owner at Patras as a factor in his business as a going concern. It is on the true value so ascertained that the interest at 5 per cent. from the date of the collision will run, as further damages, on the principles of the Court of Admiralty stated by Sir Charles Butt in *The Kong Magnus* (7 Asp. Mar. Law Cas. 583; 63 L. T. Rep. 715; (1891) P. 223)—that is, damages for the loss of the use of the money representing the lost vessel as from the date of the loss until payment. Mr. Raeburn has pressed that the matter should be sent back to the registrar and merchants for the amount of damages to be assessed on the principles accepted by this House. I have felt grave doubts about this as I am not quite sure on what principle the Court of Appeal have arrived at the sum they awarded. But the best opinion that I can form is that they intended to give simply the replacement cost, without including in the value any allowance for disturbance and prejudice during the necessary period of delay. If that is so, though I agree with their disallowance of the claim as put forward, I do not agree with the disallowance, in ascertaining the value, of anything beyond the cost of replacement. I do not think, in a case like this, interest is a compensation for that factor, because I think that factor must be something to be taken into account in arriving at the figure of value on which interest must run. On the whole, I think Mr. Raeburn is right in urging that the matter should be referred back to the registrar and merchants to ascertain the true value on the principles I have stated. From these principles it follows that the value of the *Liesbosch* to the appellants, capitalised as at the date of the loss, must be assessed by taking into account: (1) the market price of a comparable dredger in substitution; (2) costs of adaptation, transport, insurance, &c., to Patras; (3) compensation for disturbance and loss in carrying out their contract over the period of delay between the loss of the *Liesbosch* and the time at which the substituted dredger could reasonably have been available for use in Patras, including in that loss such items as overhead charges, expenses of staff and equipment, and so forth, thrown away, but neglecting any special loss due to the appellants' financial position. On the capitalised sum so assessed interest will run from the date of the loss.

The result is that the appellants have substantially failed in the appeal because they have failed in their claim that the judgment of Langton, J. should be restored, and accordingly they should pay to the respondents three-quarters of their costs of this appeal. The order of the Court of Appeal will be varied by substituting for the judgment for 9177*l*. 3*s*. 4*d*. a judgment for such sum as the registrar and merchants may find on reference back to them. Save as so varied the order of the Court of Appeal will stand. I cannot help expressing a hope that the parties may now compose this remaining difference without further proceeding in the registry.

The other noble and learned Lords concurred.

Appeal dismissed.
Order varied.

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

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

Nov. 28, 29, 1932; *March* 17, 1933.

(Before Lords Buckmaster, Blanesburgh, Warrington, Russell and Macmillan.)

Barras v. Aberdeen Steam Trawling and Fishing Company Limited. (*a*)

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

Seaman — Wages — Wreck — Trawler disabled by collision — Vessel fourteen days under repair—Seaman engaged on six months' agreement paid off until repairs completed—Claim for wages—Whether service terminated by wreck—Merchant Shipping (International Labour Conventions) Act 1925 (15 *&* 16 *Geo.* 5, *c.* 42), *s.* 1, *sub-s.* (1).

By the Merchant Shipping (International Labour Conventions) Act 1925, *s.* 1, *sub-s.* (1), *it is provided that "where by reason of the wreck or loss of a ship on which a seaman is employed his service terminates before the date contemplated in the agreement, he shall. notwithstanding anything in section one hundred and fifty-eight of the Merchant Shipping Act* 1894, *but subject to the provisions of this section, be entitled, in respect of each day on which he is in fact unemployed during a period of two months from the date of the termination of the service, to receive wages at the rate to which he was entitled at that date."*

The appellant was engaged to serve as chief engineer on a trawler on a six-monthly agreement. On returning to port, during the currency of

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

the agreement, to discharge her cargo of fish, she came into collision with another vessel, but was able, under her own steam, to make the port, where she was dry-docked for repairs.

The crew, including the appellant, were then paid off. The repairs were completed within fourteen days, and the appellant was then re-engaged. He claimed from the respondents the amount of his wages for the fourteen days under the above sub-section on the ground that his service had been terminated by reason of the " wreck or loss " of the ship.

Held, that while the accident to the ship caused an interruption of, and an interference with the maritime adventure, there was not such an interruption or interference as to cause a frustration of the maritime adventure in respect of which the seaman's contract was made.

Decision of the First Division of the Court of Session (1932, S. C. 432) *affirmed.*

APPEAL from an interlocutor dated the 5th Feb. 1932 of the First Division of the Court of Session (Lord Blackburn and Lord Morison; the Lord President dissenting) allowing an appeal from interlocutors of the sheriff and sheriff-substitute, dated respectively the 17th Nov. and the 28th July 1931, allowing the claim of the appellant as pursuer in the action. The appellant was a marine engineer and the chief engineer of the steam trawler *Strathclova*, the property of the respondents. His service was to be on board the *Strathclova* to be employed "fishing trawl North Sea, Shetland, West Coast, and Faroe," from the 4th July 1930 until the last day of Dec. 1930, or, if the boat should be at sea on that date, until the first return to the United Kingdom thereafter. But it was agreed that subject to the above stipulation the agreement might be terminated at any time before that date at the discretion of the owner. On the 25th Sept. 1930, the *Strathclova*, when at a distance of one mile to one mile and a half from her home port, the harbour of Aberdeen, came into collision with another steam trawler and was considerably damaged. She was, however, able to make the harbour of Aberdeen under her own steam, was moored near the Fish Quay, and discharged her cargo there on the 26th Sept. She was then dry-docked for the purpose of effecting the repairs rendered necessary by the collision. In the meantime, on the 26th Sept., the crew, including the appellant, were paid off, being told that the ship would be laid up until the repairs were completed. In the interval the appellant was unemployed. The repairs were completed at the cost of 265*l.* on the 10th Oct., and on the 11th Oct. the appellant was re-engaged and resumed his employment. The appellant claimed under sect. 1, sub-sect. (1), of the Merchant Shipping (International Labour Conventions) Act 1925, the sum of 9*l.* 16*s.* as being the amount of wages for the fourteen days during which the *Strathclova* was under repair. By that section : " Where by reason of the wreck or loss of a ship on which a seaman is employed his service terminates before the date contemplated in the agreement, he shall, notwithstanding anything in section one hundred and fifty-eight of the Merchant Shipping Act 1894, but subject to the provisions of this section, be entitled, in respect of each day on which he is in fact unemployed during a period of two months from the date of the termination of the service, to receive wages at the rate to which he was entitled at that date." The Court of Session held (the Lord President dissenting), that the damage sustained by the ship did not constitute a " wreck " within the meaning of sect. 1, sub-sect. (1), of the 1925 Act, in respect that the period required for repairs was not so prolonged as to render the ship unable to continue within a reasonable time the adventure contemplated in the agreement with the seaman. The case is reported (1932) S. C. 432. The seaman appealed.

John A. Lillie, K.C. (of the Scottish Bar) and *Charles A. Settle* for the appellant.

T. M. Cooper, K.C. and *W. A. Murray* (both of the Scottish Bar) for the respondents.

The House took time for consideration.

Lord Buckmaster (read by Lord Russell).—This is an appeal from the First Division of the Court of Session, recalling an interlocutor of the Sheriff that awarded to the appellant the sum of 9*l.* 16*s* as the amount of wages claimed by him under sect. 1 of the Merchant Shipping (International Labour Conventions) Act 1925. This Act, passed to give effect to certain draft Conventions of the International Labour Conference, provided that : " Sect. 1, sub-sect. (1) : Where by reason of the wreck or loss of a ship on which a seaman is employed his service terminates before the date contemplated in the agreement, he shall, notwithstanding anything in section one hundred and fifty-eight of the Merchant Shipping Act 1894, but subject to the provisions of this section, be entitled, in respect of each day on which he is in fact unemployed during a period of two months from the date of the termination of the service, to receive wages at the rate to which he was entitled at that date." And the appellant claims the benefit of that section in the following circumstances.

He is a marine engineer, and the chief engineer of the steam trawler *Strathclova*, the property of the respondents. His engagement was in terms of an agreement under which he was engaged from the 4th July 1930 to the 30th Dec. 1930, subject to a provision that the agreement might be terminated at any time before that date at the discretion of the owner. It is common ground that it was not so terminated.

On the 25th Sept., while returning to Aberdeen, a collision occurred between the *Strathclova* and another steam trawler, which, though a fairly severe one, did not prevent the *Strathclova* from returning to the port of Aberdeen under her own steam on the 25th Sept. The crew, including the appellant, were paid off on the 26th Sept, and told that the ship would be laid up until the repairs were completed. The repairs were not completed until the 20th Oct., and on the 21st the appellant resumed his duties. The amount claimed is the amount of wages for the fourteen days during which the *Strathclova* was under repair, and no question arises as to the amount.

The claim is resisted by the respondents upon the ground that the *Strathclova* was not a wreck within the meaning of the Act of 1925, and that on no consideration can the phrase " wreck " or " loss " within the meaning of the Act be made to apply to the facts of the present case.

The question as to the meaning of the word " wreck " in the Merchant Shipping Act of 1894, where in sect. 158 it occurs in the same context and to provide for similar conditions as those covered by the later statute, was the subject of judicial consideration in the case of *The Olympic*

(12 Asp. Mar. Law Cas. 318; 108 L. T. Rep. 592; (1913) P. 92). In that case a vessel in the White Star Line, on leaving Southampton for New York, came into collision with H.M.S. *Hawke.* She returned to Southampton, and proceeded under her own steam to Belfast, where she was fully repaired, and after nine weeks resumed her place in the Atlantic service. The Court of Appeal, from whose judgment Kennedy, L.J. dissented, decided that in these circumstances the vessel was a wreck within the meaning of sect. 158. Both Vaughan Williams, L.J. and Lord Wrenbury, who was then in the Court of Appeal, decided the question by considering the word "wreck" in relation to the service of the seamen, and, in the words of the last-named judge (12 Asp. Mar. Law Cas. at p. 323; 108 L. T. Rep. at p. 597; (1913) P. at p. 107), "the wreck of the ship in this context, I think, is anything happening to the ship which renders her incapable of carrying out the maritime adventure in respect of which the seamen's contract was entered into." The marked contrast between this and the ordinary maritime conception of a wreck is best illustrated in a sentence of Kennedy, L.J., who said (12 Asp. Mar. Law Cas. at p. 327; 108 L. T. Rep. at p. 600; (1913) P. at p. 115): "In my view 'wreck' means such disaster caused by collision with some external object, be it stationary, such as a rock, or moving, *e.g.*, another ship or some substance floating in the waves, as destroys her character as a ship, and reduces her practically to the condition which, speaking from memory, I think has been judicially described in the case of a wooden ship, as 'a congeries of planks.'" This case was referred to later in the opinions given in this House in the case of *Horlock* v. *Beal* (114 L. T. Rep. 193; (1916) 1 A. C. 486) without any expression of disapproval though without expressed assent.

The respondents here have based the main part of their case, as explained in the reasons they have given, upon the ground that *The Olympic* (*sup.*) was wrongly decided, and that the limited and relative meaning there attributed to the word "wreck" is not the true interpretation of the phrase. I do not think that the consideration of that question is open to this House. It has long been a well-established principle to be applied in the consideration of Acts of Parliament that where a word of doubtful meaning has received a clear judicial interpretation, the subsequent statute which incorporates the same word or the same phrase in a similar context, must be construed so that the word or phrase is interpreted according to the meaning that has previously been assigned to it. James, L.J., in the case of *Ex parte Campbell; Re Cathcart* (23 L. T. Rep. 289, at p. 291; L. Rep. 5 Ch. App. 703, at p. 706), expresses this rule in the following terms: "Where once certain words in an Act of Parliament have received a judicial construction in one of the superior courts, and the Legislature has repeated them without alteration in a subsequent statute, I conceive that the Legislature must be taken to have used them according to the meaning which a court of competent jurisdiction has given to them." And this opinion was expressed in a case where the learned Lord Justice himself said it was difficult to bring the interpretation within the words of the Act. The same opinion was expressed by Lord Halsbury in delivering the judgment of the Judicial Committee in the case of *Webb* v. *Outtrim* (*The Attorney-General for the Commonwealth of Australia intervening*) (95 L. T. Rep. 850; (1907) A. C. 81), and I know of no authority that has in any way weakened the effect of this pronouncement. It is, in my opinion, a salutary rule and one necessary to confer upon Acts of Parliament that certainty which, though it is often lacking, is always to be desired. It is indeed argued that in the Act of 1925 this rule need not apply, because it was an Act whose stated purpose was to give effect to a draft international convention scheduled to the statute which, by art. 2, had provided that the indemnity against unemployment to the seamen arose only where such unemployment resulted from "the loss or foundering" of the vessel, and that the words in sect. 21 must be construed as the equivalent of the phrase in the Convention which the statute was designed to confirm.

To my mind the answer to this is clear. At the time of the passing of the later Act, rights were enjoyed by the seamen under the Act of 1894, which, according to the judicial interpretation of the statute, conferred upon them wider and more extended rights than those contemplated by the Convention, and I think the conclusion is plain, that the Act, while intending to embody the Convention, did not intend to restrict or limit the rights which our seamen already possessed under the earlier statute of 1894. It does not follow that because the Convention had agreed to something less than that which our seamen enjoyed therefore we should reduce their rights down to the lower level. I am very clearly of opinion that the word "wreck" must be construed in the Act of 1925 as it was construed in the Act of 1894.

There remains the question as to whether the facts of this case bring it within the principle of *The Olympic* (*sup.*). In other words, whether the damage had been such as to cause such an injury that the ship cannot continue "the maritime adventure in respect of which the seamen's contract was entered into," notwithstanding that after repair she could perhaps perform some other adventure. In that case the adventure was a voyage to New York and home, if so desired, by a series of calls at ports in the South Atlantic, and she resumed her place in nine weeks. In this case the fishing trip lasts from five to fourteen days, and the ship generally sailed out after a day and a half in harbour. It was for such an adventure, lasting six months unless terminated, that the appellant was employed, and the point that arises is, was that adventure frustrated? It is impossible to establish any standard by which such a question can be tested, and this case illustrates the difficulty of deciding on which side of the line the facts cause the case to fall; but upon the whole I cannot find sufficient grounds for saying that the opinion of the majority of the Court of Session was wrong, but I think Lord Morison was in error when he thought that the defenders had terminated the contract in exercise of their rights in this respect under the contract. It was not so terminated. Had it been, this question would not have arisen. For these reasons I think this appeal should be dismissed.

Lord Blanesburgh (read by Lord Macmillan).—This cause, the details of which are before the House, was instituted in the Sheriff Court of Aberdeen really for the purpose of having the question settled by the order of your Lordships whether or not *The Olympic* (*sup.*) was rightly decided by the majority judgment of the Court of Appeal. The parties, having reached this House, find themselves confronted with the objection that that question is no longer open to discussion in any court. The decision, it is suggested, must be taken to have received the approval of the Legislature in the Merchant Shipping Act 1925. Upon that suggestion, while fully conscious of the difficulty created

by competing considerations, I have reached the conclusion that the correctness or otherwise of the decision still remains a matter fully open to discussion in this House, and I am persuaded that it was wrong. And I proceed at once to examine it, reserving, in the interest of convenient arrangement, until I have completed that task, the statement of my reasons for holding that the question whether it was right or wrong is still at large here.

The *Olympic*, one of the greater ocean going liners of her day, sailed from Southampton on her voyage to New York in the forenoon of the 20th Sept. 1911. Shortly after leaving port she came into collision off Cowes with H.M.S. *Hawke*, and sustained damage to her hull at a point on her starboard side 30ft. from her stern. After the collision she dropped anchor in Cowes Roads, where she remained during the night, returning to Southampton next day under her own steam. Her damage was local, but so far serious that she could not set out again on an Atlantic voyage without some permanent repairs. After receiving temporary repairs at Southampton she proceeded, again under her own steam, to Belfast, where she remained while the permanent repairs were being executed. On the 29th Nov., some nine weeks after the collision, she resumed her place on her owners' Atlantic service. That is the whole story of the disaster; set forth here in detail that it may be compared with the account of the stranding of the *Elizabeth*, to be given presently. The plaintiffs in the action were a fireman and seaman of the *Olympic* serving at the time of the collision under articles for what, in substance, was a voyage from Southampton to New York and back. On the vessel's premature return to Southampton on the 22nd Sept. they were discharged, with the rest of the crew, and were paid their wages to that date, but no more, the defendants contending that the payment of these wages was the measure of their liability under sect. 158 of the Merchant Shipping Act 1894, which in their view applied to the case. The plaintiffs, on the other hand, contending that sect. 158 had nothing to do with them, as there had, in their view, been no wreck of the *Olympic* within the meaning of that section, claimed compensation, under sect. 162 of the Act, for their wrongful discharge. That was the issue between the parties—the seamen on the one side, the owners on the other. Did sect. 158 apply to the case, as the owners contended, or did it not? If it did the defendants were right. If it did not the plaintiffs, under sect. 162, were entitled to recover the sum agreed.

Before the case finished a now well-known divergence of judicial view disclosed itself. But there were some fundamentals with reference to which there was never any question. It is convenient to recall these now.

The issue turned upon the introductory words of sect. 158: "Where the service of a seaman terminates before the date contemplated by the agreement by reason of the wreck or loss of the ship," and it was never in judicial debate that the section was operative only in a case to which these words applied. Again, with reference to the words themselves, it was not in debate that the position of a seaman as regarded the termination of his service must be ascertained according to the law as at the passing of the Merchant Shipping Act 1854, in which, as sect. 185, the enactment first appeared. The Legislature, said Kennedy, L.J. (108 L. T. Rep. at p. 598; (1913) P. at p. 109), "is referring to two events—wreck and loss—which it regarded as being, at the time of the passing of the Act, recognised causes of termination, namely, the termination by 'wreck' and the termination by 'loss.'" Nor, again, was it in contest that in 1854, and, perhaps, for generations before, a wreck of a ship resulting in her total loss did bring about the termination of a seaman's agreement. "A total loss by wreck happens. This operates a total loss of wages" (*The Elizabeth* (2 Dods. 403, at p. 408)).

But clearly there had been no such total loss by wreck in the case of the *Olympic*. "Would any one," Kennedy, L.J. asks (12 Asp. Mar. Law Cas. at p. 327; 108 L. T. Rep. at p. 600; (1913) P. at p. 115), "sailor or layman, say that the *Olympic*, as she lay at anchor in the Solent after the collision, or when afterwards she was navigating the waters of the Solent under steam on her way back to Southampton, was a 'wrecked' ship or describe the disaster as the 'wreck of the *Olympic*'?

The problem to be solved, therefore, was whether in 1854 anything short of a total loss by wreck—whether in particular such a disaster as had happened to the *Olympic*—would have been recognised as a "wreck of the ship" which brought about a termination of her seamen's agreements.

Here, again, on this question it was agreed that direct authority was confined to one decision. "The one authority," said Buckley, L.J. (12 Asp. Mar. Law Cas. at p. 322; 108 L. T. Rep. at p. 596; (1913) P. at p. 105), "which deals with the meaning of 'wreck' in the sense of casualty to the vessel is *The Elizabeth* (*sup.*), already cited, a decision of Lord Stowell's, and accepted on all sides as of unimpeachable authority. Indeed, the final difference of opinion amongst the learned judges is so directly traceable to their divergent views as to what Lord Stowell actually decided in that case that I asked learned counsel for the appellant in the course of his argument whether the correctness or otherwise of *The Olympic* decision might not definitely be ascertained by the test whether the view of *The Elizabeth* (*sup.*) taken by Buckley, L.J. or that taken by Kennedy, L.J. was correct. I understood him to agree that it might. But whether so or not, I believe it to be a sure test, as I hope now to show.

What *The Elizabeth* (*sup.*) actually decided is a matter so completely in difference between Buckley, L.J. and Kennedy, L.J. that I have thought it desirable to examine the report of the case critically. That examination, while it has disclosed the existence of expressions open perhaps to some ambiguity, makes to my mind the whole judgment, on the presently essential question, so clear as to cause surprise that it should ever have been understood in more than one sense.

The *Elizabeth*, a brig, sailed from London in June 1818, on a voyage to St. Petersburg and back to Portsmouth. She arrived in due course at St. Petersburg, and, having loaded a cargo of hemp and deals, she sailed thence on her return voyage to England on the 25th Sept. On the 27th Sept., "without the default of any person," she ran on to a reef of rocks near the island of Gothland. With local assistance and the help of the crew her cargo was unloaded and the brig got off the rocks, and she was brought to Ostergam, where she was laid on shore for the purpose of being examined. Her situation being thus summed up by Lord Stowell in his judgment (2 Dods at p. 407): "Here was a ship which had encountered what the law might call a semi-*naufragium*—full of water, as they themselves" [that is, the seamen] "state, so that they could not live on board. She is put into the hands of foreign carpenters for the course (a protracted course) of necessary repairs. It was doubtful whether she could at all receive such repairs as would restore her to a navigable state. It was by no means

doubtful that she could not receive such repairs as would enable her to proceed till after the approach of spring in that climate had restored the seas to a navigable state, so as to allow her a passage."

She was ultimately found to be repairable, and in April 1819, she arrived in England under the care of a Swedish crew picked up in Gothland. In Gothland on the 21st Oct. 1818, that is nearly four weeks after the stranding, the crew had been discharged by the master. He justified his action on the ground that the *Elizabeth* could not be repaired before the Baltic was blocked with ice, and that their discharge was necessary to avoid the expense of maintaining them in idleness for the whole winter. Their wages up to that date were tendered to them and they went, or were sent, to Elsinore and there they embarked for England, where they arrived in Jan. 1819. The suit was by Brokershaw, one of the seamen, but it clearly was in effect a test action. The plaintiff claimed his wages under his agreement up to the date of the *Elizabeth's* actual arrival in England in April 1819, with the expenses of his journey home. That the owners were liable for these expenses was not contested, and this matter need not be further referred to. The main, indeed the only pleaded, defence of the owners was that the men had accepted their discharge at the time it was made, and on the terms offered, namely, their wages to date. On this issue Lord Stowell found against the owners; there had been no acceptance by the men. And he then proceeded to deal with a further question which had not been pleaded, but which in a Court of Admiralty he felt it to be his duty to entertain and decide. Speaking of the *Elizabeth* and of the discharge of the seamen by the master, he says (2 Dods at p. 406): "If . . . the master had a right to dismiss the mariners upon proper conditions, and with a due responsibility for the performance of such conditions, the want of consent on the part of mariners could not invalidate his act of authority if he possessed it. The only real question in this case is, did he possess such an authority." The form of this question is a little ambiguous and has, I suspect, been a source of misunderstanding. What Lord Stowell meant by it, however, appears from his answer, which was that in the circumstances the termination of the services of the men by the act of the master was in a business sense reasonable as touching the interests of both sides under the agreement, but that the discharge could only be justified as against the men if it carried with it an obligation on the part of the owners to pay proper compensation to them for their loss of wages sustained through the refusal of the owners any longer to be bound by the obligations of the agreements. In Lord Stowell's view the owners' submission that the plaintiff was only entitled to wages up to the moment of discharge by the master was as entirely inadequate as was the plaintiff's counter contention extravagant that he was entitled to wages up to the actual date of the *Elizabeth's* arrival in England with another crew months after the only voyage ever in contemplation would have ended. *Medio tutissimus ibis*. The proper compensation to be paid to the plaintiff was, that with a free passage to England, he should receive the equivalent of his wages up to the date of his own arrival there in Jan. 1819, and Lord Stowell explained how that measure of compensation would secure for the plaintiff all that he would have received under his agreement had it been carried out as contemplated by both parties at the time it was entered into.

In order to enable a judgment to be formed upon the divergent views as to Lord Stowell's actual decision it may be well to ascertain from his judgment its *ratio decidendi*. It may, I think, be put thus: Where a seaman has been wrongly discharged, *sans cause valable*, upon idle or false pretences he has in most countries a right to his wages up to the time of the return of the vessel to her original port. But to Lord Stowell it did not seem that that result could be extended to a case where the discharge was occasioned by misfortune approaching to almost a necessity.

"I confess, it appears to me," he said, "that the circumstances in which this vessel was placed did vest in (the master) an authority to discharge his crew upon proper conditions."

The "authority" with which, as I understand it, Lord Stowell treated the master as being vested was not only one conferred by the owners, but was an authority derived from the proper implications of the agreements themselves, for, as he says, it seemed hardly just, where the disaster had arisen from a *vis major*, an act of God, in contemplation of neither party at the date of their agreement, that the whole of the inconveniences should fall upon one party whilst a new and unexpected benefit for the other was to arise from this common calamity—the benefit of living in ease and safety on shore at his owner's expense. "This," he said, "can hardly be the true rule applicable to such a case, under all possible circumstances that the seaman can insist upon staying with the ship, be the prospect of its return ever so distant, and the most just terms offered for a return to this country."

"I know and feel," he added, "the partiality which the maritime law entertains for this class of men, but it must not override all consideration of justice to other classes, particularly to merchants their employers; for what is oppressive to the merchant cannot but be injurious to the mariner."

Had Lord Stowell been sitting in a court of equity he might perhaps have described the result in this way: The plaintiff had shown no case for specific relief, but he had shown a right to compensation for the actual loss sustained by him through the determination of his agreement without legal justification. This is the keynote of the judgment. It was never suggested, even by the owners, that the plaintiff's agreement had terminated by reason of the disaster to the *Elizabeth*. It had been determined by the master discharging him four weeks later. The owners always acknowledged liability for his wages up to the date of that discharge. It was because the discharge by the master, while, in Lord Stowell's opinion, impliedly justified in the circumstances, was only *sub modo* so justified that the plaintiff was held entitled to the compensation awarded him.

The substance and effect of the judgment are thus explained with, as I believe, perfect accuracy by Kennedy, L.J. in *The Olympic* (12 Asp. Mar. Law Cas. at p. 326; 108 L. T. Rep. at p. 599; (1913) P. at p. 113): ". . . while (Lord Stowell) held that it was . . . in the interests of the shipowners 'reasonable' for the master to discharge the crew, the contract with the seamen was not dissolved—did not (to use the language of sect. 158) 'terminate' upon the happening of the disaster to the ship; and that if their services were terminated by the master's act, the owner thereupon became liable to pay compensation to the seaman for the loss of the wages which he could have earned on the voyage for which he had contracted to serve. That is, in principle, exactly what the plaintiffs claim to be their right in the present case; it is the right

which the law has recognised in sect. 162 (where there is a limitation) that the seaman's compensation shall not exceed one month's wages. Lord Stowell, not being fettered by any such statutory limitation, awarded the plaintiffs in the case of the *Elizabeth* wages up to the time of their being landed in their own country, and this was in effect, though not in intention, giving them wages for the whole of the period for which the homeward voyage of the *Elizabeth* would have lasted if she had not been damaged. . . . The damage to the *Elizabeth*, be it observed, was incomparably greater than that suffered by the *Olympic* in the present case. . . . It was indeed very doubtful, in the case of the *Elizabeth*, whether the vessel could ever be repaired . . . and yet in his judgment Lord Stowell would not describe even the case of the *Elizabeth* as *naufragium*, 'wreck,' but as semi-*naufragium*, a 'half-wreck,' and, as I have said, would not hold that the services of the seamen serving on her 'terminated' by the disaster, but held them to be terminable by the owner subject to the right, in Lord Stowell's time not a statutory but an equitable right, to be compensated for the loss by being paid wages as and for the period which I have stated from the report."

It is convenient at this point to compare the disaster to the *Olympic* with that to the *Elizabeth*. There must, I think be complete agreement with Kennedy, L.J. that the mishap to the *Elizabeth* was incomparably the greater of the two. Further, in the case of the *Elizabeth*, "the wreck of the adventure," so much in the *Olympic* case insisted on by Buckley, L.J., was overwhelming. Its completeness in contrast with the similar "wreck" in the case of the *Olympic* is as remarkable as is the fact that quite clearly in Lord Stowell's view it had no effect upon the situation one way or the other. He never even refers to it.

Now, if Lord Stowell, on the facts stated by himself, had held that the semi-*naufragium* to the *Elizabeth* worked a termination of her seamen's agreements, experience in this present case shows that it would have remained a serious question whether any justification for a similar finding in the case of the *Olympic* was thereby disclosed. I do not, however, propose to discuss the decision from that point of view, because it is not too much to say that if Kennedy, L.J.'s interpretation of *The Elizabeth* judgment be correct, the final decision in *The Olympic* (*sup.*) by a court which recognised the authority of *The Elizabeth* (*sup.*) was impossible. How, then, was it reached? This brings us to the view taken of Lord Stowell's decision by Buckley, L.J., whose judgment alone deals in detail with it. The Lord Justice says (12 Asp. Mar. Law Cas. at pp. 322, 323; 108 L. T. Rep., at p. 596; (1913) P. at p. 105): "The result of Sir William Scott's judgment in *The Elizabeth*, so far as it bears upon the question here to be decided is, I think, that, inasmuch as the vessel had encountered what he called a semi-*naufragium* (which, as a matter of fact, meant that she was full of water and required necessary repairs to restore her to a navigable state), the seaman's contract had terminated. The judgment goes on to decide what it was that under those circumstances the seaman was entitled to receive—this was held to be gratuitous conveyance home . . . and payment of his wages until he returned home. The decision is that the misfortune had arisen from *vis major*, the act of God, which neither party had in contemplation at the time of the contract, and that the circumstances vested in the master all authority to discharge the crew under proper conditions" (as above stated). "The consequences of termination are now supplied by sect. 158 of the Act of 1894 . . ."

I have set forth at, I fear, excessive length from the report itself both the facts in relation to the *Elizabeth* and Lord Stowell's judgment upon them in order that within the four corners of this judgment it may be made apparent that in attributing to Lord Stowell a decision that the agreements of the *Elizabeth's* seamen had terminated as a result of her semi-*naufragium* the Lord Justice paid no heed to any of the following reasons to the contrary:

(1) That, as already stated, it was never suggested, even by the owners, that the agreements of the seamen terminated in consequence of the disaster to the *Elizabeth*, or otherwise than as a result of the seamen's discharge from service by the master four weeks later.

(2) That if Lord Stowell had held the agreements terminated as a result of the disaster he could not have awarded any compensation after its date. The semi-*naufragium*, would have operated in his own words "as a total loss of wages."

(3) That the compensation awarded the plaintiff could not have been Lord Stowell's substitute for that now provided by sect. 158 of the Act of 1894. The forerunner of sect. 158 was passed in order to remedy the injustice under the common law in Lord Stowell's day, that if his vessel were wrecked or lost in the course of a voyage the sailor had no right to any wages at all.

(4) That, very clearly, the whole judgment turned on the propriety and effect of the master's discharge of the seamen four weeks after the semi-*naufragium*. If that disaster had been regarded by Lord Stowell as one terminating their agreements, there was nothing left for the master's discharge to operate upon.

(5) That so soon as it is shown from his judgment that this discharge was in Lord Stowell's mind the critical thing, it follows that the compensation he awarded is now represented by the limited statutory provision made by sect. 162 of the Act, a section which becomes operative in a case where the conditions of sect. 158 have not been fulfilled.

In the result it is, I suggest, established that the Lord Justice's statement of the position just set forth cannot stand in the presence of the explanation of Lord Stowell's judgment given by Kennedy, L.J.

But this view of *The Elizabeth* (*sup.*), which, I suggest, is not to be supported, was the foundation upon which the whole of the majority judgment in *The Olympic* (*sup.*) was erected.

(1) It enabled the Lord Justice to treat a semi-*naufragium* as a proper foundation for the application of sect. 158. It enabled him to disregard Dr. Lushington's judgment in *The Florence* (16 Jur. 573), where he said: "In shipwreck the contract continues so long as a plank can be saved," and it enabled him to make a statement for which, apart from his own view of *The Elizabeth*, there is, so far as I have been able to find, no authority anywhere. "The question is not," he says, "whether the vessels had been so injured and damaged that she ceased to be a ship of any service to the owners, but a smaller question, namely, whether she had been so injured and damaged that she ceased to be a ship of service for the purposes of the adventure, the subject of the seaman's contract."

But (2), the most important of all, it opened the way for the Lord Justice to treat the disaster to the ship as being little more than an accident in relation to what was the essential thing: "the wreck of the adventure," a consequence to which,

as I have shown, Lord Stowell attached no relevance at all.

Accordingly, I reach the clear conclusion that the decision in the case of *The Olympic* (*sup.*) was fundamentally wrong; that the opposing view of Kennedy, L.J. was right, and that if a case in which the true meaning to be attached to the words "wreck of the ship" in sect. 158 had before 1925 come before this House, *The Olympic* decision upon that question must have been overruled. And here is the beginning of the second question raised by this appeal. Is there anything in the Act of 1925 which precludes that question under sect. 158 of the Act of 1894 being raised as freely now as it could have been before the later Act was passed.

Before proceeding to deal with that question I would draw the attention of the House to an observation of the learned sheriff-substitute which at more points than one is not without its relevance in relation to it. With the traditional judicial leaning in favour of the seaman, the learned judge expresses his preference for *The Olympic* decision on the ground that the construction which was thereby placed upon the word "wreck" gives to it a far more extensive and beneficial operation, so far as seamen are concerned, than does a construction which would treat "wreck" as merely a special variety of "loss." I do not know whether the sheriff-substitute in saying this had it in mind that it was on the narrow and not on the extended construction of "wreck" that sect. 158, in a statute containing also sect. 162, became a seaman's section. Up to the passing of the Act of 1925, it was invariably the owners, and never the seamen, who pressed for the extended construction. It was for the narrower view that the seamen fought in *The Olympic* case, and the seaman's wife in *Horlock* v. *Beal* (*sup.*) presently to be discussed. That it was to the interest of seamen so to do is shown both by the result in *The Elizabeth* (*sup.*) before the Act of 1854 and by their claim in *The Olympic* (*sup.*) after it. It was the Act of 1925 which effected, as an entirely unforeseen by-product I suspect, the *bouleversement* now apparently complete when each side is found repudiating the claims formerly made on its behalf, and embracing those always previously resisted.

With all this in mind, I proceed to a consideration of the second question, and I apprehend that before it can be ascertained whether, as a result of the Act of 1925, the decision in *The Olympic* (*sup.*) has been given legislative force, it is necessary to discover what was the precise effect of that decision as pronounced, how far in that sense it had been recognized and acted upon, how far its authority was at any time undoubted, and whether that authority, such as it had been, remained intact at the date of the passing of the Act of 1925.

By the extended meaning it attached to the word "wreck" the effect of the decision was to eliminate from the essential connotation of the term any physical destruction of the ship. Where there had been no "loss" it was, of course, on construction essential, if the section was to apply at all, that "a wreck of the ship" terminating the seamen's agreements had in some sense occurred. It had occurred, in the view of Vaughan Williams, L.J. (12 Asp. Mar. Law Cas. at p. 322; 108 L. T. Rep. at p. 595), if the vessel by reason of her injuries were made "unseaworthy for so long a time as to make the continuance of the voyage useless as a commercial venture"; it had occurred in the view of Buckley, L.J. (12 Asp. Mar. Law Cas. at p. 323; 108 L. T. Rep. at p. 596; (1913) P. at p. 106) if she had "ceased to be a ship of service for the purposes of the adventure." Buckley, L.J. could not decide whether any injury, other than injury to the hull, would suffice. It was not necessary to do so in that case. But the trifling sufficiency of the injury he had in view to constitute a "wreck" is shown by the illustration which, with a great liner in his mind, he gave (12 Asp. Mar. Law Cas. at p. 323; 108 L. T. Rep. at p. 597; (1913) P. at p. 108): "If, for instance, the injury be such as could be repaired within, say, twenty-four hours, it does not follow that the ship cannot perform the contemplated adventure." Vaughan Williams, L.J., by making unseaworthiness the test, introduced no such reservations, and it must be presumed, I take it, that in his view any engine trouble, any broken propeller or broken engine shaft, provided only the time required for repair was sufficiently prolonged, must have been a "wreck" within the meaning of the section, entitling the owners of the ship to treat the seamen's agreements as terminated. Now, when the traditional principle is recalled—conceived, be it remembered, for the safety of ships—that a seaman's contract is not lightly dissolved either on his side or on that of the owner, it will, I think, be agreed that these are extreme views. They were, of course, vigorously dissented from at the time by Kennedy, L.J. Did they survive up to 1925? I suggest to your Lordships that in their extreme form they had no existence after *Horlock* v. *Beal* (*sup.*)

In that case a British ship in the course of a voyage for which a British seaman had signed articles was in the port of Hamburg when War was declared against Germany on the 4th Aug. 1914. She was detained by the German authorities; some months later the crew were imprisoned in Ruhleben. In 1916 the ship was still being detained. The action was by the wife of one of the seamen against the owners on an allotment note for his wages. The first question to be decided was whether there had been a "loss of the ship" within the meaning of sect. 158. There was no evidence that any physical harm had befallen her, but it was suggested in the Court of Appeal by Phillimore, L.J., that in considering the meaning of the word "loss" similar considerations touching the adventure might be imported as had in *The Olympic* (*sup.*) been applied in the case of "wreck." And an argument to that effect was addressed to this House. It failed; the "loss" of the section was physical loss only. Although *The Olympic* (*sup.*) was not directly in point, the decision was referred to by Lord Loreburn, by Lord Wrenbury and by Lord Atkinson. Lord Loreburn says (114 L. T. Rep. at p. 201; (1916) 1 A. C. at p. 493): "We were referred to sect. 158 of the Merchant Shipping Act. That section tells us what is to be done in regard to wages if there is a wreck or loss of the ship. In my opinion these words refer to physical loss. . . . If I am right in thinking that both the words used in this section, namely, 'wreck' and 'loss'—refer to the ship herself and to her physical condition, then they have no bearing on this case. I will merely add that the Court of Appeal in *The Olympic* did not decide anything inconsistent with this view. They merely used the frustration of the voyage as a test by which to determine whether or not the physical injury inflicted amounted to a wreck."

Lord Wrenbury's words are not less significant. He says (114 L. T. Rep. at p. 212; (1916) 1 A. C. at p. 524): "I may dispose of the question upon sect. 158 in a few words. It was decided in *The Olympic* (108 L. T. Rep. 592; (1913) P. 92) that there is a 'wreck of the ship' within the section

where the vessel has suffered physical damage by a casualty in the nature of wreck as that she has ceased to be in a seaworthy condition to continue within a reasonable time the adventure as a commercial adventure. The same, I think, is true of the word 'loss' in the section. If there have been such a loss as that the adventure has failed as a commercial venture, the section, I think, applies. But it remains to determine the meaning of the word 'loss.' It is confined, I think, to physical loss. The wreck and the loss referred to in the section I understand to be a physical injury if it be a wreck, and a physical loss if it be a loss."

To my mind the result of these two statements is of first importance in the present connection. First of all I take Lord Loreburn to mean that in his opinion in order to satisfy sect. 158 there must be a physical "wreck" just as there must be a physical "loss." He sees no inconsistency in *The Olympic* (*sup.*) only because "frustration"——he uses, it will be noticed, a strong word—he regards as having been invoked there merely as a test of its completeness, but in no way dispensing with the duty of proving that there had been in fact a physical wreck. His words suggest to me that had he thought the decision went further he would have disagreed with it.

From Lord Wrenbury we have an authoritative interpretation by its principal author of the decision itself. He has stated what was meant by it; and it must now be understood, as I take it, that Vaughan Williams, L.J.'s unseaworthiness test is not to be understood too literally; that the Lord Justice's own reservation that something other than hull damage might constitute a wreck is no longer operative; while there must have been a casualty "in the nature of wreck," an entirely new expression. The wreck, too, like the loss, must be physical. It is true that Lord Wrenbury considers that the figurative wreck of the commercial adventure may be a consideration applicable to "loss" as to "wreck." I can, however, find no suggestion to this effect in Lord Loreburn's statement, and if "loss" in the section is physical loss, and that only, it is not quite apparent how there can be room for any such reservation. The adventure must surely disappear with the physical loss of the vessel by means of which it was being carried out.

Lord Atkinson also refers to *The Olympic* (*sup.*). And he accepts the decision as correct. But, unfortunately, his acceptance is based exclusively upon a misapprehension in a most vital particular of Lord Stowell's decision in *The Elizabeth.* Speaking of that decision, Lord Atkinson says (114 L. T. Rep. at p. 205; (1916) 1 A. C. at p. 503): "The plaintiff sued for wages up to the time of the return of the ship to the home port. It was held that he was only entitled to his wages up to the date of his discharge" by the master.

Now, as has already been seen, the decisive point in Lord Stowell's judgment was just that the plaintiff had awarded him his wages, not up to his discharge, but up to his arrival in England three months later. And the mistake on Lord Atkinson's part is vital, because, following his reasoning, it seems clear that if the true facts in that respect had been present to his mind he must have disagreed with the majority decision in *The Olympic* and have accepted that of Kennedy, L.J. Clearly, he was of opinion that in *The Elizabeth* the plaintiff's agreement was not held to have been terminated by the semi-*naufragium*, as Buckley, L.J. had supposed, but by his subsequent discharge by the master.

How then in 1925 did *The Olympic* decision stand? How must the draftsman of the Act of 1925 have regarded it?—its existence, as I assume, being known to him. First of all, on the report of the case itself, he must have been impressed by the force of Kennedy, L.J.'s dissenting judgment, which, on further inquiry, he would have found had been accepted, even here, as authoritative on subjects outside this case. Again, after the observations in this House in *Horlock* v. *Beal*, he must have felt assured that the decision in its original form could no longer be relied on as of permanent authority, nor, indeed, as authentic, except in a sense which no reader of the judgment would attach to it, while so far as it was reached on any distinction between "wreck" and "loss" it was in the gravest danger of extinction on the first effective occasion.

But another circumstance must have struck him. There seems to be no recorded instance of owners having subsequently sought to utilise *The Olympic* decision in their favour. For all that appears in the reports or textbooks it had become a dead letter. And, indeed, the liability under sect. 162, from which, where it was applicable, the decision relieved the shipowners, must have been in most cases too trifling to worry about. Not without warrant was the draftsman if he concluded that in the new Act he might use the words "wreck" or "loss of the ship" in confidence that they would have attributed to them no other than the narrow meaning for which the seamen had always contended. The recent recrudescence of *The Olympic* decision in the Northern fishing fleets, and changed attitude towards it by each side, is doubtless due to the discovery now made that the decision, although originally strongly resisted by them, has placed in the hands of the seamen there a valuable aid in support of claims under the new Act competent to them now for the first time. One must not deny omniscience to a Government draftsman. But it was in Aberdeen, I suspect, that this chance was first seen and taken.

And this brings me to the Act of 1925 itself. In relation to the problem now being discussed the Act is helpful in a way which I have not found paralleled in any similar case. Its purpose is proclaimed. Not only is it intituled "an Act to give effect to certain draft conventions relating . . . to an unemployment indemnity for seamen in the case of loss or foundering of their ship," but these words are repeated in the preamble of the Act; the Convention is scheduled to the Act, and in its art. 2 it is again the words "loss or foundering" that are used. Then in the preamble it is recited that it is expedient "for the purpose of giving effect to such draft conventions that such provision should be made as is contained in this Act." Its purpose is accordingly insistently expressed. There can be no question as to the intent of this Act whatever may be the case with most statutes. As I observed in *The Croxteth Hall; The Celtic* (*ante*, p. 186; 144 L. T. Rep. 441, at p. 444; (1931) A. C. 126, at p. 133), the method adopted by the Act, to achieve its purpose, is not, as it might have been, to transfer the international language of the Convention to the body of the statute, but is to translate that language into the phraseology of the Merchant Shipping Acts and to direct that the Act is to become part of and be construed as one with the other Acts of that code.

In sect. 1 of the Act, the translation of the Convention words "loss or foundering" is "wreck or loss," words already found in the same connection in sect. 158 of the Act of 1894, and the first question is whether the meaning attributable to the words in each of these sections is to be the same. If I am not debarred from an expression of that view by the case of *The Croxteth Hall; The Celtic* (*sup.*),

in which the House construed the word "wages" in sect. 1 as a word apart and without reference to its meaning, either in sect. 158 or anywhere else in the Acts, then I say that the meaning to be attached to the words in sect. 1 "where by reason of the wreck or loss of a ship on which a seaman is employed his service terminates before the date contemplated in the agreement" is the same as is the meaning to be attributed to the words in sect. 158 : "Where the service of a seaman terminates before the date contemplated in the agreement by reason of the wreck or loss of the ship." In the one case too, as in the other, the question whether the service terminated or not is to be ascertained by reference to the law as it stood at the passing of the Merchant Shipping Act 1854. It seems to me clear that the condition on which each section is to become operative is the same.

But what is that meaning? I ask the question, first of all, with reference to sect. 158. Let it be supposed that the facts in *The Olympic* (*sup.*) were reproduced in the case of another liner, and a claim made by the seamen under sect. 162 was brought to this House for final decision, can it be doubted that the use of the words "wreck or loss" in the Act of 1925, where, as it clearly appears, they are a translation of the words "loss or foundering" would be pointed to, and rightly so, as the strongest confirmation on the part of the Legislature itself of the correctness of Kennedy, L.J.'s views as expressed in *The Olympic* (*sup.*)

And if the question is put with reference to sect. 1 of the Act of 1925, is the answer to be reversed? Is it, then, to be said that the decision in *The Olympic* (*sup.*) must be treated as now informing the word "wreck" and that, regardless of the fact that the words "wreck or loss" of the section are a translation of the words "loss or foundering" of the Convention and are found in an Act passed to give that Convention effect, still the meaning of wreck is not necessarily more than a temporary unseaworthiness of the ship? And is this answer to be given, although it must be recognised that thereby there is being attached to the word a construction to which seamen had always been opposed?

In *Young and Co.* v. *Mayor and Corporation of Leamington* (49 L. T. Rep. 1, at p. 4 ; 8 App. Cas. 517, at p. 526), in relation to just such a question as we are now discussing, I find Lord Blackburn saying this : "I have no doubt that in fact those who prepared the Act of 1875 knew of the differences of opinion that had been expressed, and the difficult questions that might yet have to be decided, and really intended to provide that those differences should not arise with reference to the urban authorities they were creating."

Is it possible for anyone, in the face of the Convention and the expressed purpose of the Act of 1925 in this matter "to have no doubt" that *The Olympic* construction, destructive of both, was by the Legislature being permanently attached to the word "wreck"? If the question be permissible there can, I suggest, be no doubt as to the answer.

And the question, I think, is permissible. For giving to the rule of construction now under discussion its fullest expression, it is in the end a question of legislative intention, and it is not every decision of the courts that will be regarded as sufficiently authoritative or notorious to suggest any such intention on the part of the Legislature. There is no question as to the existence of the rule. It is in its application that difficulty arises.

One of its best statements is that made by Griffith, C.J., and approved by Lord Halsbury, when delivering the judgment of the Privy Council in *Webb* v. *Outtrim* (*The Attorney-General for the Commonwealth of Australia* intervening) (95 L. T. Rep. at p. 852 ; (1907) A. C. at p. 89). It runs as follows : "When a particular form of legislative enactment, which has received authoritative interpretation, whether by judicial decision or by a long course of practice, is adopted in the framing of a later statute, it is a sound rule of construction to hold that the words so adopted were intended by the Legislature to bear the meaning which has been so put upon them."

That statement is specially valuable because of its insistence on the condition that the interpretation shall be authoritative. It is useful also in that it recalls that the interpretation may result both from judicial decision and by a long course of practice. If the numerous authorities are looked at it will be found, I think, that the foundation for the application of the rule has been discovered in a long course of practice far more frequently than in a judicial decision, particularly where that judicial decision is one of a court short of this House.

I will give a very notable example of this in a case to which I referred during the argument, but was not able then completely to identify. I have done so since. It is the case of the *Colonial Bank* v. *Whinney* (55 L. T. Rep. 362 ; 11 App. Cas. 426). The question there was whether shares in an incorporated company were choses in action within the meaning of sect. 44 of the Bankruptcy Act 1883. On the corresponding section of the Bankruptcy Act 1869, it had been held by Bacon, V.-C., in 1871, in *Ex parte The Union Bank of Manchester Limited ; Re Jackson* (24 L. T. Rep. 951 ; L. Rep. 12 Eq. 354), that such shares were not choses in action. That decision had never been questioned, and in 1883 the earlier section was re-enacted in a form unaltered. There, in the opinion both of Cotton and Lindley, L.JJ., was a case for the application of this rule. "In my opinion," said Cotton L.J. (53 L. T. Rep. at 277 ; 30 Ch. Div. at p. 278) : "Parliament must be taken to have known of that decision, and if they did not intend the same construction to be put upon the expression 'choses in action' in this Act as had been put upon it in a precisely similar proviso of the former Act by a decision which had stood unimpeached for so many years, they would have inserted something to show that intention, and would not have framed this proviso in the same terms as that of the former Act." Lindley, L.J. expressed the same view (53 L. T. Rep. at p. 279 ; 30 Ch. Div. at p. 284). The case was brought on appeal to this House. As a pupil of Mr. Buckley, with Sir Horace Davey, of counsel for the respondent, I listened to the argument. I heard Sir Horace Davey cite the case of *Ex parte The Union Bank of Manchester Limited ; Re Jackson* (*sup.*) (as appears in the report) and claim for it the influence attributed to it by the two Lords Justices. In answer I heard Lord Blackburn say words to the effect that the Legislature was not to be presumed to have before it every decision of every judge of first instance, and he brushed the whole thing aside. Unfortunately the report makes no reference to this incident, but it does show that *Ex parte The Union Bank of Manchester Limited ; Re Jackson* (*sup.*) is not referred to in their judgments by any of their Lordships, and that the House held that "shares" were choses in action under the Act of 1883.

To my mind that case is much stronger than the present. *Ex parte The Union Bank of Manchester Limited ; Re Jackson* (*sup.*), although the decision of a judge of first instance, was the decision of the Chief Judge in Bankruptcy, sitting in bankruptcy

pronounced two years after the Act of 1869, a decision which must have been constantly applied in bankruptcy, and it was never subsequently questioned. Here the decision is a decision of the Court of Appeal, but of two members of the court only, with a most elaborate dissent from the third Lord Justice dealing with a subject upon which he had special knowledge—a decision, moreover, which had been qualified, I suggest, almost out of recognition in this House, and even by Lord Wrenbury himself, and with no evidence that it had ever been utilised at the instance of any shipowner. When to all that is added the fact that this decision can only be read into this sect. 1 at the price of a partial defeat of the avowed purpose of the statute, it becomes, I suggest to your Lordships, a case outside the rule altogether, however that rule be stated. I have been unable to find any case at all approaching the circumstances of the present in which the rule has been applied.

I wish to add that while *Ex parte Campbell; Re Cathcart* (23 L. T. Rep. 289; L. Rep. 5 Ch. App. 703) will always remain of value for the statement of the rule by James, L.J., it cannot be invoked as an illustration of its application. James, L.J. there found the application for the rule in his belief that in the Bankruptcy Act of 1861 a section had been brought over from an earlier Act unaltered in its terms, notwithstanding an intervening objection to it by Lord Westbury in a case *Ex parte Alexander; Re Thin and Plett* (1 De G. J. & S. 311). The Lord Justice, however, was mistaken in his dates. *Ex parte Alexander* (*sup.*), which he had himself argued, was not decided until 1863, while the objection then taken by Lord Westbury was removed in the subsequent Bankruptcy Act of 1869. This fact reduces the statement of the Lord Justice to an *obiter dictum.* I do not suggest that, coming from such a source, it is really less valuable on that account. But the case is not otherwise in point.

In my judgment there was in this case no "wreck" of the *Strathclova* within the meaning of sect. 1 of the Act of 1925 or of sect. 158 of the Act of 1894. The appellant's claim as pursuer in the cause fails *in limine*, and for that reason his appeal should, I think, be dismissed.

Lord Warrington. — This is an appeal from an interlocutor dated the 5th Feb. 1932 whereby the First Division of the Court of Session by a majority (Lords Blackburn and Morison; the Lord President dissenting) allowed an appeal from interlocutors of the sheriff and sheriff-substitute dated respectively the 17th Nov. and the 28th July 1931, allowing the claim of the appellant as pursuer in the action.

The appellant was a seaman on the steam trawler *Strathclova*, of which the respondents were the owners, under the terms of a running agreement dated the 4th July 1930, and was by that agreement engaged for a period from the 4th July 1930 to the 30th Dec. 1930. His claim in the action was founded on sect. 1, sub-s. 1, of the Merchant Shipping (International Labour Conventions) Act 1925, and was for wages as provided by that Act. The section in question is as follows: "(1.) Where by reason of the wreck or loss of a ship on which a seaman is employed his service terminates before the date contemplated in the agreement he shall notwithstanding anything in sect. 158 of the Merchant Shipping Act 1894, but subject to the provisions of this section, be entitled in respect of each day on which he is in fact unemployed during the period of two months from the date of the termination of the service to receive wages at the rate to which he is entitled at that date."

Sub-sect. (2) contains provisions restricting the right to wages under certain conditions not alleged to be applicable to the present case.

Sect. 158 of the Merchant Shipping Act 1894 provides that "where the service of a seaman terminates before the date contemplated in the agreement, by reason of the wreck or loss of the ship, or of"—an event not applicable in the present case—"he shall be entitled to wages up to the time of such termination, but not for any longer period." Thus the Act of 1925 gives to the seaman, in the event specified in both Acts, a claim to wages more extensive than that to which he would have been entitled under the Act of 1894, and is in effect an amendment of that Act.

Two questions arise for decision:

(1) Whether on the true construction of the Act of 1925 the event of a wreck or loss of the ship has occurred?

(2) Whether if so the seaman's service was terminated by reason of such wreck or loss?

In considering these questions I need not state the facts in detail, but will give a short summary only.

The seaman's service in this case was to be on board the *Strathclova*, a steam trawler to be employed "fishing trawl North Sea Shetland West Coast and Faroe" from the 4th July 1930 until the last day of Dec. 1930, or, if the boat should be at sea on that date, until the first return to the United Kingdom thereafter. But it was agreed that, subject to the above stipulation, the agreement might be terminated at any time before that date at the discretion of the owner. It is common ground that under such an engagement the parties contemplated a series of short trips to the fishing ground, each ending in a return to the home port followed in due course by another trip. Before this House counsel agreed that as a rule the maximum length of a trip would be fourteen days and the minimum five days, and the normal interval in the home port would be one day and a half. The venture was therefore one of practically continuous fishing for the period of the agreement.

On the 25th Sept. 1930 the *Strathclova* when at a distance of one mile to one mile and a half from her home port, the harbour of Aberdeen, came into collision with another steam trawler and was considerably damaged. She was, however, able to make the harbour of Aberdeen under her own steam, was moored near the Fish Quay, and discharged her cargo there on the 26th Sept. She was then dry-docked for the purpose of effecting the repairs rendered necessary by the collision. These were completed on the 10th Oct., and on the 11th Oct. the appellant was re-engaged and resumed his employment. The fishing trips were then resumed. In the meantime, on the 26th Sept., the crew including the appellant were paid off, being told that the ship would be laid up until the repairs were completed. In the interval the appellant was unemployed.

On these facts the first question is: Was the accident to the *Strathclova* a "wreck" within the meaning of the Act of 1925?

In my opinion this question should be answered in the affirmative, the point being settled by authority.

In the case of *The Olympic* (*sup.*) it was decided by a majority in the Court of Appeal (Vaughan Williams and Buckley, L.JJ.; Kennedy, L.J. dissenting) that the "wreck or loss" of the ship referred to in sect. 158 of the Merchant Shipping Act 1894 includes any accident occasioned by a peril of the sea which renders the ship unfit or

unable to proceed on the voyage. It was further decided on the facts of that case that the mercantile venture on which the ship was then engaged was frustrated by reason of the wreck, and the services of the seamen were accordingly terminated. But on this point it may be, and the Court of Session have so decided, that on the facts this case should be decided the other way. This is, of course, the second question I have put to myself.

To return to the first question, the case of *The Olympic* (*sup.*) clearly decided the point. It is, however, a decision of the Court of Appeal, and would *primâ facie* be open to review in this House. For myself I should not, I think, differ from the view of the Court of Appeal even if I thought myself at liberty to decide the other way, but this is immaterial if it be true that this House is not now at liberty to overrule their decision.

The present case is, in my opinion, covered by the judgment of James, L.J. in *Ex parte Campbell; Re Cathcart* (*sup.*). The question there was whether under sect. 216 of the Bankruptcy Act 1861 a particular interrogatory was covered by the words of the section and was therefore one which the witness was bound to answer. The point had been decided against a witness in a case of *Ex parte Vogel* (2 B. & Ald. 219) under a previous Act of Parliament containing practically the same words as those afterwards employed in the Act of 1861. The learned Lord Justice said this (23 L. T. Rep. at p. 291; L. Rep. 5 Ch. App. at p. 706): "Where once certain words in an Act of Parliament have received a judicial construction in one of the superior courts, and the Legislature has repeated them without any alteration in a subsequent statute, I conceive that the Legislature must be taken to have used them according to the meaning which a court of competent jurisdiction has given to them."

Counsel were unable to refer us to any case in which the view of James, L.J. had been questioned. It is particularly applicable in the present case, because in the Act of 1925, which professed to give effect to an International Convention in which the words "loss or foundering" in a similar context were used, the Legislature have used the words "wreck or loss" appearing in the Act of 1894 which had previously received the interpretation in question. For these reasons therefore I think the first question must be answered in the affirmative, namely, that the accident to the *Strathclova* was a wreck within the meaning of the statute.

There then arises the second question, namely, was the service of the seaman terminated by reason of the wreck? This question was answered in the affirmative by the majority of the court in *The Olympic* (*sup.*) on the ground that the whole mercantile adventure was frustrated by the wreck. Vaughan Williams, L.J. expresses the ground of his conclusion in the following terms (12 Asp. Mar. Law Cas. at p. 322; 108 L. T. Rep. at p. 595; (1913) P. at p. 103): "Such damage" (namely, the damage occasioned by the wreck) "although repairable, would make the ship unseaworthy for so long a time as to make the continuance of the voyage useless as a commercial venture." Buckley, L.J. says (12 Asp. Mar. Law Cas. at p. 323; 108 L. T. Rep. at p. 597; (1913) P. at p. 107): "The wreck of the ship in this context, I think, is anything happening to the ship which renders her incapable of carrying out the maritime adventure in respect of which the seaman's contract was entered into."

In the present case the mercantile adventure in respect of which the seaman's contract was entered into was not merely for a single voyage. It was for a series of fishing trips, each of short duration, extending over several months. The repairs took fourteen days only to complete, and on this being done the ship resumed her fishing trips and continued them until the time fixed by the contract. Under these circumstances I agree with Lord Blackburn and Lord Morison that the service of the seaman was not terminated by reason of the wreck, and accordingly the seaman was not entitled to the benefit of the Act of 1925.

The third plea in law originally set up by the respondents, founded on the averment that the seaman's service was terminated in terms of his contract, was withdrawn, and in my opinion rightly withdrawn. It is true that the contract contained a provision that it might be terminated at any time at the discretion of the owner. But I think it is plain that in paying off the men on the 26th Sept. 1930, the owner did not purport to act on this provision, for the Sheriff-Substitute finds as a fact (No. 8) that the crew were told at the time of paying off that the ship would be laid up until the repairs were completed, and we know that on this being done the fishing trips were renewed.

On the whole I am of opinion that the interlocutor appealed from should be affirmed and this appeal dismissed with costs.

Lord Russell.—The case of *The Olympic* (*sup.*) decided, in reference to the words "wreck or loss" which occur in sect. 158 of the Merchant Shipping Act 1894 that the word "wreck" meant something different from and less than "loss," and that in that section the wreck of the ship meant anything happening to the ship which rendered her incapable of carrying out the maritime adventure in respect of which the seaman's contract had been made.

Some twelve years later, *The Olympic* decision having in the meantime governed the construction of the section, the Legislature enacted the Merchant Shipping (International Labour Conventions) Act 1925. That Act shows by its full title and by its preamble that its object is to give effect to certain draft conventions which had been adopted by the International Labour Conference relating to (among other things) "an unemployment indemnity for seamen in case of loss or foundering of their ship." The draft conventions referred to are set out in the First Schedule to the Act. Sects. 1 and 7 of the Act run thus:

Sect. 1, sub-sect. (1): "Where by reason of the wreck or loss of a ship on which a seaman is employed his service terminates before the date contemplated in the agreement, he shall, notwithstanding anything in section one hundred and fifty-eight of the Merchant Shipping Act 1894, but subject to the provisions of this section, be entitled, in respect of each day on which he is in fact unemployed during a period of two months from the date of the termination of the service, to receive wages at the rate to which he was entitled at that date."

Sub-sect. (2): "A seaman shall not be entitled to receive wages under this section if the owner shows that the unemployment was not due to the wreck or loss of the ship, and shall not be entitled to receive wages under this section in respect of any day if the owner shows that the seaman was able to obtain suitable employment on that day."

Sub-sect. (3): "In this section the expression 'seaman' includes every person employed or engaged in any capacity on board any ship, but, in the case of a ship which is a fishing-boat, does not

include any person who is entitled to be remunerated only by a share in the profits or the gross earnings of the working of the boat."

Sect. 7: "This Act may be cited as the Merchant Shipping (International Labour Conventions) Act 1925, and shall be construed as one with the Merchant Shipping Acts 1894 to 1923, and those Acts and this Act may be cited together as the Merchant Shipping Acts 1894 to 1925."

The effect of sect. 7 has been succinctly stated by one of your Lordships in *The Croxteth Hall; The Celtic* (*ante*, p. 186; 144 L. T. Rep. at p. 443; (1931) A. C. at p. 133), where he uses the following language: "The Act . . . of 1925 thus becomes a constituent part of a statutory code with special meanings attached to some of its terms by definition and to others by accepted usage or judicial decision. The result, of course, is that a meaning may necessarily be attributable to its provisions very different from that which would attach to the very same words in an independent enactment."

On looking at sect. 1, we find that Parliament, in legislating for the purpose of carrying out the draft convention, has used in the first three lines of sect. 1 words which are for all relevant purposes the same as those in sect. 158 of the Act of 1894, although the order in which they occur is somewhat altered. The words in sect. 158, "by reason of the wreck or loss of the ship," become in sect. 1 "by reason of the wreck or loss of a ship on which a seaman is employed." There is not, in my opinion, any room for doubt that whatever they mean, the words "wreck or loss" must mean the same in both sections. Nor, in my opinion, can your Lordships in the present case avoid attributing to the Legislature when it used in sect. 1 of the Act of 1925 the identical words "wreck or loss" which had in 1913 been judically construed by the Court of Appeal, and used them in reference to the same-subject matter, an intention to use the words in the sense in which they had been so judicially construed. The authorities in support of a presumption of such intention are numerous and weighty. Some are referred to in the opinions of your Lordships and I need not repeat them. I may, however, call attention to two others. In *Barlow* v. *Teal* (53 L. T. Rep. at p. 53; 15 Q. B. Div. at p. 405), Lord Coleridge, C.J. said: "Where cases have been decided on particular forms of words, in courts, and Acts of Parliament use those forms of words which have received judicial construction, in the absence of anything in the Acts showing that the Legislature did not mean to use the words in the sense attributed to them by the courts, the presumption is that Parliament did so use them." In this House, Lord Loreburn, in giving his opinion in *North British Railway Company* v. *Budhill Coal and Sandstone Company* (101 L. T. Rep. 609, at p. 612; (1910) A. C. 116, at p. 127), stated that "When an Act of Parliament uses a word which has received a judicial construction it presumably uses it in the same sense."

Is there anything in the Act of 1925 which would justify us in rebutting this presumption? For myself I find nothing, but I find much to compel us to act upon it, for, be it observed, full effect could have been given to the draft conventions by legislating strictly in the language thereof and adhering to the words "loss or foundering." Instead of following this course the Legislature has, as it appears to me, elected not to do so, but to legislate by reference to a section of an existing Act of Parliament the words of which, by virtue of a judicial construction which had stood unchallenged for years, covered many occurrences other than loss or foundering. In these circumstances I feel bound to hold that the word "wreck" in sect. 158 of the Act of 1925 bears the meaning attributed to it by the Court of Appeal in *The Olympic* decision.

There remains the question whether the facts of this case bring it within that decision. Did that which happened to the ship render her incapable of carrying out the maritime adventure in respect of which the seaman's contract was made? Was the ship unseaworthy for so long a time as to frustrate that adventure? In my opinion, the answer should be "No." The venture was a contract for a series of practically continuous fishing trips extending over a period of about six months. The ship was laid up for some fourteen days. While the accident to the ship no doubt caused an interruption of and an interference with the maritime adventure, I cannot hold that there was such an interruption or interference as to cause a frustration of that adventure. I agree with the judgments of Lord Blackburn and Lord Morison upon this point.

I think that the interlocutor should be affirmed and the appeal dismissed.

Lord Macmillan.—The sheriff-substitute in his findings of fact has furnished a full and accurate account of what befell the steam trawler *Strathclova* on the 25th Sept. 1930. It is not contested that by reason of the occurrence so described the service of the appellant, who was a seaman (in point of fact the chief engineer) employed on the *Strathclova*, was terminated before the date contemplated in his agreement with the respondents, the owners of the vessel. The question is whether in the circumstances his service can properly be said to have been terminated by reason of the "wreck" of the *Strathclova*, within the meaning of sect. 1, sub-sect. (1), of the Merchant Shipping (International Labour Conventions) Act 1925, so as to give the appellant the benefit of that section.

The legislation under consideration is the most recent step in the progressive mitigation of the harsh rule of the common law that freight is the mother of wages, which deprived the seaman of any right to remuneration for his services unless the enterprise of maritime transport in which he was employed was duly completed. By sect. 157, sub-sect. (1), of the Merchant Shipping Act 1894 it is roundly declared that "the right to wages shall not depend on the earning of freight," and in sect. 158, where the seaman's service is prematurely terminated by reason of "the wreck or loss of the ship" he is given a right to his wages up to the time of such termination. Finally, by the section of the Act of 1925 now before your Lordships, the lot of the seaman whose service has suffered untimely termination "by reason of the wreck or loss" of his ship is further alleviated by entitling him to continue receiving his wages for a period of two months after such termination of his service, if he remains so long in fact unemployed.

The question of the circumstances in which a seaman's service could properly be said to have been terminated by reason of the "wreck" of his vessel came before the courts in the well-known case of *The Olympic* (*sup.*). It was there held by a majority of the Court of Appeal, affirming the judgment of Bargrave Deane, J., that if the service of a seaman was terminated in consequence of a physical casualty befalling his ship, whereby she was rendered "incapable of carrying out the maritime adventure in respect of which the seaman's contract was entered into" (per Buckley, L.J. (108 L. T. Rep. at p. 597; (1913) P. at p. 107),

then it could properly be said that the seaman's service had terminated by reason of the "wreck" of his ship within the statutory meaning. The criterion is thus seen to lie in the consequences of the casualty. "The frustration of the voyage," to quote Lord Loreburn, L.C. in *Horlock* v. *Beal* (114 L. T. Rep. at p. 201; (1916) A. C. at p. 493), affords "a test by which to determine whether or not the physical injury inflicted amounted to 'wreck.'"

In my opinion this interpretation has much to commend it. The word "wreck" is obviously a word of the most vague and general connotation. In the language of the literature of adventure, and possibly also for some legal purposes, it may well be that the wreck of a vessel means, as Kennedy, L.J. said in his dissenting judgment in *The Olympic* (12 Asp. Mar. Law Cas. at p. 327; 108 L. T. Rep. at p. 600; (1913) P. at p. 115), "such disaster caused by collision with some external object, be it stationary, such as a rock, or moving, as, *e.g.*, another ship or some substance floating in the waves, as destroys her character as a ship, and reduces her practically to the condition which, speaking from memory, I think has been judicially described in the case of a wooden ship as a 'congeries of planks.'" But I do not think that it was intended that the enactment now under consideration should operate only on the occurrence of so dramatic and catastrophic a casualty. Suppose a ship at spring tide runs on a sandbank in some remote part of the world and remains fast so that she cannot be refloated for a long period or at all and the crew are consequently discharged. I should hesitate to say that in such a case there had been no wreck of the vessel within the meaning of the Act, although she in fact remained intact. It is well to bear in mind what Buckley, L.J. points out in *The Olympic* (12 Asp. Mar. Law Cas. at p. 323; 108 L. T. Rep. at p. 596; (1913) P. at p. 106), that for the present purpose we have not "to inquire whether the ship was a wreck, that is to say, whether she had become a certain physical thing, but whether she had been so injured and damaged that she ceased to be a ship of service for the purposes of the adventure, the subject of the seaman's contract."

On the best consideration I have been able to give to the matter I have come to the conclusion that the view of the majority in *The Olympic* (*sup.*), which your Lordships are invited to overrule, was well founded and should be followed. In so holding I am not uninfluenced by the fact that the decision in *The Olympic* (*sup.*) was pronounced twenty years ago and until now has not been called in question. For this long period it has doubtless regulated the practice of shipowners and marine insurers. Indeed, so far from being in any way questioned, the decision in *The Olympic* (*sup.*) was discussed and expounded in this House in the subsequent case of *Horlock* v. *Beal* (*sup.*) without any indication of disapproval but rather with every indication that the noble and learned Lords who referred to it accepted its doctrine as sound.

I am accordingly of opinion that in deciding whether the occurrence which befell the *Strathclova* on the occasion in question brought the appellant's case within the operation of sect. 1, sub-sect. (1), of the Act of 1925, which in terms is merely an amending extension of sect. 158 of the Act of 1894, the interpretation adopted in *The Olympic* should be applied by your Lordships. I reach this conclusion without the necessity of invoking the rule of construction enunciated by James, L.J. in *Ex parte Campbell; Re Cathcart* (23 L. T. Rep. at p. 291; L. Rep. 5 Ch. App. at p. 706), upon which some of your Lordships have specially relied, though I am far from desiring to depreciate the value of the aid afforded by that rule in the interpretation of statutes. The principle of the rule is that where the language of a statute has received judicial interpretation, and Parliament again employs the same language in a subsequent statute dealing with the same subject-matter, there is a presumption that Parliament intended that the language so used by it in the subsequent statute should be given the meaning which meantime has been judicially attributed to it. Parliament, in short, is to be presumed to have given statutory effect to the judicial interpretation so as to render it as binding on the courts as if it had been expressly enacted in an interpretation section. If this rule were to be treated as a canon of construction of absolute obligation I can see that it might have very far-reaching and possibly undesirable consequences. I hope I am always ready and willing to obey the voice of Parliament and I fully recognise that, as Lord Esher once said, "The Legislature has the power to make you read English in a way in which you would not read it except by command" (2 Tax Cas. 249, at p. 254): *Rev. C. A. Stevens* v. *Bishop* the phrase does not occur in the report (58 L. T. Rep. 669; 202 Q. B. Div. 442). But I must be satisfied that it is the authentic voice and the authentic command of Parliament, and I find it rather a strain to have to believe that the reputed omniscience of Parliament extends to every decision of the courts. What if the interpretative decision has never been reported? And what if Parliament has repeated language which has been construed in contrary senses by courts of co-ordinate jurisdiction in England and Scotland? In my view the rule of interpretation which I am discussing affords only a valuable presumption as to the meaning of the language employed in a statute. Where a judicial interpretation is well settled and well recognised the rule ought doubtless to receive effect, but it must, I think, be a question of circumstances whether Parliament is to be presumed to have tacitly given statutory authority, say, to a single judgment of a competent court so as to render that judgment, however obviously wrong, unexaminable in this House. After all, there is another rule of statutory interpretation of not less, if not indeed of higher authority, of which Parliament must be equally taken to be aware, namely, Lord Wensleydale's "golden rule" that in construing statutes the grammatical and ordinary sense of the words is to be adhered to, unless it leads to some absurdity, repugnance or inconsistency. For myself, I prefer the later form in which James, L.J. himself restated his rule in the case of *Greaves* v. *Tofield* (43 L. T. Rep. 100, at p. 102; 14 Ch. Div. 563, at p. 571) as follows: "If an Act of Parliament uses the same language which was used in a former Act of Parliament referring to the same subject, and passed with the same purpose, and for the same object, the safe and well-known rule of construction is to assume that the Legislature, when using well-known words upon which there have been well-known decisions, uses those words in the sense which the decisions have attached to them." To the rule as so stated I am prepared wholeheartedly to subscribe.

It now only remains to consider whether the particular circumstances of the casualty to the *Strathclova* entitle the appellant to say that his service was terminated by reason of the wreck of his ship, within the meaning attributed to that expression in *The Olympic* (*sup.*). The appellant

was on the 4th July 1930 engaged to serve on board the *Strathclova*, " which is to be employed Fishing Trawl North Sea, Shetland, West Coast and Faroe until the last day of Dec." 1930. When so employed the vessel was regularly engaged in plying her trade on the fishing grounds, returning to port from time to time to discharge her catch and then putting to sea again after a day or two occupied in unloading, bunkering and other ordinary incidents. In consequence of the casualty of the 25th Sept. 1930, the vessel had to be laid off work for a fortnight and placed in dry dock, where repairs costing 265*l.* were effected, the crew, including the appellant, having meantime been paid off. In my opinion the fact that for this relatively short period of time the vessel was off work in consequence of the casualty which had befallen her, did not render her " incapable of carrying out the maritime adventure in respect of which the seaman's contract was entered into," so as to entitle the appellant to claim that the premature termination of his service was by reason of the wreck of his ship within the statutory meaning.

I am accordingly of opinion that the interlocutor appealed from should be affirmed and the appeal dismissed with costs.

Appeal dismissed.

Solicitors for the appellant, *Sharpe, Pritchard, and Co.*, agents for *Milne* and *Reid*, Aberdeen, and *James Mackenzie*, Edinburgh.

Solicitors for the respondents, *Pritchard* and *Son*, agents for *James* and *George Collie*, Aberdeen, and *Alex. Morison* and *Co.*, W.S., Edinburgh.

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Feb. 21, 22, *and March* 2, 1933.

(Before CLAUSON, J., sitting as an additional judge of the King's Bench Division.)

Sutherland v. Administrator of German Property. (*a*)

Conflict of laws—Local situation of debt—Enemy property—Marine insurance—Doctrine of subrogation — Insurer's rights vested in Alien Property Custodian of United States—Claim to fund within jurisdiction of English court—Marine Insurance Act 1906 (6 *Edw.* 7, *c.* 41), *s.* 79, *sub-s.* (1)—*Treaty of Peace Orders* 1919-1921, *s.* 1, *sub-s.* (*xvi.*).

An insurer of cargo who has paid the claim of the cargo owner for a total loss is entitled to be recouped the amount so paid out of the proceeds of an action by the cargo owner against the shipowner; and that right is locally situated within the forum *in which the shipowner is sued.*

Where, therefore, a German insurer had paid a United States cargo owner for a total loss and was entitled to be recouped out of the proceeds of an action brought by the cargo owner in an English court before the coming into force of the Treaty of Versailles, the insurer's rights were " property rights and interests " of an enemy situated in England, and passed to the Administrator of German Property by virtue of the Treaty of Peace Orders 1919-1921, *s.* 1, *sub-s.* (*xvi.*), *notwithstanding that the bills of lading for the cargo and the letters of subrogation were held in the United States of America by the United States Alien Property Custodian.*

THE plaintiff, who was the Alien Property Custodian for the United States of America, claimed a sum of 4538*l.*, which was in the possession of the Administrator of German Property by reason of the following circumstances. In the year 1912 a cargo of goods was shipped from Baltimore to Hamburg in the British ship *Mount Oswald*, which became a total loss in the course of the voyage. The cargo was insured by a German company, the Mannheim Insurance Company, who on a date prior to Nov. 1918 paid the insured as for a total loss, and thereupon became subrogated to their rights against the ship. An action was subsequently brought in England in the name of the cargo owners on behalf of the Mannheim company and other insurers, and that action was compromised by the payment of a sum of which the proportion payable to the Mannheim company was 4538*l.* 8*s.* 4*d.* As the Mannheim company were enemy aliens that sum was paid to the defendant, the Administrator of German Property.

After the outbreak of war between the United States and Germany, and during the pendency of the above-mentioned action, the plaintiff, on the 18th Nov. 1918, made a " demand " in pursuance of the United States Trading with the Enemy Act 1917 upon the Mannheim company, which had the effect of vesting in him as custodian all the property rights, claims and assets of that company within the United States. The shipping documents and letters of subrogation had in fact been delivered to the Mannheim company's American branch, and were shortly after the 18th Nov. 1918 seized by the plaintiff in his capacity as custodian. In the present action he contended that the right to recover the 4538*l.* 8*s.* 4*d.* was vested in him, whereas the respondent maintained that it was " property rights or interests " of an enemy situated in England and passed to him by the operation of the Treaty of Peace Orders.

The Marine Insurance Act 1906, s. 79, sub-s. (1), provides as follows :

> " Where the insurer pays for a total loss . . ., he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss."

The Treaty of Peace Order 1919, s. 1, sub-s. (xvi.), provides as follows :—

> " All property, rights and interests within His Majesty's Dominions or Protectorates belonging to German nationals at the date when the Treaty comes into force . . . and the net proceeds of their sale, liquidation or other dealings therewith, are hereby charged . . (with certain payments)."

(*a*) Reported by V. R. ARONSON, Esq., Barrister-at-Law.

A. T. Miller, K.C. and *H. I. P. Hallett* for the plaintiff.

Sir *Boyd Merriman*, K.C. (S.-G.) and *Wilfrid Lewis* for the defendant.

Clauson, J.—The plaintiff in this action is the Alien Property Custodian for the United States of America. The defendant is the Administrator of German Property in this country. The claim is for a sum of 4538*l.* 8*s.* 4*d.*, part of a sum recovered by the owners of three parcels of goods, against the owners in England of the British steamship *Mount Oswald*. The goods were shipped at Baltimore in Feb. 1912. The ship sailed in that month and was never heard of again. Two of the three parcels were insured by the Mannheim Insurance Company, a German national, through its American branch, and one parcel by the Continental Insurance Company, a German national, also through its American branch. The two insurance companies were very closely connected, and I may conveniently treat them as one and refer to them as "Mannheim." The details of the insurance are immaterial. The assured claimed against the German insurers, and some time prior to Nov. 1918 were paid by them for a total loss. In due course proceedings on the contract of carriage against the shipowners were taken in England for the benefit of the insurers by the owners of the goods. The sum claimed is that portion of the amount ultimately recovered by way of settlement in those proceedings which corresponds with Mannheim's share in the insurance. Mannheim being enemy aliens, the sum claimed was paid to the defendant as Administrator of German Property.

The plaintiff bases his claim on the fact that on the 18th Nov. 1918 (when as a matter of fact proceedings in respect of two of the three parcels of goods had already been begun in England) he took the proper steps in the United States of America which, according to the law of the United States of America, vested in him all the property, rights, claims, and assets of Mannheim within the United States of America. He claims that the interest of Mannheim in the right of action against the shipowners which ultimately fructified into the 4538*l.* 8*s.* 4*d.* was at that date property, rights, claims, or assets of Mannheim within the United States of America; and there is no question but that if this interest of Mannheim was at that date within the United States of America the 4538*l.* 8*s.* 4*d.* must be paid over to him by the defendant. The question which I have to determine is whether the interest in question can properly be described as being at that date within the United States of America.

It seems desirable first to examine what Mannheim's interest at that date as insurers who had paid on a total loss was. Mannheim were entitled (see sect. 79 of the Marine Insurance Act 1906) to take over the interest of the assured in the goods in question and had become subrogated to all the rights and remedies of the assured in and in respect of the goods, including, of course, the right of action which ultimately fructified in the sum now in question. The bills of lading and subrogation letters had in fact been handed over to Mannheim, and were on the 18th Nov. 1918 seized as part of Mannheim's property by the plaintiff. The effect of the subrogation was that on the crucial date of the 18th Nov. 1918 Mannheim had an equitable right as against the owners of the goods to have the advantage of the right of action which those owners had (and as regards two of the parcels of goods were in fact proceeding to enforce in England) against the shipowners (see *Castellain* v. *Preston*, 49 L. T. Rep. 29; 11 Q. B. Div. 380), and, as I understand the statement of the law by Lord Blackburn in *Burnand* v. *Rodocanachi* (4 Asp. Mar. Law Cas. 576; 47 L. T. Rep. 277; 7 App. Cas. 339), to have that advantage to such extent (and no more) as might be necessary in order to recoup to them the amount paid to the assured.

Debts and choses in action are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced (Dicey, Conflict of Laws, 4th edit., p. 344), and unless the peculiar nature of the goods owners' right of action against the shipowners, and of Mannheim's equitable right to the advantage of that right of action, brings the matter within some exception to this general rule the answer to the question propounded to me would seem to be that the interest in question was at the crucial date not within the United States of America, but in England.

It was urged upon me that marketable securities, physically in the United States of America transferable there by delivery with or without endorsement, must be held to be situate in the United States of America, and my attention was drawn to the fact that in the case of *Secretary of State for Canada* v. *Toronto Power Company* (1931, Supreme Court Reports, 170), the Supreme Court of Canada has expressly held that shares in Canadian Companies so transferable, where the usual certificates are physically in the United States of America, are for the purpose of the very provision with which I have to deal, to be treated as within the United States of America. It was suggested that the presence of the bill of lading and the subrogation letters in the United States of America was strictly analogous to the presence of the certificates in the United States of America in the case cited, the bills of lading passing in substance by delivery and representing the goods and (see Bills of Lading Act 1855, s. 1) carrying to the holder the rights of the original shipper under the contract of carriage evidenced in the bill of lading, at all events if the indorsee is one to whom under the particular circumstances of the indorsement, the property in the goods passes.

The analogy does not, however, assist me. The cited case turned upon the fact that both according to Canadian and United States of America law the title to the shares in question passed by delivery of the documents which were physically in the United States of America and seized there by the Alien Property Custodian. The case before me might well be governed by the analogy of that decision if I had any justification for holding that Mannheim's title to be indemnified out of the fund to be recovered against the shipowners would pass by delivery of the bill of lading with the subrogation letter attached; but no attempt was made to suggest either on authority or by virtue of any custom or customary course of dealing that such a result would ensue either according to the law of this country or of the United States of America. If, as the result of subrogation, Mannheim became absolutely entitled to the right of action against the shipowners, instead of being merely entitled to recoup themselves out of the fruit of that right of action, the position might be that mere delivery of the bills of lading would pass Mannheim's rights; but it seems quite clear that that is not the correct view of the operation of the doctrine of subrogation. It was ingeniously suggested that the delivery of the bills of lading to Mannheim when they paid for a total loss was to be treated as evidence that the goods owners had given up the right of action to Mannheim absolutely, and that thus Mannheim had become absolutely entitled to the right of action

in lieu of being merely entitled to an equitable right to be recouped out of its fruits; but I can find no support for this suggestion either in the agreed statement of facts or in any recognised legal principle.

For myself, I am of opinion that the plaintiff failed to establish that there is any ground for holding this case to form an exception to the general rule which I have already stated, and accordingly I hold that the right of action against the shipowners and the fruits of that action must be treated as locally situate, for the relevant purpose, in England. I must, however, add that the same conclusion may be reached by a somewhat different avenue of approach. It is well settled that an equitable interest under a settlement of a fund invested in England is to be treated as situate in England, and the decision in the *Public Trustee* v. *Wolf* (129 L. T. Rep. 738; (1923) A. C. 544) is but one example among many of the court acting upon this principle for the purpose of the kind of legislation with which I have to deal in the present case. The analogy between on the one hand an equitable interest (as for example an equitable right to be recouped out of a fund to be recovered from a contracting party in England in an action properly brought against him in England), and on the other hand an equitable life interest in a settled fund invested in England, is sufficiently close to confirm me in the conclusion that the interest of Mannheim in the present case must at the relevant date be treated as situate in England. In the view that I take the action must fail, and will accordingly be dismissed.

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

Solicitor for the defendant, *Solicitor to the Clearing Office.*

Wednesday, March 1, 1933.

(Before Acton, J.)

Lykiardopulo v. Bunge y Born Limited. (*a*)

Charter-party—Construction—Expenses of discharging cargo—Carriage of wheat, maize, or rye—Optional cargo—No importation of rye at port of discharge—Expenses exceeding those of discharging heavy grain.

A charter-party provided that the expenses of discharging cargo in excess of the expenses of discharging heavy grain should be for the charterer's account. "Heavy grain" is a term used commercially to denote wheat, maize, and rye and no other form of cereal. It was proved that at the port of discharge no rye had been imported for a number of years, and that rye was more expensive to discharge than either wheat or maize.

Held, that the shipowner was only entitled to recover from the charterer the amount by which the expenses actually incurred exceeded the expense of discharging wheat or maize or rye, whichever was the highest, and that the expense of discharging rye could not be disregarded, although substantially no rye was handled at the port of discharge.

(*a*) Reported by V. R. Aronson, Esq., Barrister-at-Law.

Special case stated by an umpire.

A charter-party provided for the carriage by a ship of a cargo of wheat and (or) maize and (or) rye from the River Plate to the French port of St. Nazaire, and further provided that the charterers could ship a different form of cargo at their option on the terms that "all extra expenses incurred in discharging such merchandise over heavy grain" (was) "to be paid by the charterers."

In exercise of this option the charterers shipped a cargo of other merchandise and the expenses incurred in discharging it exceeded those which would have been incurred in discharging either wheat, or maize, or rye. "Heavy grain" is a term used commercially to denote wheat, maize, and rye, and no other form of cereal.

The umpire found that the expense of discharging rye exceeded that of discharging either of the other descriptions of heavy grain, and he further found that substantially no rye had been shipped to St. Nazaire during a period of five years preceding the date of the charter-party. He held, however, that this fact was immaterial, and that the expense of discharging rye must be taken into consideration. The charterers had already paid all that was due from them on that footing, and he accordingly made an award in their favour.

Sir *Robert Aske* for the shipowners.—The charter-party must be construed with reference to the actual conditions prevailing at St. Nazaire. Rye must therefore be left out of account, and we are entitled to recover from the charterers the difference between the expenses actually incurred and those which would have been incurred in discharging a cargo of wheat or maize.

Willink for the charterers.—We are entitled to compare the actual cost of discharging the optional cargo with that of discharging rye, and therefore less is due than if the standard of comparison were limited to wheat and maize. The ship was bound to carry rye to St. Nazaire if ordered to do so. The test is what expense the ship could have been made to bear at St. Nazaire apart from any question of optional cargo. Clearly that would include the expense of discharging rye. This follows from Rowlatt, J.'s decision in *Hain Steamship Company Limited* v. *Louis Dreyfus and Co. Limited* (37 Lloyds List Reports 101).

Sir *Robert Aske* replied.

Acton, J.—I am of opinion that this award is correct and can be upheld. The point which arises upon the award, stated in the form of a special case, is upon clause 6 of the charter-party, which is in these terms: "Charterers have the option of shipping other lawful merchandise"—certain articles being expressly excluded—"in which case freight is to be paid on steamer's dead weight capacity for wheat in bags on this voyage at the rate above agreed on . . . all extra expenses in discharging such merchandise over heavy grain to be paid by the charterers."

In the circumstances of this particular case the umpire was invited to attend to and to find certain facts which he accordingly has found in the special case, saying that although he has done so at the request of the owners, he finds that those matters have no relevance in deciding the questions at issue between the parties.

In this proposition I find myself entirely in accord with him. The clause in question has been construed by Rowlatt, J., and the construction which he adopted in the case of *Hain Steamship Company Limited* v. *Louis Dreyfus and Co. Limited* (37 Ll. L. Rep. 101) has been adopted and followed

by Roche, J. in *Atlantic Shipping and Trading Company Limited* v. *Bunge y Born* (39 Ll. L. Rep. 292). The way Rowlatt, J. construed it is expressed in these words: "In my judgment the arbitrator has come to a correct decision here, because I think the clause simply means this, that the charterer is to relieve the ship of all the expenses of discharging incurred by the ship in excess of the expenses which the charterer could have caused the ship to have incurred by shipping heavy grain."

The port to which this particular vessel was directed was the French port of St. Nazaire, and it appears that there is, in fact, very little import from overseas of rye into French ports, and that in fact for a period of a considerable number of years no rye, so far as is known, has been imported from overseas into the port of St. Nazaire, and therefore that substantially this is a port which does not deal with cargoes of rye shipped from overseas. It is said, therefore, that an implication arises and must be read into the contract and into the clause in question of this contract that for the purpose of estimating extra expenses of discharging over the expenses of discharging heavy grain, which admittedly includes rye as well as wheat and maize, regard must be had to what is the regular or habitual trade of the particular port to which the charterers directed the ship, or, at all events, if it be the fact that there is no trade for a considerable number of years in a particular kind of grain, that kind of grain is to be excluded from consideration by virtue of this implication.

On the other hand, it is said that the ship was a ship which was prepared to carry cargoes consisting either wholly or in part of wheat or maize or rye, and accordingly under the contract was bound to discharge rye, if loaded, at any port within the prescribed limits indicated by the charterers to which they might direct the vessel. The charterers, it is said, are then given the option of taking cargoes of different kinds of merchandise—that is to say, other than maize or wheat or rye, upon terms, the terms being that the charterers have to pay any extra expenses incurred by the shipment in excess of the primary obligation, which is an obligation to carry cargoes of heavy grain, which includes rye as well as wheat and maize. Therefore, it is said, and to my mind quite correctly said, that, having regard to the construction put upon this clause by Rowlatt, J. and adopted by Roche, J., in order that the argument of Sir Robert Aske may prevail, it would be necessary to read in place of the words in the sentence I have read, "Expenses incurred in discharging such merchandise over heavy grain," the words, "Expenses which it would be likely might have been incurred by the ship having to carry heavy grain to the particular port to which it happens that the vessel is directed." It is conceded, and indeed it appears in the special case, that the shipowner has received all the excess of expenses over and above what would have been the expenses of discharging rye at the port of St. Nazaire, and it is therefore said that the umpire was perfectly right in saying that he has received all that he is entitled to.

In my view that opinion expressed by the umpire in the special case is quite correct. I think he was quite right also in saying that the facts to which his attention was drawn had no relevance in the construction of this contract, and therefore that the award must stand.

Solicitors: for the shipowners, *Holman*, *Fenwick*, and *Willan*; for the charterers, *Richards* and *Butler*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Jan. 31, *Feb.* 7, *and March* 3, 1933.

(Before Langton, J.)

The Napier Star. (*a*)

Collision — Damages — Interest — Repairs — Interest on estimated sums for repairs not actually carried out and on demurrage —" Slip order "—R.S.C., Order XXVIII., r. 11.

In assessing damages in a collision claim, items in respect of prospective repairs and similar estimated items of expenditure which have not actually been incurred at the date of the reference, and estimated demurrage during such period of repairs, are not included in the sum upon which interest by way of damages is allowed.

Motion in objection to the report of the registrar upon a reference to assess damages in a collision action.

The defendants, owners of the steamship *Napier Star*, moved to vary or amend the report of the Admiralty Registrar (Mr. E. S. Roscoe) in a reference to assess damages in an action arising out of a collision between the *Napier Star* and the plaintiff's steamship *Leeds City*, which took place in Buenos Aires Roads in Feb. 1931. The defendants admitted liability for the collision, and the damages were referred for assessment to the registrar.

In his report the registrar allowed the cost of temporary repairs, and also the estimated cost of permanent repairs, demurrage and various items for coal and stores during the period of permanent repairs, survey fees, pilotage, &c. These estimated items, which were numbered 27 to 31 in the plaintiffs' claim, amounted to 1400*l*.

At the conclusion of the report the registrar reported that he found that "there is due to the plaintiffs in respect of their claim the sum and interest as stated in the schedule hereto annexed together with the cost of proving their claim."

The sum as interest stated in the schedule to be due to the plaintiffs was 3493*l*. 14*s*. 9*d*. "with interest at 5 per cent. from the 22nd Feb. 1931, until paid."

The 22nd Feb. 1931 was the date upon which the plaintiffs paid the bill for temporary repairs.

The defendants moved to amend the report under R. S. C. 1, Order XXVIII., rule 11, by adding the words "save items 27 to 31 inclusive" after the words "until paid," but leave was given to extend the time for objection to the registrar's report so as to raise directly the question of the defendant's liability to pay interest.

Brightman, for the defendants.

Noad, K.C., for the plaintiffs.

[Reference was made to the following cases: *The Dundee* (1827, 2 Hagg. 137), *The Gazelle* (1844, 2 W. Rob. 279), *The Hebe* (1847, 2 W. Rob. 530), *The Rosalind* (1920, 37 Times L. Rep. 116), *London Chatham and Dover Railway Company* v. *South-Eastern Railway Company* (69 L. T. Rep. 637;

(*a*) Reported by Geoffrey Hutchinson Esq., Barrister-at-Law.

(1893) A. C. 429), *The Crispin* (1929, 34 Ll. L. Rep. 400; 35 Ll. L. Rep. 197), and *Re Swire* (1885, 53 L. T. Rep. 205; 30 Ch. Div. 239).]

Langton, J.—This motion concerns five items in a report of the late Mr. Registrar Roscoe, dated the 29th July 1932. The question at issue is whether or no interest is payable under the report upon the items numbered therein as 27, 28, 29, 30 and 31. It was originally brought before me upon a motion by the defendants to add certain words to the report on the ground that these words had been omitted from the report of the learned registrar through a clerical mistake or accidental slip. As the result of the first hearing, however, Mr. Brightman elected to avail himself of leave from me to reconstitute his motion upon a broader ground.

As it now stands, the motion raises the point whether interest is payable or ought to be ordered to be paid upon items of estimated repairs and estimated demurrage, in circumstances where *ex concessis* no expenditure of any kind has been incurred at the date of the report.

Two main questions were argued and one subsidiary point. The main questions were: First, what does the report as it stands mean—a question of construction; secondly, how ought the registrar to deal with interest in these circumstances—a question upon the merits? The subsidiary point—a question of practice only—was whether this particular matter could and ought to be dealt with as the defendants had sought to deal with it under Order XXVIII., r. 11.

First, upon the question of construction. The report is couched in these terms: "I find that there is due to the plaintiffs in respect of their claim, the sum and interest as stated in the schedule hereto annexed, together with the costs of proving their claim." The schedule is then set out, and at the end of the schedule there are these words: "With interest at 5 per cent. from the 22nd Feb. 1931, until paid."

It is not in dispute that the date of the 22nd Feb. 1931 was the date upon which the plaintiffs paid the bill for temporary repairs effected immediately after the collision. The collision occurred on the 3rd Feb. 1931. The claim in the schedule was put forward upon a familiar and well-recognised basis wherein all items of expenditure actually incurred were first set out, and estimated items were then added in respect of expenses which would have to be incurred for final repairs and the loss by detention which would be occasioned thereby. There is not, I think, much to be gained from a consideration of the form of words used by the registrar. The actual expressions which I have quoted as immediately preceding and succeeding the schedule are both matters of common form in reports of this character. As Mr. Noad pointed out, the final words do not in terms exclude any of the items set out in the schedule. But does it follow that one must therefore apply the expression to every one of them? To my mind there is significance in the date selected as the date from which interest is to begin to run. Everyone who is familiar with this class of legal work knows that it is customary to take the date of the payment of the repair bill as the date to commence the computation of interest, for the very simple and obvious reason that this is the date from which the plaintiff has been out of pocket in respect of the main portion of his expenses. Similarly, where the only expenses which have been actually incurred are of the nature of a temporary repair, the date of the payment of the principal temporary repair bill is selected as the interest date for the same reason.

Now, still confining the matter to one of pure construction, what possible significance has the date, the 22nd Feb. 1931, in connection with estimates of repair and detention which are delayed to an indefinite future? From this aspect alone, I think the registrar's report is, at least, ambiguous. The defendants seek to clarify it by adding the words "save items 27 to 31 inclusive"; but although, for reasons which I will give, I am wholly in sympathy with this emendation, I am doubtful whether they could succeed, as a mere matter of construction, in demanding that the report could be read in the sense it would clearly have after such an emendation had been made.

I accordingly welcomed the broadening of the basis of the motion which Mr. Brightman elected to make, to enable what is, after all, a point of frequent occurrence to be considered upon its merits.

Owing to the deeply lamented death of Mr. Roscoe it was not possible to make any inquiry of him as to the practice in this class of case; but Mr. Registrar Darby has come to my assistance, and informs me that a fairly exhaustive study of the registrar's reports over a period of about thirty years shows that in no instance has interest been actually and specifically allowed in the case of repairs to be effected or detention to be incurred *in futuro*, and in some cases interest on such items has been definitely excluded. The weight of practice, therefore, seems to be definitely against the plaintiffs.

By way of authority Mr. Noad cited the cases of *The Kong Magnus* (7 Asp. Mar. Law Cas. 64; 65 L. T. Rep. 231; (1891) P. 223), *The Joannis Vatis (No. 2)* (16 Asp. Mar. Law Cas. 13; 127 L. T. Rep. 494; (1922) P. 213), and *The Northumbria* (3 Mar. Law Cas. (O. S.) 314; 1869, 21 L. T. Rep. 681; L. Rep. 3 A. & E. 6). These cases, he contended, showed that so far as Admiralty law was concerned, in contradistinction to the common law, liability attaches in respect of the full amount of the loss from the moment of the collision. It is for this reason that interest is given in Admiralty cases as part of the damages in order to effect a true *restitutio in integrum*. As to the cases cited in support of this wide proposition it is noteworthy that two are concerned with limitation of liability for ships totally lost, and the third—*The Joannis Vatis (No. 2)* (16 Asp. Mar. Law Cas. 13; 127 L. T. Rep. 494; (1922) P. 213)—was a case having reference also to a limitation fund which represented a value according to French law. In *The Kong Magnus* (7 Asp. Mar. Law Cas. 64, 65; 65 L. T. Rep. 231, 232; (1891) P. 223, 235) the President, Sir Charles Butt, contrasts the common law rule with that prevailing in Admiralty. If he is right in the explanation which he puts forward, somewhat conjecturally, as the basis of the Admiralty rule, it seems to me that there would be something to be said for a contention that the now well-established practice of taking the date of payment of the principal repair bill as the date from which to commence the computation of interest is wrong, and that the proper date to take would be the actual date of the collision. I am at a loss to see, however, how this dictum of Sir Charles Butt can assist the plaintiffs in the present case. They make no complaint of the date chosen by the registrar, namely, the 22nd Feb., but contend that items as to which admittedly the plaintiffs have not suffered any loss of use of money, since no money has yet been or perhaps ever will be expended, should be held to carry

interest from the same date and in the same way as items in respect of which they have equally clearly and admittedly been deprived of the use of their funds. In the report of *The Kong Magnus* (7 Asp. Mar. Law Cas. 64, 65; 65 L. T. Rep. 231, 232; (1891) P. 223, 236) there is to be found in a note a concise and admirably clear passage from the reasons of the late Mr. Registrar Roscoe in the case. The case was one of total loss, and the report concludes with these words: "The plaintiffs had for a number of years been deprived of the capital sum, and equally also of the profit derivable from it; I therefore saw no reason to depart from the constant and long practice of the court in this case. The merchants agreed in my view of the matter." I read this as meaning that the registrar and merchants, who are pre-eminently a business tribunal, had on this occasion, as on all other occasions, asked themselves the simple questions whether, and for how long, the wronged party had actually been deprived of money upon which profit or interest might have been earned, and awarded, in the very words of this report, "as part of the damages to represent the amount of profit arising from the use of the capital sum," an amount stated by way of interest.

It is obvious that in any reckoning of this kind, where the ship has been totally lost, the date from which interest must be taken to run is the date of the loss of the vessel. Hence the decision in *The Northumbria* (*sup.*) and in many other total loss cases. *The Joannis Vatis* (*No.* 2) (*sup.*) rests upon quite special facts, but it assists neither side in the present controversy.

I am, however, quite unable to see how the fact that it has been the practice—and to my mind a quite comprehensible and correct practice—to allow interest from the date of the loss in total loss cases can be any warrant for saying that in a case of partial loss, such as the present case, the tribunal ought to award interest upon money which has not been expended from the date at which certain money by way of temporary repairs has been expended.

To sum up, therefore, neither upon legal precedent nor upon practice, nor, so far as I can see, upon any known legal or business principles, should any allowance for interest be made upon items in respect of which no money has been expended.

There remains only the subsidiary point, as to whether this matter could have been dealt with, as Mr. Brightman originally contended, under Order XXVIII., r. 11. In view of the fact that I have, upon his invitation, dealt with the subject as a question of principle, this point as to the meaning and scope of the rule becomes almost academic, or at the most a question which may have some bearing upon the costs. I am bound to admit that the two cases cited by Mr. Brightman have rather shaken my original view that the so-called "slip" order was not intended to cover a dispute of this class. In *Shipwright* v. *Clements* (1890, 63 L. T. Rep. 160) the defendant in an action in which an injunction had been pronounced against him, upon service of notice of motion to commit him for breach of the injunction, served a cross-notice of motion under the "slip" order to amend the decree by the insertion of certain words which he alleged were accidentally omitted from the decree of injunction. North, J., held that he had a power to act in such a case under this order, and amended the decree as prayed by the defendant. In the second case—*E.* v. *E.* (*otherwise T.*) (88 L. T. Rep. 570; (1903) P. 88)—Lord St. Helier, in spite of strong representations that the application was much too late, held that he had power to rectify, and in fact rectified, an order in which, as he said, a mistake had been made partly by the registrar and partly by himself in omitting to state a date at which certain payments were to begin. In this case he did not purport to act under the order in question, and indeed no reference to Order XXVIII., r. 11, appears anywhere in the report of the case, but the case is cited in the practice books as an example of the scope of this order, and it is difficult to believe that no reference was ever in fact made to this order. On the whole, therefore, I am inclined to think that I could have acted under this order, although I have preferred to deal with the matter as a question of principle raised by special leave after the expiry of the time allowed for objection to the registrar's report. Therefore, it follows that the motion succeeds, and that the words prayed for by the motion will be inserted in the report. I propose to give the defendants the costs of the motion except the costs of the first hearing.

Leave to appeal was granted.

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

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

Tuesday, March 7, 1933.

(Before LANGTON, J.)

The Marte. (*a*)

Collision — Damages — Reference — Vouchers — Plaintiffs ordered to file vouchers within a limited time "otherwise they be precluded from giving evidence in support thereof"—Failure to file vouchers—No vouchers available—R.S.C., Order LVI., r. 2.

The plaintiffs, who were the Russian Soviet Government, claimed damages in respect of a collision between their vessel and a vessel belonging to the defendants, for which the defendants admitted liability. The assessment of damages was referred to the registrar, and the plaintiffs were ordered by Langton, J. to file vouchers in support of their claim within six weeks "otherwise they be precluded from giving evidence in support thereof." No vouchers were filed in support of certain items, as to which the plaintiffs contended that they themselves undertook the work of repair, that no contemporary documents were therefore available for filing as vouchers, and that they were in consequence unable to comply with the order in respect of these items. The registrar refused to allow the plaintiffs to give evidence of items for which no vouchers had been filed.

Held, that having regard to the manner in which the Russian Soviet Government carried on their business, the decision of the registrar went too far, and that the plaintiffs ought to be allowed to give evidence of items in respect of which they were unable to file any contemporary documents as vouchers, but that they ought to file full particulars showing how each item for which they had filed no vouchers was made up.

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

MOTION in objection to an interim report of the Admiralty Registrar.

The plaintiffs, the Russian Soviet Government, claimed damages in respect of a collision between the Russian steamship *Armenia* and the Italian steamship *Marte*, belonging to the defendants, which took place at Odessa on the 7th March 1931. Liability was admitted by the defendants, and on the 18th Nov. 1932, the plaintiffs filed their claim. On the 16th Dec., Langton, J. ordered the plaintiffs to file vouchers in support of their claim within six weeks, "otherwise they be precluded from giving evidence in support thereof." On the 28th Jan. 1933, vouchers were filed in respect of certain items, but when the reference came on before the Admiralty Registrar on the 16th Feb., no vouchers had been filed in respect of certain other items. The registrar refused to allow evidence to be given in respect of items for which no vouchers had been filed, holding that he was precluded by the terms of the order from entertaining such evidence.

The plaintiffs moved in objection to the report.

On the 27th Feb. 1933 the motion came on before Bateson, J., who referred the matter to Langton, J.

Stranger, K.C., for the plaintiffs.—The plaintiffs themselves undertake the work of repair, and they, therefore, have no documents corresponding to the vouchers which are filed in cases where the repairs are executed by contractors in the usual way. The order only requires vouchers to be filed where there are, in fact, vouchers in existence; it was not intended to exclude evidence of items for which no vouchers exist.

Hayward and *Hunt* for the defendants.—The decision of the registrar is in accordance with the order. "Vouchers" are not necessarily documents emanating from third parties; they include all documents or particulars which enable the defendants to check or verify the items of the plaintiffs' claim.

Stranger, K.C., in reply.

Langton, J.—This matter comes before me by way of objection to the learned registrar's interim report. The claim is on behalf of a vessel which, I understand, is in the ownership of the Russian Government, against a vessel which is owned by Italians. What I am obliged to refer to as the "usual struggle" has taken place in an endeavour by the plaintiffs to obtain documents from the Russian Government in support of their claim. I made the following order on the 19th Dec. 1932; I allowed the plaintiffs six weeks within which to comply with the previous order of the court to file vouchers in support of their claim, and I added that "otherwise, they be precluded from giving evidence in support thereof." From that order there was no appeal, but before the hearing of the claim, which took place on the 16th Feb. 1933, the plaintiffs did file a bundle of documents which may, or may not, comply with the dictionary meaning of the word "vouchers." I think, on a fair and wide interpretation of the word, the documents do amount to vouchers, but, as Mr. Hayward pointed out (and pointed out with great force) before the learned registrar, they are not, in any sense, vouchers of a number of the items in the claim; that is to say, they refer to a few only of the items, and still a large number of the items in the claim remain unsupported by any kind of vouchers.

The learned registrar, before whom the matter came, took the view of my order which was pressed upon him by Mr. Hayward that although vouchers had been filed only those items which were supported by vouchers should be allowed to be the subject of proof in the claim, and he ruled that all others should not be the subject of any evidence at all.

I am far from saying that that was, in the circumstances, a very unlikely, improbable, or necessarily unjust view of my order, but I do not think it was what was in my mind. I think one must bear in mind whether, rightly or wrongly (and it has nothing to do with us whether it is right or wrong), the Russian nation have elected to carry on their business in a method entirely different from that in which business is carried on by the rest of the civilised world. It may result from that (I think it does result) that when they come into this court to endeavour to support their claims they are handicapped to an unusual degree. Over a long course of years we have arrived at what we consider to be the proper business-like method of assessing these claims—a method which will give both the plaintiff in the case full opportunity to develop his claim, and the defendant in the case a similar opportunity of checking the claim. It is for that reason that we have the procedure which we all know in the registry to-day—procedure by which vouchers are supplied in defence, and every effort of the court is made in support of that procedure. We are not slow to make orders compelling people to produce these vouchers. It may be that the Russian Government—owing to the methods which they have chosen for carrying on their business—are unable actually to produce any vouchers at all. If, notwithstanding that, they elect to come to this court to prove their claims, the fact that they have no such vouchers may weigh very heavily against them, because it adds enormously to the difficulty in checking their claims that they have no kind of written word in support. But I have to consider whether—assuming that the Russian Government have chosen to do their business in this way—it would be right and fair to say that because they cannot comply with these very excellent rules of procedure in our courts they should be shut out from giving any evidence at all in support of their claim. To my mind that would be going too far. On the other hand, I cannot see why the Russian Government, having elected to come to this court, should not go a great deal further than they have done in the way of giving some fair notice to the other side of what their case is composed of. This bundle of documents which they have produced in the way of vouchers falls immensely short of being a fair and full notice as we understand it, to the other side, of the case which they have come here to make. Bateson, J., who heard one part of this case, made an observation concerning items on it which I desire to accept and repeat. In argument with Mr. Stranger about the subject he said: "It is not a question of production, it is a question of filing vouchers which will vouch the claim. If you have none in evidence, I suppose you can put down on paper that evidence and say: 'I have no fair documents like you are in the habit of producing, but I am going to call a witness who is going to support this statement.' For instance, for your demurrage you have no voucher except in the sense that you have your books. You can set out the particulars of how you make out your claim—that is a voucher."

If the question is (and Mr. Stranger assures me it is) that, so far as the solicitors who instruct Mr. Stranger are concerned, they cannot produce any actual paper in support of the claim—any kind of contemporary document—it still appears to me that they could do what Bateson, J. very wisely suggested—they could give full particulars of the way in which they propose to put forward their

claim. There is no item to which that is more applicable than the large item in this claim—the item of detention. They could give very full and fair indication to their opponents of how they propose to justify that claim. They could say, and could give notice of what their evidence is as to the material, as to the time, as to the labour, as to the profits, and as to all the matters on which they could build a claim. Those being the circumstances, I think justice would be done, and my order would be carried out as I intended it to be carried out, if, notwithstanding the many failures that the plaintiffs have made in this case, I varied the registrar's order by saying that the plaintiffs should be allowed to give evidence, not only of the three items which the learned registrar has allowed them to give evidence upon but upon all such other items of which they give fair and full particulars to the defendants as to the nature of their claim, and it will be for the learned registrar to say, when the matter comes before him, whether that condition has been complied with.

It does not seem to me that it is putting too much upon the Russian Government that they should do that, and if I put less on them I think I should be doing an injustice to the defendants. That is the view at which I have arrived after hearing counsel on both sides at length on the subject, and that is the order which I shall make.

Solicitors for the plaintiffs, *Middleton, Lewis* and *Clarke*.

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

Supreme Court of Judicature.

COURT OF APPEAL.

March 31, *April* 3, *and May* 1, 1933.

(Before SCRUTTON, GREER and SLESSER, L.JJ.)

Owners of Steamship Anastasia v. Ugleexport Charkow. (*a*)

Dampskibsselskabet Heimdal v. Russian Wood Agency Limited. (*a*)

APPEALS FROM THE KING'S BENCH DIVISION.

OWNERS OF STEAMSHIP ANASTASIA *v.* UGLEEXPORT CHARKOW.

Charter-party—Construction—Provision of ice-breakers—Duty of charterers—Ice-breakers provided and subsequently withdrawn—Claim for demurrage—Onus of proof.

A charter-party provided that in the event of the loading port being inaccessible by reason of ice the charterers undertook, on the vessel's arrival at the edge of the ice, to provide ice-breaker assistance to enable her to reach the loading port.

Held, that the charterers had undertaken to provide ice-breaker assistance to enable the steamer from the edge of ice to reach its loading place, and they did not provide such assistance if the ice-breaker did not enable the steamer to reach its loading place.

Decision of Roche, J. (ante, *p.* 360; 148 *L. T. Rep.* 139) *affirmed.*

APPEAL from the decision of Roche, J., reported *ante*, p. 360; 148 L. T. Rep. 139, on a special case stated by an arbitrator.

The steamship *Anastasia* was a Greek vessel trading at Russian ports. She was chartered to the respondents by a charter-party dated the 20th Nov. 1930, which contained a clause dealing with delay caused by ice. That clause was as follows: "In the event of the loading port being inaccessible by reason of ice on vessel's arrival at the edge of the ice or in case frost sets in after vessel's arrival at port of loading the charterers undertake to provide ice-breaker assistance to enable steamer to reach, load at, and leave loading port, steamer being free of expense for ice-breaker assistance." The charter-party further provided for payments for demurrage.

The *Anastasia* arrived at the port of Berdiansk on the 30th Jan. 1931, and found that port inaccessible by reason of ice. She remained there waiting for assistance until the 7th Feb., when an ice-breaker was provided, but it was subsequently withdrawn for a period of seventeen days, and in consequence the steamer was delayed.

The arbitrator decided that the delay was caused by a breach on the part of the charterers of their obligation to provide ice-breakers, and he made an award in favour of the shipowners.

The charterers submitted that they had discharged their obligation by providing an ice-breaker on the arrival of the ship at the ice edge, and that the subsequent withdrawal for seventeen days was not a breach of contract. The owners contended that the obligation of the charterers was continuous, and that their duty was to provide an ice-breaker which would remain in attendance on the ship until she reached port.

Roche, J. held that the obligation on the charterers was to provide such ice-breaker assistance as was needed to enable the ship to reach port and to continue to provide such assistance as long as might be necessary, and further, that in the absence of any explanation by the charterers of the withdrawal of the ice-breaker, they must be treated as having broken the contract.

The charterers appealed.

Sir *William Jowitt*, K.C. and *H. Atkins* for the appellants.

Le Quesne, K.C. and Sir *Robert Aske* for the respondents.

Cur. adv. vult.

DAMPSKIBSSELSKABET HEIMDAL *v.* RUSSIAN WOOD AGENCY LIMITED.

Charter-party — Construction — "Enabling ship to leave port"—Ship detained in ice beyond geographical limits of port—Provision of ice-breakers—Claim by owners for damages for delay and for injury to ship.

A charter-party provided that the charterers were to supply the ship with ice-breaker assistance to enable her to enter or leave port if required by the captain to do so. Such assistance was to be rendered within forty-eight hours after the

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

steamer's arrival at the ice edge or readiness to leave port of loading.

Held, (1) *That the charterers undertook to enable by an ice-breaker the ship to enter and leave the port of loading ;* (2) *that this being a fixed time charter time lost outside the fixed lay days was for charterers' account, which must include the time lost during which ice-breaker assistance was not provided to enable the steamer to enter or leave the port ; and* (3) *that the Government regulation contemplated that the ship could require the ice-breaker assistance outside the port limits.*

Decision of Roche, J. (ante, *p.* 362 ; 148 *L. T. Rep.* 140) *affirmed.*

APPEAL from the decision of Roche, J., reported *ante*, p. 362 ; 148 L. T. Rep. 140.

In this action the owners of the steamship *Asko* claimed from the charterers damages sustained through detention by ice at the port of Leningrad.

In Jan. 1930 the parties entered into a freight agreement by which the plaintiffs undertook to carry timber from Leningrad to certain named ports, a separate charter to be drawn up for each steamer employed. In pursuance of that agreement a charter-party for the employment of the *Asko* was entered into on the 26th Nov. 1930, under which that ship was to proceed to Leningrad, load a cargo of timber and carry it to Hull. Clause 35 of the charter-party provided as follows : Charterers to supply the steamer with ice-breaker assistance if required by the captain to enable her to enter or leave port of loading free of all expenses to the owners. . . . Ice-breaker assistance to be rendered within forty-eight hours after steamer's arrival at the ice edge or readiness to leave the port of loading. Any time lost in waiting ice-breaker beyond forty-eight hours after readiness to proceed to be for charterers' account."

The *Asko* was ready to leave Leningrad on the 31st Dec. 1930, but owing to detention by ice she did not reach open water until the 12th Jan. 1931. It appeared that an ice-breaker was ordered at 1.30 p.m. on the 31st Dec., and she came and towed the *Asko* until 9 p.m. on that day, and then left her in the ice. She lay there until the 5th Jan., when she was towed as far as Kronstadt Roads. At that point she was outside the limits of the port of Leningrad, but she was still in the ice. On the 9th Jan. a convoy was formed of a number of vessels, including the *Asko*. The convoy reached the ice-edge on the 12th Jan, and the *Asko* then proceeded on her voyage to Hull.

The plaintiffs argued that the defendants were under an absolute obligation to get the steamer away from the port. It was too narrow a construction of clause 35 to say that the words "to enable her to leave the port" meant merely to get beyond its geographical boundary. They claimed demurrage and also damages for the physical injury sustained by the ship whilst detained in the ice.

The defendants contended that their duty was ended when they had taken the ship beyond the limits of the port.

Roche, J. held, first, that the obligation of the charterers was to provide an ice-breaker which would be as continuously as possible in attendance on an outward bound ship until she was clear of port ; secondly, that the assistance must be provided up to the point when the ship would be clear of the ice, even if that point were geographically outside the port.

The charterers appealed.

Miller, K.C. and *Willink* for the appellants.

Raeburn, K.C. and Sir *Robert Aske* for the respondents.

Cur. adv. vult.

These two appeals were heard together and the following judgments were delivered on the 1st May :

Scrutton, L.J.—A recent development of trading by the Russian Government has resulted in an outburst of litigation in this country in arbitrations and in actions. It has been forced upon the attention of the courts by numerous proceedings that the Soviet Government owns all the timber and coal in Russia and exports it by sales and charters made by companies who are merely its agents. The Government has lately been desirous of increasing its exports by keeping its ports open for navigation for as long a period as possible during the winter by the use of ice-breakers provided by the Government. The document of the 12th Oct. 1930, common to both the cases before us, shows that the People's Commissariat of Ways and Communications, a Government department, has issued orders "for the maintenance of the navigation to the icebound ports of U.S.S.R." If the vessel navigating does not fulfil certain conditions, the harbour-master inside the port and the master of the ice-breaker "outside the territory of a port," has "the right to refuse convoying the vessel to open sea or into a harbour" : (art. 2). No charge is made in the regulations for the ice-breaker's services. Russian ports are frequently icebound in the sense not only that the port is frozen over, but that the approach to and outside the port is frozen over. To maintain "navigation" to the icebound ports it is necessary to begin breaking ice at the edge of the open sea some distance outside the port, and similarly in leaving port to break ice from the limits of the port to the open sea. The system has not worked very smoothly and the results are nearly a hundred disputes proceeding at present between the Russian Government, the real principals to the charter-parties, and various shipowners.

The present two cases are the first to arrive at the Court of Appeal, both on appeals against decisions of Roche, J. The *Anastasia* decision was on a special case stated by a commercial King's Counsel ; the *Asko*, a decision in an action in the Commercial Court. In view of the number of cases waiting involving documents and facts not before the court, it is necessary to proceed with caution, as the imagination of the court may not be equal to foreseeing all the questions that may arise.

1. The *Anastasia*. This vessel was chartered by the Trade Delegation of the U.S.S.R. in Greece acting as agents for Ugleexport, a representative of the U.S.S.R., to proceed to Mariupol, in the Sea of Azof, and there load coal for Mediterranean ports. The Sea of Azof is frequently, and was in this case, frozen to some distance outside the port limits. On the charter was pasted an ice clause. The first and principal clause reads in its relevant words (*a*) (as to reaching or entering the port) : "In the event of the loading port being inaccessible by reason of ice the charterers undertake to provide ice-breaker assistance to enable steamer to reach and load at loading port." (*b*) "In case ice sets in after vessel's arrival at

port of loading the charterers undertake to provide ice-breaker assistance to load at and leave port of loading, in either case steamer being free of expense for ice-breaker's assistance."

The *Anastasia* arrived at the edge of the ice some distance from the port of Mariupol at 4 p.m. on the 30th Jan. 1931, but no ice-breaker appeared until 2 a.m. on the 7th Feb. 1931. The charterers agreed that, subject to the allowance of forty-eight hours under sect. 2 of the ice clause, they were liable for this detention. From 2 a.m. on the 7th Feb. to 6 p.m. on the 11th Feb. two ice-breakers rendered some assistance, but the shipowners allege twenty-one and a half hours of no assistance. At 6 p.m. on the 11th Feb. the ice-breakers went away until the 28th Feb. No evidence was offered explaining this absence of assistance.

At this stage the charterers contended in the special case, pars. 4 and 6 of their contentions: "(4) That the respondents' only obligation was to give ice-breaker assistance at the edge of the ice, and that, therefore, they had no further continuing obligation"; and "(6) That the respondents had, in accordance with the general practice, requested the port authority to provide ice-breaker asistance, and that they were under no further obligation." In other words they argued that their only obligation was to provide within forty-eight hours after the ship reached the edge of ice an ice-breaker, and they were under no obligation as to what the ice-breaker should do, though the ship itself had no contract with the ice-breaker.

I agree with the view of the arbitrator and of Roche, J. that this contention is erroneous. In my view the charterer has undertaken to provide ice-breaker assistance "to enable the steamer from the edge of ice to reach its loading place," and it does not provide such assistance if the ice-breaker does not enable the steamer to reach its loading place. The parties agreed before the arbitrator that if they were liable for any time between the 7th Feb., when ice-breaker assistance was first provided, and the time when the ship reached her loading place at Mariupol, the ship's figures of detention should be accepted. The ship had to wait when loaded for an ice-breaker for seven days sixteen hours, for which the charterers admitted liability. Apparently when the ice-breaker arrived there is no complaint of detention on her way out to the open sea.

In view of the parties' agreement as to figures, there appears to be no need to discuss in this case exactly what amount of assistance the charterer must provide by the ice-breaker, or what would excuse the ice-breaker's failure to render assistance. But I would remark that the charter is a fixed time charter to load so many tons a day. To free the charterer from such an obligation he must produce exceptions protecting him, as, for instance, the strike clause. There appear to be no such relevant exceptions in this charter; no explanation is offered of the failure to render assistance. The question must wait until it arises on a "reasonable time" charter, when existing circumstances at the time may have to be taken into account: (*Hick* v. *Raymond and Reid* (7 Asp. Mar. Law Cas. 233; 68 L. T. Rep. 175; (1893) A. C. 22). In this case, therefore, I agree with the decision of Roche, J. and the arbitrator, and the appeal must be dismissed with costs.

2. The *Asko*. In this case the *Asko* was chartered to proceed to "Leningrad below Bridges" and there load a cargo of timber and proceed to Hull. The charterer is not named. By agreement of the parties, the defendants sued were the Russian Wood Agency, well known to the court as agents of the U.S.S.R., and Churchill and Sim, well-known English brokers, who were certainly not the charterers. The charter on the face of it is to carry the balance of timber due under contract dated the 31st Jan. 1930, which is a contract made by persons described as "the Trading Agency of the U.S.S.R.," and contains a clause that all conditions are "as per attached charter Baltwood form." That form contains an Ice Clause No. 8, which entitles the shipowner not to proceed to the loading port if, in the shipowner's opinion, it is inaccessible by ice. This is not what the Soviet Government wanted, as they desired navigation to their ports to continue during the winter and provided ice-breakers for that purpose. So clause 8 was struck out of the charter, and clause 35 inserted. I am, of course, aware of the conflicting authorities as to whether you may look at clauses struck out of a printed form. I myself always do so, as I think the comparison between the original and the altered form frequently throws great light on what the parties intended by the words they used. The port of Leningrad reaches from Kronstadt twelve miles off Leningrad to a boundary in Leningrad. The *Asko* in fact loaded at a dock in Leningrad below bridges. The charter was a "fixed lay days" charter, and except clause 35 there were no applicable exceptions. The evidence as to what happened was contradictory and much of it by itself inadmissible, but the parties agreed to accept the judge's finding of fact on such evidence as there was without appeal. Clause 35 was as follows: "Charterers to supply the steamer with ice-breaker assistance if required by the captain to enable her to enter or leave port of loading free of all expenses to the owners. Captain or steamer's agents to notify the captain of the port in due time of steamer's readiness to enter or leave the port of loading. Ice-breaker assistance to be rendered within forty-eight hours after steamer's arrival at the ice edge or readiness to leave the port of loading. Any time lost in waiting ice-breaker beyond forty-eight hours after readiness to proceed, to be for charterers' account." Apparently the *Asko* got to her place of loading without difficulty from ice, but when she was loaded and ready to proceed to sea there was ice from her loading place to Kronstadt, the limit of the commercial or fiscal port, and ice for a considerable distance beyond Kronstadt to the open sea. The *Asko* was ready to proceed from her loading place at 12.30 p.m. on the 31st Dec.; an ice-breaker came to her at 7.30 p.m. that day. She did not get to Kronstadt until the 6th Jan., and during the time from the ice-breaker coming to her and her arrival at Kronstadt, the ice-breaker only gave her ten hours' assistance. She lay at Kronstadt three days without any assistance at all, until the 9th Jan.; she then proceeded to the open sea with an ice-breaker and reached the edge of the ice on the 12th Jan. In this latter period there were unexplained periods when no ice-breaker assistance was afforded, and the judge finds in all unjustified failure to render ice-breaker assistance for eight days. The judge suspects there were either too many ships, or, which is the same thing, not enough ice-breakers; both causes are due to the Soviet Government, the only charterers and providers of ice-breakers.

The charterers again argued that their only obligation was to provide an ice-breaker at the edge of the ice coming in, or at the place of loading going out, and that either (1) they had no further obligation, or (2) only an obligation that the ice-breaker should do its best. As to the first contention, I have held in *The Anastasia* on a similar

clause that the charterer undertakes to enable, by an ice-breaker, the ship to enter and leave the port of loading; as to the second contention, I hold that, this being a fixed time charter, reasonable time under existing circumstances (*Hick* v. *Raymond and Reid, sup.*) is irrelevant; time lost outside the fixed lay days is for charterers' account, which must include the time lost during which ice-breaker assistance is not provided to enable the steamer to enter or leave the port.

But it is further argued that the assistance is only to be rendered up to the limits of the port. This construction seems to me so unbusinesslike that I have a difficulty in expressing myself about it with judicial moderation. Such a contention would be contrary to the intention of both parties. The ship desires to get into, and out of, the harbour from and to open sea. It is no use to the charterer to get a ship into the harbour to load his goods for export unless he gets his goods out to the open sea. The ice-breaker coming in is to be available at the ice edge: if the ice edge is outside the limits of the port the ship cannot "enter the port" without ice-breaker assistance. The Government regulation 2 contemplates that the ship can require the ice-breaker assistance outside the port limits. Similarly if there is ice immediately outside the port limits, the ship cannot "leave the port" without ice-breaker assistance outside the port up to the edge of the ice in the open sea. The charterers' contention, as I said in argument, looks like: "I will help you into my harbour, but I will not help you to carry my goods out of my harbour." This would not be "keeping the port open for navigation" or attaining freedom of export from ice difficulties which is the object for which the Soviet Government provides ice-breakers. I agree with the result arrived at by Roche, J., and in my opinion the appeal should be dismissed, with costs.

Greer, L.J.—I agree that these appeals should be dismissed, with costs.

The questions involved in each of these two cases are questions as to the construction of rather loose words used in two charter-parties. I am not quite sure that I am of the same opinion as Scrutton, L.J. with reference to the grounds upon which the judgments should be put. I doubt whether we are entitled to consider the facts which have been proved in other cases either with regard to the shipping in the ports of the Soviet Government or with regard to the law of the Soviet Government as to the control of those ports. I also doubt whether the question of the lay days here being a fixed time or a reasonable time has a sufficient bearing upon the question to be determined in these appeals to enable one to come to a correct conclusion as to the meaning of the words used. From the start of this case I never had any doubt as to what the two parties intended to stipulate for; what I did doubt at one time was whether they have put into the words of the charter-party words which carry out that intention, but on consideration I have come to the conclusion, for the reasons stated in the judgment of Roche, J., that the words which they have used do carry out that intention, and that the intention was that assistance should be supplied from the edge of the ice to the place of loading in the one case, and from the place of loading to the edge of the ice in the other case; and I think they have, within the rules applicable to the interpretation of commercial documents, succeeded in using words which, reasonably construed in a business sense, give effect to that which I think they intended.

For these reasons, which I think are the reasons stated by Roche, J. in his judgment, I have come to the conclusion that each of these appeals must be dismissed, with costs. I have not thought it necessary to write a judgment, my reasons being such that I could state them quite shortly.

Slesser, L.J.—I agree that these appeals should be dismissed, for the reasons stated by Greer, L.J

Appeals dismissed.

Solicitors for the appellants in the first appeal, *Pettite* and *Kennedy*.

Solicitors for the respondents in the first appeal, *Holman*, *Fenwick*, and *Willan*.

Solicitors for the appellants in the second appeal, *Wynne-Baxter* and *Keeble*.

Solicitors for the respondents in the second appeal, *Botterell* and *Roche*, agents for *Sanderson* and *Co.*, Hull.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Wednesday, April 26, 1933.

(Before ROCHE, J.)

G. H. Renton and Co. Limited v. Cornhill Insurance Company Limited. (*a*)

Marine insurance — Construction of policy — Goods intended for carriage on deck—Injury before loading—Deckload warranted free from particular average.

Policies of marine insurance warranted "deckload free from particular average." Cargo which was subsequently carried on the ship as deckload was damaged whilst in lighters awaiting loading.

Held, that the warranty was only applicable to cargo whilst actually carried as deckload on a ship, and did not protect the underwriters from liability for damage sustained prior to loading by cargo which was subsequently carried on deck.

THE plaintiffs, who were importers of timber, claimed under policies of marine insurance the sum of 91*l.* 19*s.* 5*d.* in respect of a cargo shipped from Mesane, on the White Sea, to Grimsby. There were in all three policies, each of them incorporating the Timber Trade Federation Insurance Clauses, of which the material clauses were:

"(1) Each raft or craft or deckload or bill of lading or deckload of each bill of lading to be deemed a separate insurance if required by assured."

"(2) Deckload warranted free from particular average unless the vessel or craft be stranded, sunk, or burnt, but the assurers are to pay the insured value of any portion of the cargo which may be totally lost by jettison and washing overboard, or in loading, transhipment or discharge. . . ."

The practice of loading at Mesane was that the cargo was taken in lighters to the steamer, the shipper giving instructions to the lighterman as to whether or not the goods were to be carried on

(*a*) Reported by V. R. ARONSON, Esq., Barrister-at-Law.

deck, and the lighterman passing on those instructions to the ship's officers. But it happened from time to time that these instructions were not carried out and that goods intended for shipment on deck were carried under deck and *vice versa.*

Whilst the timber insured by these policies was in lighters in course of transit to the steamer, part of it was damaged by perils of the seas. The plaintiffs claimed under the policies a total amount of 1220*l.*, and the defendants admitted the claim except as to 91*l.* 19*s.* 5*d.*, which represented part of the cargo damaged in the lighters and subsequently shipped on deck to Grimsby. Loading instructions had been given that this part of the cargo should be loaded on deck, and the defendants contended that it must be treated as "deckload" from the moment when the policy began to operate; that is to say, from the time of leaving the premises of the shipper, and therefore that it was free from particular average. The plaintiff said that the mere fact that goods were subsequently carried on deck did not relieve the defendants from liability for damage incurred before shipment.

Porter, K.C. and *Stranger*, K.C. for the plaintiffs.

Willink for the defendants.

Roche, J.—This is an action which has come on for trial very conveniently and quite sufficiently on a statement of facts without evidence. That agreed statement of facts raises a short, interesting, and not altogether simple point of construction.

The matter arises in this way. The plaintiffs are the buyers of certain wood goods which were shipped at a Russian port and carried to this country, and the plaintiffs are also the assured under certain policies of insurance, of which the defendants are the underwriters. The policies protect the assured against loss or damage by the usual perils, and they contain certain clauses attached to the policies known as the Timber Trades Federation Insurance Clauses. The second clause is one which extends the time and area of protection beyond that which is granted or effected by the body of the policy. It is called a warehouse to warehouse clause and provides for the goods being covered from the time they leave the mill or warehouse at the port of loading to the time they reach the port of discharge on the ocean voyage in the steamship *Kem*, which is mentioned in the policy, and thence by transhipment or other carriage until the goods reach the final destination, either at the port of discharge or in the interior.

The other material clauses to be mentioned are that there is a memorandum in the body of the policy warranting the goods free from average under 3*l.* per cent., unless it is general, or the ship be stranded, sunk, or burnt. The Timber Trades Federation Insurance Clauses, by clause 12, extend and amplify that warranty and stipulate that the deckload is warranted free from particular average, unless the vessel or craft is stranded, sunk, or burnt; that is to say, it is free of average, whether the amount mentioned in the memorandum is exceeded or not. Then there are further limitations upon that exclusion of deckload from cover by stipulations that if there is an actual loss of part of the deckload through various causes, such as washing overboard, then the underwriters are to be liable.

Those being the stipulations of the policy, the point between the parties can best be described by stating what occurred.

While the goods were being loaded in lighters at the port of loading on board the steamship *Kem*, or were in course of transit from the mill to the steamship *Kem*, some of them were lost and some of them were damaged. The defendant underwriters admit they are liable for the goods lost, and have paid for them. But they say: "As a matter of principle we are not liable for the damage to the goods at that stage, as opposed to the loss of the goods at that stage, for this reason, that the damaged goods became part of the deckload upon the *Kem*, and that being so, we are not liable for particular average at all in respect of that part of the cargo unless the particular average consists of a partial loss." Whether that contention is right may depend upon an examination of clause 12 of the Timber Trades Federation Insurance Clauses. There are other clauses, particularly clause 1, which throws some light on the question, but the determination mainly turns upon clause 12.

I think the difference between the parties can be put in this way, that the plaintiffs say that the deckload is warranted free from particular average sustained by it as a deckload, unless the vessel or craft on which it is a deckload at the time when it sustains particular average is stranded, sunk, or burnt. The defendants say that goods which, though, when they were damaged, were not deckloads on any vessel or craft, became deckloads upon the *Kem*, are altogether free from particular average unless it be that either the *Kem* or some other craft on which they were carried be stranded, sunk, or burnt.

The construction of the plaintiffs seems to me a much more natural construction than that of the defendants. This is a clause for the protection of the underwriters, and upon general principles the underwriters must satisfy me that the words used are clear enough to excuse them from liability. These words do not satisfy that condition. I think the more natural construction is that put upon them by the plaintiffs, and if one looks at such other parts of the clauses as throw light on the question, particularly clause 1, it seems to me that the conclusions which the defendants have asked me to arrive at are resisted. Clause 1 is a provision as follows: "Each raft, or craft, or deckload, or bill of lading, or deckload of each bill of lading to be deemed a separate insurance if required by assured."

I think the only natural construction of that is to read it as: "Each raft, or each craft, or each deckload, or each bill of lading, or each deckload of each bill of lading is to be deemed a separate insurance if required by the assured." I think that contemplates and means that goods may be deckloads at various stages of the transit, and that if required they may be treated, during that part of the transit, as a separate insurance. This is not a question of whether the assured did so require in this particular case: that is not the point. The point is, what does the clause mean, and I think it means that goods are not deckload once and for all according as they are deckload on board the *Kem*, but that they are, or are not, deckload according as they are or are not deckload on the *Kem* or any other vessel or craft, and that the whole scope of the insurance, including the exceptions, is to free the underwriters from liability in the case of damage sustained while the goods are deckload, and yet to make them liable for damage sustained while goods are not deckload, although they may become deckload at some subsequent period of the voyage.

For these reasons I think that the plaintiffs' contentions prevail, and I give judgment for them with costs.

Solicitors: for the plaintiffs, *Waltons* and *Co.*; for the defendants, *William A. Crump* and *Son.*

May 25, 26, 29, 30, 31 *and June* 1, 1933.

(Before BRANSON, J.)

Akties. Steam v. Arcos Limited. (*a*)

Charter-party—Construction—Ice clause—Duty of ship to notify port of need of ice-breaker assistance—Claim for dead freight—Timber coated with snow and ice—Carrying capacity of ship reduced.

A charter-party provided that the charterers should supply the ship with ice-breaker assistance, if required by the captain, to enable her to enter or leave the loading port, and that the captain should notify the port authorities in due time of readiness to enter or leave the port, ice-breaker assistance to be rendered within forty-eight hours after arrival at the ice edge or readiness to leave, as the case might be, any time lost in waiting for assistance beyond forty-eight hours after readiness to proceed to be for charterers' account.

Held, first, that a notice given by the ship on the 23rd Dec. that she expected to arrive at the ice edge on the 27th Dec. was a sufficient notification to impose on the charterers the duty to have an ice-breaker ready to assist her within forty-eight hours of her arrival; secondly, that thereafter it was the duty of the charterers to have an ice-breaker in attendance until the ship was clear of the ice; and, thirdly, that the owners were entitled to damages for injury sustained by the ship during a period when she was left in the ice without ice-breaker assistance.

A portion of the timber loaded into the ship was coated with ice and snow, whereby its bulk was increased and the quantity which the ship could carry was reduced.

Held, that the ship was entitled to dead freight in respect of the reduction in her carrying capacity so caused.

ACTION tried in the Commercial List by Branson, J.

The plaintiffs, who were the owners of the steamship *Fagerstrand*, claimed damages for injuries caused to their vessel through ice during a voyage from Leningrad to Konisberg under a charter-party dated the 15th Dec. 1930, and they also claimed damages for "dead freight." The defendants were the charterers of the vessel.

Under the charter-party the ship was to go to Leningrad and load a cargo of timber. Clause 35 provided as follows: "Charterers to supply steamer with ice-breaker assistance, if required by the captain, to enable her to enter and (or) leave the port of loading, free of all expenses to owners. Captain or steamer's agents to notify the captain of the port in due time of readiness to enter and (or) leave the port of loading. Ice-breaker assistance to be rendered within forty-eight hours after steamer's arrival at the ice edge or readiness to leave the port of loading. Any time lost in waiting for ice-breaker assistance beyond forty-eight hours after readiness to proceed to be for charterers' account."

On the 23rd Dec. 1930 the captain telegraphed to the harbour master at Leningrad: "*Fagerstrand* sailed, expect due ice edge Dec. 27." On the 27th Dec. the ship arrived at a position where she could make no further progress towards the harbour. She waited until the 30th Dec., when she got some assistance from an ice-breaker, and she arrived at Leningrad on the 5th Jan. On the 14th Jan. she completed her loading, and on the 15th Jan. gave the following written notice to the port authorities: "Please note that my ship, the *Fagerstrand*, finished loading at 9 p.m. last night. Now awaiting ice-breaker down to coal harbour for bunkers. So soon as the bunkers are on board the ship is ready for sea." She was taken to the coal harbour by an ice-breaker, and was then moved from the quay and left in the harbour on the 19th Jan. From then until the 6th March she lay in the ice without assistance and unable to move. After that an ice-breaker assisted her, and she finally got clear of the ice on the 26th March.

The plaintiffs originally made a number of separate claims against the defendants, but some of these were disposed of before trial, and the only claims now before the court were, first, a claim for injuries sustained by the ship while she lay in the ice, and, secondly, a claim for dead freight, which arose through timber having been loaded into the ship while coated with snow and ice, whereby its bulk was increased and the carrying capacity of the ship was reduced.

Le Quesne, K.C., Sir *Robert Aske*, and *F. M. Vaughan* for the plaintiffs.

Stranger, K.C. and *C. T. Miller* for the defendants.

Branson, J.—In this case there are two claims for me to consider arising under a charter-party dated the 15th Dec. 1930 made between the plaintiffs, who are the owners of the *Fagerstrand*, and the defendants, Arcos Limited, who chartered that ship. Under the charter the ship was to go to Leningrad and there load a full and complete cargo of mill sawn red and (or) white firwood deals and (or) battens and (or) boards. It is material upon one part of the case to observe that the charter-party provides for an additional payment per standard for any boards exceeding one-third of the cargo. Clause 27 provides the rate at which the cargo is to be loaded. Clause 28 provides for the dispatch money, if it is earned, and clause 19 provides for demurrage at the rate of 20*l.* sterling per day and *pro rata* for any part of a day. The most important clause in the charter-party from the point of view of the present case is clause 35. I think I had better read it:

> "Charterers to supply steamer with ice-breaker assistance, if required by the captain, to enable her to enter and (or) leave the port of loading, free of all expenses to owners. Captain or steamer's agents to notify the captain of the port in due time of readiness to enter and (or) leave the port of loading. Ice-breaker asistance to be rendered within forty-eight hours after steamer's arrival at the ice edge or readiness to leave the port of loading. Any time lost in waiting for ice-breaker assistance beyond forty-eight hours after readiness to proceed to be for charterers' account."

The last few lines are immaterial.

The vessel went to Leningrad, and after sending a telegram on the 23rd Dec. to the harbour-master at Leningrad saying, "*Fagerstrand* sailed, expect due ice edge the 27th Dec.," she arrived at a position at which she could make no further progress towards the harbour upon the 27th. She waited

(*a*) Reported by V. R. ARONSON, Esq., Barrister-at-Law.

until the 30th, and upon the 30th she got a certain amount of assistance from an ice-breaker and she finally got into Leningrad on the 5th Jan. It is said that there was some delay in the voyage into Leningrad, but the ship having got into Leningrad on the 5th Jan. was helped again upon the 6th Jan. and then loaded, and her loading was complete at 9.30 p.m. on the 14th Jan. On the 15th a written notice was given to the harbour-master saying: "Please note that my ship, the *Fagerstrand*, finished loading at 9 p.m. last night. Now awaiting ice-breaker down to coal harbour for bunkers. So soon as the bunkers are on board the ship is ready for sea." She was taken by an ice-breaker to the coal harbour for bunkers and then moved from the quay and left in the harbour at six o'clock on the 19th Jan. From that moment until three o'clock on the 6th March she lay in the ice without any assistance from any ice-breaker and unable to move under her own power by reason of the ice. From the 6th March assistance was again rendered to her and from then onwards until the 26th she was getting assistance, with which I shall have to deal more fully at a later part of my judgment. Suffice it to say at the moment that she finally got out of the ice about the 26th March.

In those circumstances, the ship claims against the charterers, first of all, a sum of money for damages for detention; secondly, a sum of money for dead freight; and thirdly, she claims for damage which it is alleged she received in the ice. The matter does not remain quite in that way now because the defendants paid into court with a denial of liability a sum of money to cover the claim for damages for detention and for extra bunkers consumed by reason of the detention, and that money has been taken out by the plaintiffs. The position, therefore, as I see it, is that the plaintiffs have been paid in respect of detention—that is to say, the time lost at Leningrad and for the extra bunkers consumed there; but the defendants are still entitled to say: "Nevertheless and not withstanding we committed no breach of our contract and in fact there was no time lost for which we were ever liable to pay at all." I have to decide whether in fact there was any breach of contract by the defendants in respect of their dealing with this ship, the breach of contract alleged being failure to provide the ice-breaker assistance which, under the contract, they were bound to provide.

I think perhaps the simplest way of stating my view about the various points raised is to take them in the order in which they were urged by Mr. Stranger for the defendants and deal with them one by one. The first point which is taken by the defendants is that they never came under any liability to the plaintiffs to provide them with ice-breaker assistance at all, by reason of the fact that the plaintiffs never gave them the notice which is required in order to bring into operation the defendants' liability under clause 35. The argument is that such notice can only be given after the ship has arrived at whatever may be the ice edge, and that a notice to be sufficient must be a notice saying to the captain of the port: "Take notice that I have arrived in latitude and longitude so-and-so and am awaiting the assistance of an ice-breaker." In my view that is not the true construction of clause 35 at all. The obligation under clause 35 to supply ice-breaker assistance is, if it is required by the captain. The sentence upon which Mr. Stranger relies is: "Captain or steamers' agents to notify the captain of the port in due time of readiness to enter and (or) leave the port of loading." It seems to me that that expression clearly indicates that the notice is to be given in time to enable the captain of the port to provide the ice-breaker assistance when the ship arrives at the place where she will need it, and the reason for that provision is that, later on, clause 35 provides that if the ice-breaker does not arrive within forty-eight hours after readiness to proceed—not, be it marked, after receipt of notice—the charterers are responsible for the delay. It is vital, therefore, that the charterers should stipulate that the notice should be given in time for the ice-breaker to get to the ship and not to keep her waiting. So that both upon the language used and upon what seems to me to be the reasonable business of the matter I think it is plain that the notice which is provided for by clause 35 is a notice which is to be given before the arrival of the ship at the ice edge and, as I say, a notice which shall enable the ice-breaker assistance to be provided at or about the time, at all events within 48 hours of the time, when she will arrive there. Such notice, in my view, was given by the telegram of the 23rd Dec. to which I have already referred.

Then a number of points are taken which have all been dealt with in one form or another partly by Roche, J., and partly by the Court of Appeal in deciding two other cases—*Anastasia (Owners)* v. *Ugleexport Charkow* (*ante*, p. 360; 148 L. T. Rep. 139; 149 L. T. Rep. 342), *Akties. Dampskibs. Heimdal* v. *Russian Wood Agency* (*ante*, p. 362; 148 L. T. Rep. 140; 149 L. T. Rep. 343)—of a similar nature which have already arisen and also by the Court of Appeal in an interlocutory application to them in the present case. One of these points is that upon the true construction of clause 35, if the charterers provide an ice-breaker to meet the ship upon her arrival at the ice edge, that is all they have to do, notwithstanding that the ice-breaker may immediately sail away again and leave this unfortunate ship unable to get any nearer to the port. That already has been decided in the sense of saying that that is not the true construction of this charter-party. It is then said that the charterers are to provide ice-breakers which will do their best to enable the ship to enter and to leave the port. I think that can be answered in a sentence by saying that that is not what clause 35 says. Clause 35 says that they are to supply a steamer with ice-breaker assistance to enable her to enter or leave, not to try to enable her to enter or leave but to do so. That point, I think, is also covered by previous decisions. The next point has also, I think, been decided against the defendants, and that is that when you speak of entering or leaving the port of loading the agreement is confined to facilitating the entry of a ship which has already arrived at the confines of the port of loading itself, and when it refers to the leaving of the ship it also refers to that point, so that no obligation arises to provide ice-breaker assistance until the ship has presented herself somewhere within what is stated to be the actual limits of the port of Leningrad, that is to say, the boundaries stated in the extract from the code of rules and regulations relating to that port. It seems to me, again, that clause 35 plainly contemplates that the ice edge and the boundaries of the mercantile port of Leningrad may not coincide at all. The obligation to render assistance is said to arise not within forty-eight hours of the steamer's arrival at the boundary of the port but within forty-eight hours of its arrival at the ice edge, and if it is seriously contended, as I gather it still to be, that mercantile people have agreed that the obligation to render ice-breaker assistance to enter an ice-bound port which it is known cannot be approached

within many, many miles without the assistance of ice-breakers, if it is argued that that assistance is to be confined to the mercantile limits of the port, all I can say is that it does not sound like business. It would involve the ship either being an ice-breaker herself or that she should bring her own ice-breaker across and use it to enable her to get within the commercial limits of the port and keep her there while she is being loaded in order to take her back again. I find it very difficult to take a point of that kind seriously at all.

Then I think it is also contended that the words "ice edge" in clause 35 mean either the ice edge at the commercial boundary of the port or the edge of what is called the stationary ice. Here, I think, I must say a word or two about the expressions used in relation to the ice which you may expect to find in the Gulf of Finland during a winter season. One sees shore ice spoken of, which is ice which is frozen on to the shore, and shore ice may extend out into the gulf from both shores until the whole thing is completely frozen over and you get a fast covering of ice from shore to shore across that portion of the gulf. That is spoken of as stationary ice and that condition, speaking quite broadly, extends more and more to the westward as the winter goes on. A passage through the stationary ice is fairly safe because when the ice-breaker has broken a channel, the ice being stationary, the channel remains as it is broken and all that a ship has to do in order to go through the channel broken by the ice-breaker is to push aside the floating masses of broken ice which the ice-breaker has left behind it. In such a passage it seems clear to me upon the evidence that the liability of the ship to damage is not a very great one, provided, of course, that she does not try to do it at too high a speed, and provided, of course, that she goes through before the channel has frozen up again.

Beyond the stationary ice one comes to a region where the sea has got large masses of ice, which are not attached to the shore or to each other, floating about, sometimes with considerable spaces of water between them and sometimes with practically none or none at all, because if the wind acts upon these floating masses it packs them up into what is spoken of as pack ice. A passage through ice of that description may be very dangerous indeed, because the moving masses of ice, acting under the pressure of wind or current, may produce enormous pressures and may crush in the sides of, or otherwise damage, ships which are trying to get through. Also, in ice of this description an ice-breaker may break a channel which very soon is squeezed up again by the pressure of the surrounding pack ice and therefore a channel through which the ordinary ship cannot force itself with its own power, and if it is left it may find itself being squeezed and damaged by the packing ice.

Further out beyond that one comes to what is called the slush ice, that is to say, ice which has been ground, I think, to use the language of the captain of the *Ermak*, by the action of the waves into a sort of powdery slushy condition, and through that any ship can propel herself with her own power, and that is regarded as open water. It is plain upon reading the logs of these ice-breakers that the ice edge which they all refer to is that position where the ordinary ship can proceed without ice-breaker assistance. The geographical position of it may vary, and I think one finds in one case that it varies in the course of two or three days as much as eighty miles and its position at any moment must depend upon the temperature and the force and direction of winds and currents. It cannot be predicated but can only be discovered by going to look for it. That, in my view, is the meaning which in this contract is to be attributed to the expression "ice edge."

Now, the next point that is taken by the defendants is that there was no obligation to provide ice-breaker assistance for the outward voyage, again because no proper notice of readiness to proceed was given. I need not repeat the reasons for which I think that the notice given on the 15th Jan. to the harbour-master was ample notice, even if any further notice was necessary beyond the fact that this ship was lying there in the harbour obviously waiting to go to sea. Therefore, in my view, the defendants were under obligation to provide ice-breaker assistance.

It is not very easy to define what ice-breaker assistance means, and it is said on the part of the defendants that all it means is this. It was well known to the parties that there was what was called an ice-breaking campaign or an ice campaign conducted by the harbour authorities of Leningrad in the endeavour to enable ships to enter and leave that port during the winter, and all it meant was that the defendants would see that the plaintiffs' ship had got the advantage of those ice-breakers. It seems to me that something a little more personal and definite must be meant by this clause; for one reason, it is said in clause 35 that the ice-breaker assistance is to be rendered within forty-eight hours of the vessel's arriving at the ice edge. That is a contract to have ice-breakers there or an ice-breaker there at all events in relation to this particular vessel and at a time fixed by her, and it seems to me that that is quite inconsistent with the suggestion that this contract only meant that the ship should have the benefit of the ice-breaking that happened to be going on in the Gulf of Finland at the time. It is quite plain from the evidence that has been given before me and a perusal of the logs of these ice-breakers that there was nothing like a regular service under which an ice-breaker could be expected to arrive at the ice edge once every forty-eight hours. On the contrary, the arrival of the ice-breakers at the ice edge was sometimes days and days after the last appearance of an ice-breaker at that point.

I think that the true construction of this clause means that this ship shall have the attention of an ice-breaker which will enable her to enter and to leave the port. Like Roche, J., I do not decide that it is essential that every ship should have its ice-breaker. I have to deal with this contract which is made between these plaintiffs and the defendants, and whilst I must not be understood as deciding that the contract has not been fulfilled if the ice-breaker which is attending to the vessel does at the same time attend to another vessel, I do not think that this contract is fulfilled if by reason of the presence of another vessel the ice-breaker leaves this one or delays the passage of this one through the ice in order to devote its attention to the needs of some other vessel. Therefore, it seems to me impossible to contend that there were not times at which the defendants were not fulfilling their contract in regard to the provision of ice-breaker assistance to this ship.

But then it is said that that does not involve a breach of contract; it only involves a payment of more damages. Again, in my view, if that had been the intention of the contract the language of it would have been different. I cannot read this charter-party as amounting to an agreement that the defendants shall have the right to keep this ship in the ice as long as they choose provided they pay demurrage for the time during which they so keep her. I think it would require express language

to involve such a right in a case of this kind where it was contemplated, and must have been contemplated, that the ship would be making a passage through ice and where the fact that she was left unattended must, if the ice was not stationary, involve her in exposure to risks of damage for much longer periods than she otherwise would have been and might expose her to risks of being crushed by the ice, when, if she had an ice-breaker devoting its attention to her, the presence of that ice-breaker with its capacity to break the ice might prevent any damage at all.

So my view is that it being admitted, first of all, that there was a time from the 19th Jan. to the 6th March when this ship was lying unattended in the ice and, secondly, when it is plain that there were long periods when, owing to the fact that there were more ships than the ice-breakers available could get through the ice in one bunch, if I may use the expression, the plaintiffs' ship had to wait, and sometimes wait for many hours, while other ships were taken on and while the ice-breaker was then breaking a way back to the plaintiffs' ship, it seems to me to keep the ship in that way amounted to a breach of contract. It seems to me also, and this may be more directly material to the point that I have to decide, that under this contract the obligation of the defendants is to provide an ice-breaker which will prevent the ship from being damaged in the ice. I do not suppose it is necessary to deal with questions of act of God which might prevent any human means of saving a ship from damage by pressure in the ice, but in so far as it is open to the ice-breaker, if it gives its full attention to the ship, to keep it from damage, it seems to me that under this contract it should do so; and where it appears that the ship has been left, and left in ice which is packing and under compression, if it appears that damage is suffered by the ship while so left, it seems to me that that is damage which arises from a breach of contract by the defendants and as such has to be paid for by them.

Now, is there any evidence of any such damage here? I think it is plain that there is one case of such damage, and that is the damage to the rudder and the steering engine. It was said that the sternpost was also affected—that can easily be seen—on the 24th or 25th March, but there you have a case in which this ship, having been convoyed up to a point, is left in ice which is working under compression and packing together while the *Ermak* goes away with the *Truvor* to Reval and the ship is left unattended for about a day and a half. The captain says that while she was so unattended there were six or seven screws, as he called them, that is to say, periods of great ice pressure, and that whereas his rudder and steering apparatus were all right before that happened, after it happened they would not work. It seems to me upon that matter, which is to some extent confirmed by the fact that in the *Ermak's* log is recorded a complaint which the captain made the next morning when the *Ermak* came alongside her, that there is evidence to show that that was damage which was occasioned during the time when this vessel was left as she ought not to have been left in the ice which was pressing upon her and without the assistance of any ice-breaker to protect her from damage during that time.

I therefore find upon this point that I am satisfied that there was a breach of contract and that some damage has arisen from it. It seems to me, whoever has to decide the *quantum* of damage which the *Fagerstrand* suffered in the ice for which the defendants are liable, that he will have to look to see whether the plaintiffs can prove to his satisfaction that she did receive damage while the ship was being left without that ice-breaker assistance which the defendants were under obligation to provide. I agree, if I may respectfully say so, with Roche, J. that the ice-breaker assistance had to be continuous, and that when it was withdrawn in order to assist other ships for any reason there was a breach of contract.

It is also contended by the plaintiffs that they are entitled to say that there was delay and breach of contract in not getting the *Fagerstrand* out of the ice in January, and that by reason of that breach of contract she was exposed to worse conditions of ice when she did go out in March. I think it is right that I should say this with regard to that. I am not satisfied that there was any more danger to her when she did go out than there would have been if she had gone out in January, and I base myself in saying this largely upon the evidence that was given by Captain Ponomareff of the ice-breaker *Ermak*. He was quite prepared to admit that the conditions for part of the distance in January were better than the conditions for that part of the distance in March, but he said that whereas in March one part of the voyage was dangerous, in January the other part was just as bad, and he did say in re-examination that in his view the passage in January would have been more dangerous for this vessel than the passage in March. That being so, it does not seem to me that it is very material for me to consider whether what happened would have been enough to enable the plaintiffs to reinforce their claim for damages against the defendants by relying upon the fact that they might have got away, if the contract had not been broken, before the end of January, whereas in fact they did not get away until nearly the end of March. It is contended by Mr. Stranger for the defendants that even if there was a greater danger, still it makes no difference to the liability. It might be interesting to discuss the question if I were satisfied that this ship was exposed to any more danger in March than she would have been in January, but, as I say, I am not satisfied that there is any material difference, and therefore I deal no further with this point.

The next matter with which I have to deal is the question of dead freight. The position with regard to that is that I have evidence that on a variety of previous voyages this ship carried cargoes of wood of about 570 to 580 and 590 standards, whereas on this particular voyage all that she carried was 500; and it is said that the reason why she could not carry any more was that on this particular occasion the sawn wood that was tendered was wood which was covered to a great extent with snow and ice and the result was that much less of it than usual could be got into the holds. On the other hand, it is contended that you can see from the evidence of the master that the loading was stopped because the ship began to take a list and not for any other reason at all.

I think it is necessary to look for a moment at the evidence of the master and of the mate to see what it really amounts to. I think, without reading the passage again to which Mr. Le Quesne referred me in his argument, it may be summed up in this way. The master says that he could not take in so great a measurement of wood as he was accustomed to do because with the wood there came in snow and ice. It was suggested that some of this snow came through the hatches because it was snowing while the cargo was being loaded. I daresay it may be so, but there is nothing to convince me that the snow and ice to which the

captain refers as being that which prevented him getting as much wood into this ship as he otherwise would have done was such as fell in through the hatchways while the ship was loading. It is plain, I think, that what he is referring to is an accumulation of snow and ice which had adhered to this cargo while it was waiting to be put on board.

Another point that is taken is this. It is quite plain that where you have sawn boards you do not as a rule find that the ship can stow as many standards as if the cargo was deals and battens, and it is said that is not only common knowledge but it is dealt with in this particular charter-party, as I have already mentioned, by allowing for extra freight for boards over one-third of the total of the cargo.

It is also said that there is no evidence that this ship could carry more than the 500 standards of boards, and that this cargo was practically all, if not entirely, a cargo of boards. It seems to me that the answer to that is contained in the evidence. There is nothing to challenge the evidence of the captain that it was the presence of this snow and ice adhering to the cargo which was offered to him which prevented him taking as much as he otherwise would. No evidence was called by the defendants to contradict that, and they must have people from whom they could have got evidence to contradict the captain if they had so desired and if the evidence was forthcoming; but here I have the uncontradicted evidence that this was the position, and I find nothing in the logs or in the cross-examination of the captain to lead me to favour the suggestion made, which was that this was a normal cargo of boards and that if there was anything in the matter of snow which prevented more being put on board, that snow was snow which came down through the hatchways because the captain did not stop the loading when the snow came down, and I cannot find it.

It seems to me that the plaintiffs are entitled to succeed upon their claim for dead freight. It is admitted that they are bound to give some credit in respect of that claim for the amount of expense to which they would have been put in loading and discharging the extra number of standards, but it is contended that that is not the total that they are entitled to claim. It is said: "Not only are you going to save the loading expenses and discharging expenses of the extra standards which you say you could have loaded, but there is also the time which it would have taken you to load them and the time which it would have taken you to discharge them, you have saved that." With regard to that it seems to me, there being no authority that I know of in which this question of time has been taken into account in favour of a charterer who has got to pay dead freight, and approaching the matter as though it was a new point altogether, the simple answer to it in the present case with regard to the time saved in loading is this, that upon the facts of this case the ship obviously made nothing out of the time which she was saved in loading this cargo. She had finished loading on the 19th Jan. Supposing it had taken her another ten days to load it she would still have been ready to get out by the 6th March, which was the day on which she was taken in charge of to be taken out of the ice, and it cannot possibly be said that she made or could have made any profit in respect of being now saved the extra time which those eighty standards would have taken to load.

Then with regard to discharging my view is this. If it could be shown by a charterer that the ship had in fact made some profit or had got some profit out of days which she would otherwise have been spending in unloading cargo upon which dead freight was claimed, he might be entitled to claim it, but I cannot think that, it being a question of a man in breach of his contract trying to minimise the damages, he can minimise those damages by saying: "You have had this ship," without going on to say, "and you could have made some money out of her." If he could point out that the shipowner could have used the ship to some advantage and had used her to some advantage by reason of getting those three extra days, then something might be said for it, but merely, as was suggested here, to make a calculation of the amount of profit that the ship earns in a year and say: "Because you have got your ship back three days sooner than you would have done if I had loaded this cargo, therefore you ought to allow me in damages a deduction of three days' profits off what I have to pay for dead freight," seems to me to be not only new in a case of assessing damages by way of dead freight of a ship but a new principle in any case of breach of contract.

For these reasons it seems to me that the amount claimed in respect of the dead freight in par. 2 of the points of claim is correct. The net result of it all is that I think the plaintiffs should have judgment for the 150*l.* 0*s.* 5*d.* which they claim for dead freight; and with regard to the rest, what I suggest is, that counsel should submit to me the form of declaration which they desire me to make.

Note.—The judgment as finally approved by his Lordship was in the following terms: "Judgment for the plaintiffs for 150*l.* 0*s.* 5*d.* in respect of dead freight with a declaration that damage was done to the *Fagerstrand* by the defendants' breach of clause 35 of the charter-party dated the 15th Dec. 1930, with the costs of the action. The amount of the damages to be assessed by a special referee to be agreed between the parties within fourteen days, or, failing agreement, such a referee to be appointed by the court. Liberty to apply."

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

Solicitors for the defendants, *Middleton, Lewis,* and *Clarke.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

May 11, 12, 15 *and* 16, 1933.

(Before Langton, J.)

The Kite. (*a*)

Collision—River Thames—Barge in tow of tug—Collision between barge and abutment of Cannon-street Railway Bridge—Damage to cargo—Action against owners of tug—Negligence by servants of owners of barge alleged by defendants—Onus of proof.

Contract—Not liable for negligence—"Persons supplying tugs or barges to the company to enable it to fulfil its contracts shall incur no greater liability to company's customers than that of the company hereunder"—Negligence of a sub-contractor—Authority to contract upon

(*a*) Reported by Geoffrey Hutchinson, Esq., Barrister-at-Law.

terms that negligence shall be excepted—Action of tort against sub-contractor—Construction—London Lighterage Clause.

The plaintiffs, owners of cargo laden upon the barge B. *claimed damages from the defendants, the owners of the tug* K. *for injury sustained by their goods by reason of the* B. *having come into collision with the abutment of Cannon-street Railway Bridge whilst being towed by the* K. *The defendants alleged that the collision was caused by the failure of the lighterman on board the* B. *(who was not the servant of the defendants) to make properly fast the breast rope by which the* B. *was secured to the barge which was being towed alongside her.*

Held, that the defendants having shown that the mishap was capable of being satisfactorily accounted for by an explanation which was no less probable than negligence of those in charge of the tug, the onus of proof shifted back to the plaintiffs, and that the plaintiffs failed to show that the negligence of the defendants' servants was the cause of the damage.

The dictum of Lord Dunedin in Ballard *v.* North British Railway Company (1923, *S.C.* (*H.L.*) 43, 54) *considered and followed.*

The plaintiffs' cargo was being carried in the B. *in pursuance of a contract made between the plaintiffs and a firm of wharfingers, by the terms of which the wharfingers were not liable for the negligence of their servants. The contract further provided that "persons supplying tugs or barges to the company for the purpose of enabling it to fulfil its contracts shall incur no greater liability to the company's customers than that of the company hereunder." The wharfingers contracted with a firm of lighterers for the carriage of the plaintiffs cargo in the* B. *The contract between the wharfingers and the lighterman was subject to the London Lighterage Clause, by the terms of which it is expressly stipulated that the person with whom the contract is made shall be the owner of the goods or his agent and shall accept for himself and all parties interested the terms and conditions contained therein. The terms and conditions include a condition that the contractors shall be at liberty to employ any lighter, tug or vessel belonging to other owners or to sublet the whole or any portion of the contract, and in either event the above terms and conditions shall apply to such employment or subletting and shall be deemed to have been agreed to between the goods' owner or customer and such other owners or sub-contractors. The lighterers contracted with the defendants for towage by the* K. *upon terms that the defendants should not be liable for loss or damage caused by the negligence or misconduct of their servants. The parties and all the other persons concerned in these transactions were accustomed to do business with each other, and the course of business followed was generally understood.*

Held, that, having regard to the fact that each party knew what the other was doing, there was a limited authorisation from first to last that at each step the independent contractor might reserve that subsequent sub-contractors should have the same exemption from negligence that the first contractor had got. The plaintiffs could not therefore sue in tort in respect of negligence for which defendants by the terms of their contract could not be made liable.

DAMAGE ACTION.

The plaintiffs, who were the owners of the cargo laden on board the barge *Brooklyn*, claimed against the defendants, J. P. Knight Limited, owners of the steam tug *Kite*, for damage sustained by their cargo in consequence of the *Brooklyn* having struck the abutment of Cannon-street Railway Bridge whilst being towed by the *Kite*. The plaintiffs alleged that the defendants' servants in charge of the *Kite* were negligent in failing to keep a good look out and in failing to keep the *Brooklyn* clear of the abutment of the bridge. It was contended on behalf of the plaintiffs that in the circumstances the onus of proving that those in charge of the *Kite* were not negligent was upon the defendants, and Langton, J. at the close of their case ruled that there was *primâ facie* evidence of negligence. The defendants denied negligence, and called the tug master, whose evidence was that, although he had not actually seen the collision, he had seen the *Brooklyn* and the barge, alongside of which she was made fast, "flaired out," as though the breast rope had not been properly secured. It was the duty of the lightermen's servants, and not the defendants' servants, to make fast the breast ropes.

The defendants further contended that the plaintiffs had agreed for the conveyance of their cargo with Brook's Wharf and Bull Wharf Limited, a firm of wharfingers (referred to in the judgment of Langton, J. and in this report as Bull Wharf Limited), under a contract by the terms of which Bull Wharf Limited were not liable for any loss of or damage to the goods or property caused by any act of neglect or default of the company or its servants or others for whom it might be responsible. It was further expressly stipulated that "persons supplying tugs or barges to the company to enable it to fulfil its contracts shall incur no greater liability to the company's customers than that of the company hereunder." In their turn Bull's Wharf Limited contracted with Messrs. Wrightsons, a firm of lighterers, for the carriage of the plaintiffs' cargo in the barge *Brooklyn*. The contract between Bull Wharf Limited and Wrightsons was subject to the London Lighterage Clause, the terms of which are as follows:

"LONDON LIGHTERAGE CLAUSE.

"The rates charged by us are for conveyance only, and are exclusive of dock dues, demurrage, disbursements or other charges. They are quoted upon the express condition that the person with whom any contract is made is either the owner or authorised agent of the owner of the goods intended to be carried, and accepts both for himself and for all other parties interested in such goods the terms and conditions herein contained. The goods are carried only at owner's and or customer's risk, excepting loss arising from pilferage and theft of goods on board the barge whilst in course of transit, such loss or damage being limited to 20*l.* per package and not exceeding 50*l.* per ton. Save as aforesaid, we will not be liable for any loss or damage to goods entrusted to us for lighterage or for any

loss or damage or expense occasioned to the owners of the goods or to the customers howsoever, whensoever or wheresoever, such loss or damage or expense be occasioned, and whether or not such loss, damage or expense be occasioned by any negligence, wrongful act or default of our servants or agents, or other persons for whose acts we might otherwise be liable, or be occasioned by any delay or failure in collecting, carrying or delivering the goods, and although the barge may for any reason have deviated or departed from the intended transit with the goods, and although the goods may have been loaded in the barge with other goods. We will not be liable to contribute in general average. We will not be responsible for any consequences arising from strikes, lock-outs or other labour difficulties. We are to be at liberty to employ any lighter, tug or vessel belonging to other owners, or to sublet the whole or any portion of the contract, and in either event the above terms and conditions shall apply to such employment or subletting and shall be deemed to have been agreed to between the goods owner or customer and such other owners or sub-contractors."

Messrs. Wrightsons, who did not supply tugs, contracted with the defendants to perform the towage with the tug *Kite* upon terms that the defendants were not liable for damage caused by the negligence of those in charge of the *Kite.*

All the parties had done business together for many years, and the course of business between them was well known.

At the trial Langton, J. ruled that it being admitted that the barge was brought into collision with the bridge, there was a *primâ facie* case of negligence. The defendants thereupon called the master who was in charge of the tug at the time. He stated that he looked round as he was coming for the arch and found his craft in line for the arch, everything in order as it should be to go through the arch. He then heard the knock of the barge against the bridge and the noise of shouting, and when he looked round he saw the barges "flaired out." His explanation of the collision was that the breast rope by which the *Brooklyn* was secured to the barge which was being towed alongside her had not been properly made fast.

Le Quesne, K.C. and *Naisby* for the plaintiffs.—*Primâ facie*, the defendants are liable for the collision. They have failed to discharge the burden which rested upon them of displacing the *primâ facie* case of negligence made by the plaintiffs. The defendants are not entitled to rely upon any of the exemptions contained in any of the various contracts, for they were not party to any contract with the plaintiffs. As regards the "Bull Wharf" clause, they did not supply the tug to the Bull Wharf Company, but to Wrightsons, and the clause has therefore no application. *Elder, Dempster and Co.* v. *Paterson, Zochonis and Co.* (16 Asp. Mar. Law Cas. 351; 131 L. T. Rep. 449; (1924) A. C. 522) is distinguishable. In any case, the "Bull Wharf" clause does not give an exemption from liability, but merely provides for limitation in accordance with the Merchant Shipping Acts and the London Lighterage clause. [Reference was also made to *Mersey Shipping and Transport Co.* v. *Rea Limited* (1925, 2 Ll. L. Rep. 375) and *The Winkfield*, 9 Asp. Mar. Law Cas. 259; 85 L. T. Rep. 668; (1902) P. 42).]

Trapnell, K.C. and *Wilfrid Lewis* for the defendants.—The defendants sufficiently discharge the onus of proving that the collision was not caused by their negligence, which the fact of the collision no doubt imposes upon them, by showing that the accident may be due to some no less probable cause. This they have done: (see *The Waalstrom*, 1923, 17 Ll. L. Rep. 53; *The Paludina*, 16 Asp. Mar. Law Cas. 453; 132 L. T. Rep. 724; (1925) P. 40; see also *Ballard* v. *North British Railway Company*, 1923, S. C. (H. L.) 43, for observations of Lord Dunedin at p. 54; *Langham* v. *Wellingborough School Governors*, 147 L. T. Rep. 91; *Wakelin* v. *London and South Western Railway Company*, 12 App. Cas. 41; 55 L. T. Rep. 709). If the defendants were in fact negligent, they are protected against liability by the terms of their contract. The plaintiffs cannot escape from the exceptions in the contract by framing their action in tort: (see *Elder, Dempster and Co.* v. *Paterson, Zochonis and Co., sup.*; *Barratt* v. *Great Northern Railway Company*, 20 Times L. Rep. 175; *Hall* v. *North Eastern Railway*, 1875, 33 L. T. Rep. 306; L. Rep. 10, Q. B. 437). The defendants contend that the Bull Wharf Company, as agents for the plaintiffs, made an agreement with Wrightsons, who in turn contracted with them upon terms which are universal on the river, and well known to all the parties concerned, namely, the London Lighterage Clause. The defendants are in any case entitled to the protection of the Bull Wharf clause.

Le Quesne, K.C. replied and referred to *Armour* v. *Tarbard* (37 Times L. Rep. 208) and *Lynch Bros.* v. *Edwards and Fase* (15 Asp. Mar. Law Cas. 208; 125 L. T. Rep. 187).

Cur. adv. vult.

May 16, 1933.—**Langton, J.**—This case is of no little interest and at one time it seemed to me to be possibly a case of some importance. Had I arrived at a conclusion which I was, at one time, minded to do, upon the facts, it would, I think, have given rise to what is certainly, in its present form, a novel point of law about which, in the circumstances, as I am now going to find them, does not really arise. However, as the matter has been argued so fully before me, and as I must consider the possibility that I may be wrong in the conclusion at which I have now arrived on the facts, I think it is wise and fair to the parties that I should express my view on all the matters which have been raised.

The relevant facts admit, I think, of being stated concisely, and they are these: The plaintiffs are the owners of certain perishable goods—that is to say, perishable when in contact with water—namely, tea, cocoa, and rubber. Their goods on the 5th Feb. 1932 were on board a barge called the *Brooklyn*, which was in tow of the tug *Kite*. The *Kite* towed the *Brooklyn* up between bridges with these goods on board the *Brooklyn*, and the *Brooklyn* came into collision with the northern abutment of the northernmost arch of the Cannon-street Railway Bridge. In consequence of this collision the goods were damaged.

The plaintiffs, the owners of the goods, are suing J. P. Knight Limited, the owners of the *Kite*, and, as will be seen by a glance at the pleadings, they put their case in the least possible number of words and lay it entirely in tort. Those, I think, are all, so to speak, the actual relevant facts—a very small series of facts—concerned with a short and concise claim.

But in order that the case may be fully understood, and for the purpose of the argument that has taken place here, it is necessary to examine with quite unusual care the whole series of events by which the business of the carriage of these goods

in the barge *Brooklyn* came to be effected. The plaintiffs are a company—I think their proper style and title is the Rajawella Produce Company Limited—and they have been accustomed to carry on business in the City of London for a very large number of years. Indeed, I may shorten this matter by saying that all the *dramatis personæ* in this occurrence have known each other, and done business with each other, for periods which are either proved or admitted before me, for periods varying between twenty years as a minimum and, I think, fifty years as a possible maximum. So that each knows the other very well, and each is perfectly familiar with both the manner and, indeed, the details in which the other does business.

The first document of importance is the document which sets out how, and under what conditions, the plaintiffs entrusted their goods to the wharfingers. The wharfingers in the case are Messrs. Brooks Wharf and Bull Wharf Limited. There was no written contract in the case, but it is not for a moment denied, on behalf of the defendants, that Messrs. Brooks Wharf and Bull Wharf Limited do their business, and have been accustomed to do their business, for a long term of years under the conditions of a certain clause. The clause, so far as it is relevant to the case, is as follows. For the purpose of easy distinction I will call the various sentences and paragraphs in the clause by numbers which do not appear in the clause. Par. 1 is in general terms, and it is not necessary to recite it. Par. 2—a somewhat strange paragraph—is in these terms: "The Merchant Shipping Acts 1894 to 1921, and the London Lighterage Clause respectively limit the liability of a lighterman for loss or damage to goods carried by lighter, barge or like vessel, and the company in respect of such goods shall in no case be liable to a greater extent than may be in fact recoverable from the owner of such vessel." That is par. 2. Par. 3 goes on: "Save in any such case as aforesaid the company shall not be liable for loss, detention, damage or injury of or to the goods or property, howsoever and whensoever caused and of what kind soever. In particular and without prejudice to the foregoing, the company shall not be liable for consequences of lockouts, strikes, and labour difficulties, or for any act, neglect or default of the company or its servants or others for whom it might be responsible, or for unfitness or unseaworthiness of any barge or tug on loading or commencement of the voyage or otherwise, or for unfitness or breakdown of machinery, appliance, store or refrigeration, or for deviation of craft." Then par. 4: "Persons supplying tugs or barges to the company to enable it to fulfil its contracts shall incur no greater liability to the company's customers than that of the company hereunder." That is a paragraph to which I shall have to return; it has been the subject of much debate in this case. But it is material to observe in passing, that it does convey to anybody dealing with Messrs. Brooks Wharf and Bull Wharf Limited that the company may call in the aid of tugs or barges which are not their own property in order to fulfil their contracts. It is not surprising to learn in view of that paragraph, specially inserted in the clause, that the next stage of the business was that Messrs. Brooks Wharf and Bull Wharf made a contract with Messrs. Wrightson and Son Limited, well-known lighterers on the river, for the transport of these goods, in a barge belonging to Messrs. Wrightson. Messrs. Wrightson have been accustomed to work—again to the knowledge of all parties in this case—under the London Lighterage Clause. That clause is so well known that it is unnecessary for me to recite it here, but there are two portions of it which I think are of special importance, and I think it may be desirable to read them at this stage. Speaking of the rates charged the clause says this: "They"—meaning the rates—"are quoted upon the express condition that the person with whom any contract is made is either the owner or authorised agent of the owner of the goods intended to be carried, and accepts both for himself and for all other parties interested in such goods the terms and conditions herein contained." Messrs. Wrightson therefore are saying to anyone who does business with them: "We do not do business with anybody who comes to us on a matter of transport, save on these terms, that you are actually the owner of the goods, or that you have at least this limited authority from the owner of the goods that you are to be entitled to accept, and do, for the owner, hereby accept, all the terms and conditions contained in the London Lighterage Clause." At the end of the clause the matter is carried a stage further. The lighterer says to the party with whom he contracts or sublets, as follows: "We are to be at liberty to employ any lighter, tug, or vessel belonging to other owners, or to sublet the whole or any portion of the contract, and in either event the above terms and conditions shall apply to such employment or subletting and shall be deemed to have been agreed to between the goods owner or customer and such other owners or sub-contractors." There the lighterers are saying: "We reserve to ourselves the right to sublet any portion of this contract either to the extent of hiring lighters from other people or hiring the motive power in the shape of a tug." But even when they act in that way and thereby employ not an agent for themselves but actually a sub-contractor, they say, "We take it that you who are making a bargain with us for the transport of goods are willing to be bound so far as the sub-contractor is concerned in the same way as you are bound to us." And the important stipulation, so far as this case is concerned, is that just as in the Bull Wharf Clause that I have read, there is a perfectly clear exception as regards negligence (I am not forgetting Mr. Le Quesne's point as to whether it is not clear—to my mind it is clear in the exception of negligence), there is also in the London Lighterage Clause a perfectly clear exception of any damage arising from negligence. I draw attention to the fact that in the London Lighterage Clause they go further than I remember to have seen any contracting party go, by saying that they pass on that exception of negligence and purport to contract for their sub-contractors that they (the sub-contractors) shall also have the benefit of this freedom from the results of damage by negligence. Messrs. Wrightson (to continue the business of this case) did not, themselves, supply a tug. Indeed—again to the knowledge of all parties concerned—they did not possess any tugs, and they have been accustomed over a long period of years to employ Messrs. J. P. Knight Limited and Messrs. J. P. Knight Limited supplied the tug *Kite*. Messrs. J. P. Knight Limited have also been accustomed for a long period of years, to do their business upon a well-known clause. One need not, I think, read it—it is quite a common clause. It presents no unusual features to my mind, but it presents a feature of importance in this case perhaps that there is a clear exemption I should say from any liability arising through loss or damage caused by the negligence or misconduct of their servants. That I think is the whole business arrangement upon which these goods were transported. With all these careful provisions of each party in the chain exempting the others from any

possible loss from negligence, the plaintiffs come forward and say, "Well, nevertheless, you are liable. We, the plaintiffs, know nothing about Messrs. Knight's clause, or, if we did know about it, it does not effect us; we did not contract with Messrs. J. P. Knight Limited at all. The situation as between ourselves and J. P. Knight Limited is that J. P. Knight Limited had control"—I do not think they say the custody—but "had control of our goods, and whilst the goods were in their control the goods were damaged."

I must come back to the initial question in the case, which is, was there negligence, and were the goods damaged by negligence? Mr. Le Quesne on behalf of the plaintiffs put in a letter of admission on behalf of the defendants written by the solicitors for the defendants. It is a letter of the 20th Jan. 1933 in which the solicitors say, "So as to save expense at the trial of this action, we are quite prepared to admit, on behalf of our clients, that the *Brooklyn* was brought into collision with the bridge and that in consequence the plaintiffs' cargo became damaged." Speaking for myself I hardly see how the solicitors could have prudently acted otherwise. That strictly limited admission seems to me to be the only businesslike thing to do, in order to save a possible large area of expense. There was, I think, also an interrogatory in the case which was answered by the plaintiffs. The interrogatory was in these terms: "Did you not on or about the 5th Feb. 1932 agree with Bull Wharf Limited that Bull Wharf Limited should arrange for the collection of the cargo the subject-matter of the claim herein at Harrison's Wharf and for the conveyance of the same from Harrison's Wharf to Brook Wharf?" That interrogatory, as I have said, was answered by the plaintiffs as follows: "In the month of Jan. 1932 I" (James Thomas Hayes, Secretary of Ceylon and Eastern Agency Limited, the secretaries of the Rajawella Produce Company Limited) "on behalf of the plaintiffs, agreed with Brooks Wharf and Bull Wharf Limited that the said Brooks Wharf and Bull Wharf Limited should collect by themselves or their servants or agents the cargo the subject-matter of the claim herein."

On the letter of admission Mr. Le Quesne claimed that there was a *primâ facie* case of negligence against the defendants; that the facts, to use a familiar phrase, *res ipsa loquitur*, and that it was for the defendants to rebut that *primâ facie* case. It is fair to say that Mr. Trapnell did not at all agree as to that, and argued that there was no *primâ facie* case of negligence; that the defendants had not got the goods in their custody, but only had the control of them temporarily, and that the barge in which they were damaged was not the defendants' barge, and was not actually in charge of one of the defendants' servants. I ruled upon that that there was a *primâ facie* case of negligence. I think it is now far too well established to be challenged that in the case of a tug and tow in the Thames—in the absence of extraordinary circumstances which, of course, always might rebut a *primâ facie* case—the tug is in charge of the navigation, and *primâ facie* must answer for any damages which the barge that is being towed suffers whilst the tug is supplying the motive power in that way. It was at one time a subject of fairly lively controversy whether that was so. I think now, in the present state of civilisation and development, it is thoroughly established that the tug is in sole control of the navigation, and if the navigation comes to grief the tug has got to answer for it in the first place. I think, however, it is material to notice that when one uses the somewhat illusive expression "burden of proof," or "onus of proof," it does not follow that the onus of proof is equally heavy in each case. Two or three authorities to which I have been referred have given me great assistance in that matter. To begin with, I think one can always derive useful assistance by reminding oneself of the dictum of Hill, J. in *The Waalstroom* (17 Ll. L. Rep. 53). In that case Hill, J. stated—as I think with very great precision—the position as regards onus of proof, and his general statement in the matter was adopted subsequently by the Court of Appeal in *The Paludina* (16 Asp. Mar. Law Cas. 453; 132 L. T. Rep. 724; (1925) P. 40). Both these cases I should say dealt with the consequences of collision—that is to say the ulterior consequences after the first collision. *The Waalstroom* litigation was concerned with a second collision resulting from the original collision. *The Paludina* was the third or fourth collision resulting from the original collision. What Hill, J. says is this: "In my view, in the circumstances of this case, the burden of proving that the consequential damage was a consequence of the negligence is upon the plaintiffs. In my view it is always upon the plaintiffs: but the facts may speak for themselves, and in themselves shift the burden upon the defendants, as, for instance, in a case where stranding immediately follows the collision, and so follows that it speaks for itself and is *primâ facie* a consequence of the collision." Not to pursue the matter further—because, of course, the facts of the case are widely different—that I think lays down the position here, and it is important that one should not forget it. The burden of proof is upon the plaintiff to prove negligence. He seeks to prove it by the aid of this letter and the known facts of the case, which it would be idle to deny, that the barge *Brooklyn* was brought into collision with the bridge and that in consequence the cargo was damaged. That puts upon the defendants, in my view, a burden—not, perhaps, in the circumstances anything like so heavy a burden as if they were themselves in charge of the vessel in which the damaged goods were, because, obviously, their knowledge then would, or should, be very much more detailed and particular than in a case where someone else is in charge of the vessel in which the damaged goods actually are.

Taking the matter a step further, I was referred to Lord Halsbury's very well-known statement in *Wakelin* v. *London and South-Western Railway Company* (55 L. T. Rep. 709; 12 App. Cas. 41). He says this: "I am not certain that it will not be found that the question of onus of proof and of what onus of proof the plaintiff undertook, with which the Court of Appeal has dealt so much at large, is not rather a question of subtlety of language than a question of law." It puts one, I think, a little upon one's guard against imagining that onus of proof is the simple thing that it sometimes sounds. He goes on to say this, "If the simple proposition with which I started is accurate, it is manifest that the plaintiff, who gives evidence of a state of facts which is equally consistent with the wrong of which she complains having been caused by—in this sense that it could not have occurred without—her husband's own negligence as by the negligence of the defendants, does not prove that it was caused by the defendants' negligence. She may, indeed, establish that the event has occurred through the joint negligence of both, but if that is the state of the evidence the plaintiff fails, because *in pari delicto potior est conditio defendentis.* It is true that the onus of proof may shift from time to time as matter of evidence, but still the question must ultimately arise whether the person who is

bound to prove the affirmative of the issue"—in this case the negligent act done—"has discharged herself of that burden." That is a passage which I think is useful here and must be applied. The onus of proof may shift from time to time as a matter of evidence, but the question ultimately arises: has the plaintiff proved that the defendant was negligent? The plaintiff says: "Well, you were towing the barge; the barge struck the bridge." That, I think, is sufficient to shift the burden of proof for the moment, and it is for the defendant to give an explanation of how this occurred. When he has given that explanation one has still to see whether negligence has been proved. The explanation may be disbelieved; the explanation may not at all exclude negligence, but the explanation may leave the matter in doubt (still in some doubt) as to exactly how the occurrence did happen, but leave an equal possibility that it happened without negligence as with negligence. Of course it may, on the other hand, be sufficient to exclude any question of negligence at all. Those are all possibilities of what may result from the explanation.

Before I pass from that I might cite one more case, which, I think, is of great assistance in this question: *Ballard* v. *North British Railway Company* (1923, S. C. (H. L.) 43). The important passage is from the dissenting judgment of Lord Dunedin. As Mr. Le Quesne quite rightly pointed out, being a dissenting judgment it cannot be said to have the full authority of the House of Lords, but following upon *Wakelin's* case (*sup.*), and coming as it does from Lord Dunedin, no one would for a moment suggest—and certainly Mr. Le Quesne did not—that it was not a dictum to which very great weight should be attached. Lord Dunedin says: "I think this is a case where the circumstances warrant the view that the fact of the accident is relevant to infer negligence. But what is the next step? I think that, if the defenders can show a way in which the accident may have occurred without negligence, the cogency of the fact of the accident by itself disappears, and the pursuer is left as he began, namely, that he has to show negligence. I need scarcely add that the suggestion of how the accident may have occurred must be a reasonable suggestion. For example, in *Scott* v. *The London and St. Katherine Docks Company* (13 L. T. Rep. 148; 3 H. & C. 596), a case where a bag of flour fell on a man who was passing along a quay in front of a warehouse, it would not have been sufficient to say that the flour bag might have fallen from a passing balloon. I think this view of mine is borne out by the expressions used in the case of *Scott* (*sup.*). Erie, C.J. who gave the judgment of the court (and it is to be noticed that though he and Mellor, J. did not agree with the majority on the facts, the whole matter depending on the interpretation of the judge's notes, the judgment was unanimous on the law) expressed himself thus: 'There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care. I take notice of the word 'explanation'; it is not in absence of 'proof.'" Now if that be a correct statement of the law—and I humbly think it is—what the defendants have to do here is not to prove that their negligence did not cause this accident. What they have to do is to give an explanation, and a reasonable explanation, which, if it is accepted, is an explanation showing that it happened without their negligence. And they need not even go so far as that because if they give a reasonable explanation, which is equally consistent with the accident happening without their negligence as with their negligence, they have again shifted the burden of proof back to the plaintiff to show—as he always has to show from the beginning—that it was the negligence of the defendant that caused the accident. When one has got that far one has to see what is the evidence in the case, and the evidence in the case comes from one side only—comes entirely from the mouth of Mr. Edward Mason, who was in charge of the tug at the time. I expressly did not say the tug master, because he was an emergency master. It appears that there was a strike of tug men and lightermen at the time. Mr. Mason, who had served a long apprenticeship in matters of navigation generally—he had been on board coasting steamers, a mate on pleasure steamers, during War time a Channel pilot, and for some time a mate on a tug—was just the kind of man one would expect people would fall back upon in an emergency to do necessary work of this kind. No one suggests that he was not fully qualified to take on the business of towing four barges between the bridges. The barge *Brooklyn* was in the charge, as far as can be ascertained (the evidence was a little vague here) of somebody whose customary business lay in a less active field, because, so far as I have evidence about it now, the evidence is that the barges at this time were being manned from people in the office of Messrs. Wrightson Limited, the lighterers. It appears to have been a case of "all hands to the pumps." Anybody who had a pair of hands and could possibly do the business acted as a volunteer to do work on barges at this time. I think that is not at all irrelevant to this case because, to put it shortly, Mr. Mason's explanation was that this accident happened because the breast rope from the *Brooklyn* to the barge immediately alongside of her was either improperly, or carelessly, or negligently, or whatever you like to say, but at least not properly, made fast. The flotilla consisted of the tug *Kite* and four barges, in two ranks abreast. The *Brooklyn* was in the starboard sternmost rank, and was breasted, or should have been breasted, to the barge on her port side. The *Kite*, after passing through Tower Bridge with her tow, was following two other tugs and tows ahead of her. The leading tug and tow could only be identified as a small yellow-funnelled tug which was proceeding very slowly. The next in the procession was an A.P.C.M. tug, with six barges in tow, proceeding reasonably fast—that is to say, at the same pace at which the *Kite*, with her flotilla, was proceeding. There was a flood tide of about three knots, and both the A.P.C.M. tug and the *Kite* were making a not improper speed in the circumstances, as it seems to me, of six knots through the water, making nine knots in all. As those flotillas respectively arrived at London Bridge they passed through, and then, at a distance of about a cable-and-a-half above that, they would have to negotiate Cannon-street Railway Bridge. As they approached Cannon-street Railway Bridge making to work for what is known as the central arch, the yellow-funnelled tug with her tow was seen to be, as I gather, in some difficulty with craft ahead. The *Kite* was working up a little to the north of the A.P.C.M. tug, and making to negotiate in the first instance the middle arch. The A.P.C.M. tug, seeing the trouble ahead, altered her intention and her course, and made for the northern working arch. The *Kite* found that she was constrained to do the same thing. It was a little obscure first

why she was constrained to do the same thing. All I think he meant was that he thought he would have collided with the A.P.C.M. tug, but I think the real reason he meant to convey was that if he had persisted in going for the centre arch he would either have got his craft athwart the tide, if he had eased up, or have collided with the yellow-funnelled tug ahead, and he had no real difficulty in avoiding collision—he would in no circumstances have had any difficulty in avoiding collision with the A.P.C.M. tug. However that may be, he made an alteration. It is material, again, I think to notice that he, with four tugs, made a lesser alteration than the A.P.C.M. tug with six barges in tow, so that there would be less reason for his getting a swing and getting his craft out of control. He was about 150ft. behind the A.P.C.M. tug, and I am not prepared to say that there was anything negligent in that, so that I can see no negligence in the way he was negotiating this part of the river, and in the manœuvre which he took immediately before the accident occurred. Just what occurred at the moment of the accident was at one time a little in doubt. Mr. Lewis—with that forensic skill for which he is so well known—put a series of questions, none in themselves, I think, objectionable, and presented the picture which I think the witness wanted to present, with the barges flaired out. That is to say, the *Brooklyn* went out to starboard, and her companion in that rank went out to port; that after they had flaired out the *Brooklyn* struck the bridge and the damage, of course, resulted. That may be a correct picture, but I do not think that that is all the picture, because when Mr. Mason was cross-examined about this and the facts were more exactly ascertained, the picture he really gives is this: "I looked round as I was coming for the arch. I found my craft in line for the arch—everything in order, as it should be, to go through the arch. I then heard the knock of the barge against the bridge. I then heard shouting and I looked round and saw that the barges were flaired out." That is not quite the picture, as I say, that Mr. Lewis gently led the tug master to give in examination in chief. But though there was nothing necessarily in conflict between the two pictures, he did see the barges flaired out, he did not see the collision, and the only possible inaccuracy in the earlier version is that it is not true that he saw the barges flaired out before he saw the collision. I think it must be agreed that he was not induced to say so. It is only, perhaps, a matter of forensic skill as to the order in which you introduce these comparatively minor events. I have to ask myself with these circumstances, have the defendants offered me an equally consistent explanation with the explanation of their negligence. Is there a stronger case—a far higher probability (I think one could not put it on a mere balance of probabilities), but really a substantial, a higher probability that this accident was caused by some negligence on the part of the tug, or is it equally possible that there was negligence on the part of the barge. I have examined with great care the various manœuvres, and I think I have shown by this rather over-detailed examination each step of the journey, and I cannot say that I see any positive negligence upon which I could fasten to say that the defendants were negligent in that respect.

I do not think there is any negligence in proceeding at nine knots with a clear eye ahead. I do not see any negligence in following a faster tug through the northern arch. I do not see that I can infer from these facts that the train in tow of the *Kite* did get a swing, and that it must be on account of the swing that the barge struck the northern abutment of the northern arch. It seems to me equally consistent at least that this amateur on board the *Brooklyn* did fail to make his breast rope properly fast. No doubt this alteration of the tug's helm—a port helm alteration—followed, as he told me, by a hard-a-starboard helm, might have imposed upon that breast rope a greater strain than it had endured up to that moment in the towage. But unless it was a wholly negligent manœuvre, the breast rope ought to have been so made fast or strong enough to meet that strain. Further than that, I am left in complete ignorance. Mr. Le Quesne pointed out, I think very fairly, that he could not give me any evidence in the matter. He said he had applied to the solicitors acting for the lighterer in the circumstances to get a statement from the man in charge of the barge, but the solicitors refused him that indulgence. That seems to me to be the plaintiffs' misfortune in this matter; it may not be their fault, but they do not come to offer me any counter explanation. I am not even told how the rope was made fast. Mr. Mason told me that so far as he understood that, of course it was made fast in the ordinary way round a bollard or dolly on each barge. I could infer that for myself, there is no other way that I know of in which you can made a breast rope fast. But whether it was made fast in the proper way to meet an ordinary strain no one can tell me, and I am not even told whether this rope just rendered round the bollard or whether it broke, that might have given me a great deal of information if I had known that, but Mr. Mason, it is fair to say, gave his evidence very fairly and gave me no reason to distrust him. He was most frank on the subject when he was tested about it as to hearing the noise first before he actually saw the flair out, and he was a man of quite sufficient intelligence to have appreciated that it would have been much better for him to have seen the flair out before he heard the noise of the collision. He had not seen the rope made fast. It was not any business of his how it was made fast, and he could not tell me whether it was broken or rendered, so that I am left in complete ignorance really as to how this accident happened, and I have only the evidence of one credible witness from the defendants, and he tells me that his explanation of the matter is that the rope was not properly made fast. In the circumstances, guided as I am by these authorities, I think there is a state of affairs there at least equally consistent with no negligence, and I am driven to find—I do not say that I do it unwillingly, for I think it is a fair and proper finding in the circumstances—and I do find that the case of negligence is not proved against the defendants.

Now there, of course, I might, in the circumstances, stop; but I have had a very careful and excellent argument from both sides on other questions of law, and I think, in fairness to them and by way of precaution in case I am wrong about the conclusions I have arrived at on this first point, that I ought to notice their several contentions, and give my view about them.

If I may attempt to summarise Mr. Le Quesne's clear argument about it, I think it would be fair to say that it amounts to this: "None of these exemption clauses have anything to do with me. I, the owner of the goods, am suing in tort only the man who had control of my goods. The contracts are *res inter alios acta*, they have nothing to do with me. I am not suing under contract, and there is no relationship other than that of temporary control between the defendants and

myself." He seeks to establish that in a variety of ways. First he criticises the Bull Wharf clause in very great detail. He says, as regards par. 2, that it deals with limitation of liability, and purports to leave the limitation of liability position as it is in the statute and in the London Lighterage Clause, and he says, in effect, there are certain limitations of *quantum* imposed by statute and this clause; that those limitations stand and the plaintiffs do not seek to alter them. In cases where these limitations do not exist, he says that the Bull Wharf clause seeks to obtain absolute exemption from negligence, and he is assisted in that argument by the way in which these two clauses are framed. The first is, to my mind, in an odd declaratory form, and declares the existence of the Merchant Shipping Act and the London Lighterage Clause, a declaration which certainly seems to me to be rather supererogatory; I should have imagined that they were known to most people who have dealings with this firm. Having declared that, and declared a certain position under it, clause 3 goes on to say, "save in any such case as aforesaid." It certainly is a fair point to put in argument, at any rate, that "save in any such case as aforesaid" means that anything that has been done by the foregoing paragraphs is not to be affected by what comes in the paragraph heralded in by the words "in any such case as aforesaid," and until one looks at clause 2 very carefully that argument certainly has, to my mind, great force. But when one looks at that paragraph carefully and considers it with par. 3, and the rest of the clause and with the circumstances in mind, I think it assumes a somewhat different complexion. Par. 3 says that "The Merchant Shipping Act 1894 to 1921, and the London Lighterage Clause, respectively, limit the liability of a lighterman for loss or damage to goods carried by lighter, barge, or like vessel." It goes on to say: "and the company in respect of such goods shall in no case be liable to a greater extent than may be in fact recoverable from the owner of such vessel." When one looks at the London Lighterage Clause—which is the important matter from this point of view—one sees that there is in the London Lighterage Clause a limitation as to *quantum* in respect of pilferage or theft, and it is to that I have no doubt that the paragraph in the Bull Wharf clause refers. What it means—it certainly is a little obscurely worded—is, to my mind, quite incontrovertible. It means that where there is loss or damage limited to 20*l.* per package and not exceeding 50*l.* per ton recoverable from the lighterman that amount shall equally be recoverable by the owners of the goods from the Bull Wharf Company Limited. Why they think it necessary to put that in and to state that they will be so generous as to restore what, under no circumstances they could honestly keep, I do not know. It seems to me a form of meagre generosity at the best, and possibly it was not put in for that purpose, but it was thought to clarify the position with regard to the London Lighterage Clause. To my mind, it does a good deal to obscure it but, that is a question for those who framed the clause and those who work under it to consider in the future. Mr. Le Quesne says that the whole of par. 3 refers to no other conditions than carriage. It has got a number of provisions, such, for example, as "unfitness or unseaworthiness of any barge or tug on loading or commencement of the voyage or otherwise . . . or for deviation of craft"; and I find it impossible to see how any of those words can be given any meaning if they do not apply to the voyage. How can you deviate with a craft when the craft is still at the wharf is beyond my imagination. I am constrained, therefore, to say that although I see the force of Mr. Le Quesne's argument concerning these two paragraphs—though I am not at all certain that par. 2 is in the right position in this clause in order to express clearly the meaning which they want to give it—I do not think I am doing any violence to the general language of the clause in reading it in the way that par. 3 gives an absolute exemption in respect of any negligence during or before the voyage, and par. 2 gives the owner of the goods the same right as regards pilferage from a barge as is reserved to the owner of the goods under the London Lighterage Clause which gives him the advantage of par. 2 of the Bull Wharf clause, and gives him the same advantage as he would have had if he himself had contracted under the London Lighterage Clause in respect of pilferage. I think that is all that par. 2 is aimed at, and I think that is a fair and proper construction of this not very elegantly worded document. I now come to par. 4 of the Bull Wharf clause, to which I have already averted in reading it. Mr. Le Quesne says as to that that this Bull Wharf clause may contemplate that tugs or barges are supplied to the company, and it may properly provide for what is to be done where these tugs and barges are supplied to the company, but in point of fact the tug and the barge in this case were not supplied to the company. They were supplied to the independent contractors, and his argument is that you must take the words "Persons supplying tugs or barges to the company to enable it to fulfil its contracts shall incur no greater liability" strictly as they are written. Again I do not think that that is a negligible point. I think there is force in it, and if one were dealing with people who by any stretch of imagination could be called strangers to the business—people unfamiliar with the business who would have to inquire (if they thought it their business to inquire) whether the Bull Wharf Company did their business with their own tugs and barges or with other people's—I think I should be constrained to read it, as Mr. Le Quesne so forcibly says, in its clear and grammatical sense; but when one comes to remember that these people have all done business with one another for twenty or fifty years; that the Rajawella Company, contracting under this clause, and the Bull Wharf Company knew perfectly well that the tug would be supplied by somebody like Knights, if not actually Knights; and that the barge would be supplied by somebody like Wrightson, if not actually by Wrightson; in other words, knew perfectly well that the Bull Wharf Company must go outside their own resources to carry out the contract which they had undertaken—then I think the matter assumes a different complexion. I think it is shutting one's eyes to the known facts to construe this clause in an absolutely strict and grammatical way by saying that it is confined to cases in which tugs and barges were supplied by the company and not by an independent contractor. It is contrary to the known facts—known to everybody in the whole chain—and no one would say anybody really meant that by the words they have actually used.

So much then for some of Mr. Le Quesne's arguments upon the Bull Wharf clause.

But in case the case goes further there were other arguments to which I am afraid I have not done justice. In his very candid argument Mr. Le Quesne put a case before me which has made a good deal of history in commercial law—*Elder, Dempster and Co.* v. *Paterson, Zochonis and Co.*

(16 Asp. Mar. Law Cas. 351 ; 131 L. T. Rep. 449 ; (1924) A. C. 522). At one time I hoped that I was going to get a great deal of assistance from that case and, in particular, from the judgments in the case, but I suffered disappointment as I went through it and I found that I could get no assistance from it at all except along a quite general line. It was argued twice in the House of Lords and in the end the House of Lords decided that provisions in a bill of lading could not be altogether ignored even though they were made as between goods owner and charterer, and not made strictly between goods owner and ship owner. That was, as it were, a beginning of the kind of case that we have to-day, because there the vessel had been chartered for the Elder, Dempster Line, and there were no actual contractual relations between the goods owner and the ship owner. The goods owner contracted with the charterer, who was the only person he knew, and then sued the ship owner in tort. So that is the same class of case, but not, of course, so complicated as the case I have to deal with now. Lord Cave says : " It was stipulated in the bills of lading that ' the shipowners ' should not be liable for any damage arising from other goods by stowage or contact with the goods shipped under the bills of lading ; and it appears to me that this was intended to be a stipulation on behalf of all the persons interested in the ship, that is to say, charterers and owners alike. It may be that the owners were not directly parties to the contract ; but they took possession of the goods (as Scrutton, L.J. says) on behalf of and as the agents of the charterers, and so can claim the same protection as their principals." That is a clear line of agency, and Lord Cave says there are the ship owners and the charterers. The ship owners servants are still in possession, and, therefore, one can say that the owners took possession as agents for the charterers and are entitled to the same protection as their principals. Lord Finlay, dealing with the case, took a slightly different view of it. He says this : " This contention seems to me to overlook the fact that the act complained of was done in the course of the stowage under the bill of lading, and that the bill of lading provided that the owners are not to be liable for bad stowage. If the act complained of had been an independent tort unconnected with the performance of the contract evidenced by the bill of lading the case would have been different. But when the act is done in the course of rendering the very services provided for in the bill of lading, the limitation on liability therein contained must attach, whatever the form of the action and whether owner or charterer be sued. It would be absurd that the owner of the goods could get rid of the protective clauses of the bill of lading, in respect of all stowage, by suing the owner of the ship in tort." Again one must remind oneself that that is not this case, but it is pretty clear that Lord Finlay took the view that the justice of the case demanded that a man who had taken pains to contract himself out of a certain liability ought not to be told afterwards, " You may, as a matter of contract succeed, but you see you are still liable in tort if you have not, as it were, shaken hands with and made the personal acquaintance of the actual individual whose goods you are shipping." Mr. Trapnell, on the same lines, urged upon me that it would be impossible to carry on the business of the Port of London if it were necessary that every man who transported goods in a barge should make the personal acquaintance of everybody who had goods in that barge, and made a separate contract with him. I hope I am always duly impressed with the necessity of the law being in consonance with the needs of commerce, but I do think in this instance that provides the solution, because Mr. Le Quesne suggested the solution of this difficulty when he pointed out that business could perfectly well be carried on with perfect immunity to the barge owner by putting in the same clause of indemnity as that which the tug owner has in this case.

If the plaintiff were to succeed it is not the nominal defendants who would suffer, it would be, in fact, the barge owners, because the tug owner would immediately recover by way of indemnity. So that so far as interference with the business of the Port of London is concerned it would mean that a clause which is already overburdened with words, should be further burdened and an indemnity added all along the line.

I think, therefore, the solution of the case, from the legal point of view, is not to be found in the need for carrying on the work of the port, but one is not, therefore, obliged to be blind to the manifest absurdity to which Lord Finlay's observations point. Lord Sumner dealt with the matter in the *Elder, Dempster* case (*sup.*) in a somewhat different way and from a different angle. He notices the cases of agency which were adopted by Lord Cave in his opinion, but for his part Lord Sumner preferred to notice that this bailment of the goods could not be, as he called it, a bald bailment in view of the fact of the contract that had been actually entered into between the goods owner and the charterer. He says : " It may be, that in the circumstances of this case the obligations to be inferred from the reception of the cargo for carriage to the United Kingdom amount to a bailment upon terms, which include the exceptions and limitations of liability stipulated in the known and contemplated form of bill of lading. It may be that the vessel being placed in the Elder, Dempster, and Co.'s line, the captain signs the bills of lading and takes possession of the cargo only as agent for the charterers, though the time charter recognises the ship's possessory lien for hire. The former I regard as the preferable view, but, be this as it may, I cannot find here any such bald bailment with unrestricted liability, or such tortious handling entirely independent of contract, as would be necessary to support the contention."

For that case, therefore, one gets two possible lines—one the line of agency, the other the line of bailment. One also gets from Lord Finlay a valuable pronouncement as to the way in which a judge may fairly approach this class of contention put forward by the plaintiffs to-day. I hoped at one time that the ingenuity of the defendants was going to show me that I could go peacefully forward upon the line of agency, but Mr. Trapnell, after having made a violent effort and got as far as Wrightson's on the line of agency, was unable to go further, and could not say that there was a line of agency throughout in the full sense. That is to say, he could not claim that Wrightsons in making their contract with Knights were in the full sense of the word acting as agents. Quite clearly they were not. They were making an independent contract at an independent rate. I am not so sure whether one does not reach the true solution in this case through what I may call a limited authority of agency. I will deal with that later.

As regards bailment, it was of a very light character, for it was admitted that the tug had not got the custody of the goods ; she had nothing but the control ; and Mr. Trapnell again specifically disclaimed any desire to travel along the road of bailment. He said he did not think in the

circumstances that he could claim that there was a bailment. The two roads opened by the *Elder, Dempster* case (*sup.*) appeared to be clearly barred in this case.

Mr. Trapnell, however, put it in this way. "I do claim that so far as Bull Wharf and the lighters are concerned, Bull Wharf were undoubtedly acting as agents for the owners in contracting with Wrightsons. Indeed, in view of the fact that Wrightsons will not contract on any other terms, it does not seem to me that business could be done, or could be taken to be done, under any other terms, because Wrightsons, by the London Lighterage Clause, insist that there shall be an express condition of the contract that it is made either with the owner or with the authorised agent of the owner. Mr. Trapnell, therefore, seemed to me to be on strong ground thus far. As regards the further step, his original way of putting the matter was that the plaintiffs through their agents, the Bull Wharf Co., were affected with knowledge of Knight's contract, and he said, "I bring in Knight's contract that way. I say Knights have contracted with Wrightsons, and through Bull Wharf the plaintiffs are affected with knowledge of that contract." For my own part, I prefer another line of reasoning which Mr. Trapnell also adopted, and it is this. One gets as far as Wrightsons with Bull Wharf Co. as authorised agents in the terms of the London Lighterage Clause to contract for the owner of the goods. Wrightsons, under the London Lighterage Clause, reserve a special right to sublet upon terms of the London Lighterage Clause, and that seems to me to imply that if they happen to vary the clause for other purposes they have at least this limited authorisation that they shall not contract on any worse terms for the owner than the terms of the London Lighterage Clause, and so far as this case is concerned it is not suggested that they did contract. They are entitled to contract as it seems to me upon terms that will be as good as the London Lighterage Clause for the sub-contractor and no worse for the owner, and that is all, in this case, they have done.

It seems to me, therefore, that if you treat this case throughout not as a case in which each party has acted as agent for the other, in the full sense—because quite clearly they have not, they are really in many senses completely independent contractors—but if you bear in mind what they each knew about the others' business, and the language that they used, you can find in it a limited authorisation from first to last—that is from the plaintiffs to the defendants—that in each step of the way the independent contractor may reserve—as he does under the Bull Wharf Clause—that the people who follow after shall have the same exemption from negligence as he, the first contractor, has got. You get it in this way; par. 3 of the Bull Wharf clause gives a perfect exemption from negligence; par. 4 a reservation that people following after who supply tugs and barges shall have no greater liability. The London Lighterage Clause gives a perfectly good exemption from liability from negligence and a reservation in regard to subcontractors, and then Messrs. Knight's clause where they reserve the same liability for negligence. Of course if one were dealing with a case in which the final contractors, the defendants, were claiming something more than ever had been set out or claimed originally in the Bull Wharf agreement, there might be, I can see, a difficulty, but I do not myself see any difficulty in inferring a limited authority in view of the fact that everybody knew precisely what the other was doing and that it was probably a great surprise to everybody concerned that this somewhat ingenious point of tort was relied upon to excuse the defendants.

I do not pretend in this review of the case that I have done full justice to all the arguments on both sides, but I have dealt with what I think are the principal points as I see them, and the result of my judgment must be that the plaintiffs fail and there must be judgment for the defendants with the usual consequence as to costs.

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

Solicitors for the defendants, *J. A.* and *H. E. Farnfield.*

May 30 ; *June* 2 *and* 20, 1933.

(Before LANGTON, J.)

The Rehearo. (*a*)

Steam trawler—Repairs being carried out in public dock—Bailment—Liability of repairer for safety of trawler during repairs—Custom at Grimsby.

The plaintiffs, owners of the steam trawler R. *claimed damages from the defendants, a firm of ship repairers, in respect of injuries sustained by the* R. *whilst the defendants were carrying out certain repairs on the* R. *The* R. *was undergoing repairs in a public graving dock at Grimsby, belonging to the railway company. The defendants' workmen and other servants went on board the* R. *for the purpose of carrying out the repairs. There was throughout on board a watchman, who was the servant of the plaintiffs, and after working hours, when the defendants' servants had left work, he was the only person who was on board. The* R. *was put into dock at the instance of the plaintiffs, and by the terms of the contract between the parties the first dues were paid by the plaintiffs, and subsequent dues by the defendants. During the repairs, the defendants having removed certain bow plates, it became necessary, when water was admitted to the dock, for the* R. *to float on one of her bulkheads ; unknown to the parties there were open rivet holes in the bulkhead through which water entered. The entry of water was not discovered by the watchman from the time when the defendants' workmen left the* R. *after the conclusion of work on Saturday until the following morning when it was too late to prevent the* R. *from falling over and subsequently sinking, in consequence of which she sustained serious damage.*

Held, that there was no implied term in the contract under which the repairs were being executed that the defendants should be answerable for the safety of the R. *during the repairs.*

Ex parte Willoughby ; In re Westlake (1881) 44 *L. T. Rep.* 111 ; 16 *Ch. Div.* 604 ; Earle's Shipbuilding and Engineering Company Limited *v.* Akt. D/S. Gefion and others (1922, 10 *Ll. L.* 305) *distinguished.*

Held, further, that there was at Grimsby a custom that whilst repairs to trawlers were being carried

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

out in the manner in question, representatives of the owners should be responsible for inspecting the bulkhead, and, if necessary, watching it during repairs.

Held, further, that there was no negligence on the part of the watchman, but that the action failed on the ground stated above.

THE plaintiffs were Messrs. George Frederick Sleight and Raymond Laurence Humphrey, trustees of the late Sir George Sleight, and owners of the steam trawler *Rehearo.* The defendants were Messrs. J. S. Doig (Grimsby) Limited, a firm of ship repairers carrying on business at Grimsby.

The plaintiffs claimed damages for injuries sustained by the *Rehearo* in Oct. 1932 whilst lying in the London and North-Eastern Railway Company's No. 3 graving dock at Grimsby undergoing repairs.

The facts and contentions of the parties fully appear from the head-note and the judgment of Langton, J.

Somervell, K.C. and *Pilcher* for the plaintiffs.

Dickinson, K.C. and *Cyril Miller* for the defendants.

June 20.—**Langton, J.**—In this case the plaintiffs, who are the owners of the trawler *Rehearo*, sue the defendants, Messrs. J. S. Doig (Grimsby) Limited, who are repairers, for damage sustained to the *Rehearo* whilst lying in No. 3 graving dock at Grimsby. The case is an unusual one, and it is a case not without a good deal of difficulty. It has been excellently argued on both sides, and notwithstanding the difficulty I have felt about it I think it is better I should give judgment now while all the points are present to my mind. The *Rehearo* had suffered some damage to her forward plates, and it became necessary to have this damage repaired. The defendants, Messrs. Doig, undertook the repair after a tender and the contract upon which they undertook the repair is contained in certain letters. The final letters are letters of the 25th Oct. 1932 from the plaintiffs to Messrs. Doig, and on the 28th Oct. from the plaintiffs to Messrs. Doig. The facts are that the *Rehearo* was put into No. 3 graving dock, a public dock owned by the London and North-Eastern Railway Company, and let to the public at certain rates of hire, and she occupied the dock in common with five other trawlers also under repair. The *Rehearo* was put in the dock at the instance of the plaintiffs, and the first dock dues were to be paid by the plaintiffs, subsequent dock dues were to be paid by the defendants. On the 29th Oct. 1932, which was a Saturday, the defendants' workmen were working on the *Rehearo* on the morning of that day. At noon they left the *Rehearo*, and the condition in which they left her was that certain of her bow plates had been removed and she was exposed to the necessity of floating on her forward bulkhead when the dock was filled with water. The bulkhead in question was not the foremost bulkhead of all—that is a short bulkhead at the aftermost end of the fore peak—but a watertight bulkhead that comes in the way, I think it is, of sixty-one strain plates and just forward of some space devoted to spare gear and the fresh water tank. This bulkhead is a bulkhead extending the full height of the vessel, and it is not denied that it is quite customary for the purpose of repair to float vessels of this class upon that bulkhead. As the case first presented itself to me I saw it in this way. The repairers had taken off the bow plate. They had exposed this forward bulkhead—an unusual surface when judged generally—to the action of the water, and therefore one would imagine some duty lay upon them to examine the bulkhead in question. A great deal of evidence has been called, and the matter has been fully thrashed out before me.

To follow the facts a little more in detail. On the afternoon of Saturday, the 29th Oct., the dock was filled with water. The defendants' workmen had, of course, departed, and there was in charge of the *Rehearo* only one man, a watchman, in the employment of the plaintiffs. By an extraordinary mischance, which is quite unexplained in any evidence before me, the bulkhead had three small rivet holes in its surface or face whereby water was able to, and did in fact, enter. So far as can be judged by the appearance of these holes they had originally held in position some form of bar or piece of metal, but one can see there are bars of this character in other portions of the bulkhead but no one has attempted to explain how it came to pass that the holes were in existence at this time. The vessel was classed at Lloyd's, and she had undergone a special survey within some three years of the occurrence. It is inexplicable that she should have had these rivet holes in the bulkhead at the time. Now there is evidence that she had been exposed to some test since then which would have made it quite impossible that the holes could have been in existence at the time she passed her survey. The holes being there and the surface being exposed to water, the water entered through the bulkhead, and the vessel, which had been listed to the quay with her starboard side made fast by ropes to the quay, lost her list, fell over to port, and in a very short time sank with water entering the engine room aft over the deck, and thereby sustained very considerable damage. The problem which is presented by these facts is who is responsible for the damage which the vessel sustained. The plaintiffs plead that it was an implied term that the defendants safely keep the *Rehearo* during the execution of the repairs, and obviously she was not so kept because she was damaged, and they lay their case in negligence and in breach of the implied term of this agreement and they say the repairers are liable. The defendants' case is at first sight a little inviting because they say this. They say: "No, by the terms of this agreement we had no duty at all to look after this vessel while she was in this dock. Furthermore, we say there is a custom of the port of Grimsby that at least so far as this dock is concerned and so far as the repair of trawlers is concerned the duty of looking after the vessels while they were in this dock lies with the owners of the vessels, and any duty there may be for watching the bulkhead when vessels are floated on the bulkhead lies also on the owners of the vessel." Further, it is said in this case, "The vessel was in charge of your watchman. Your duty is to have a watchman who is able to deal with the ordinary and usual occurrences on board a vessel, and your watchman failed in that, because he perceived nothing at all till five or six o'clock in the morning when the vessel had lost her list and was very soon about to sink." That defence struck me as somewhat unusual. It is not at all willingly that one comes to a conclusion as regards a custom of this character, but I cannot ignore the evidence if sufficiently strong in character to show that the common law is varied by local custom.

First of all considering the case one looks to see whether any light can be obtained from the terms of the contract. But the terms of the contract are not at all illuminating. It would be

perfectly possible to imply by that contract either that the owner or the repairer had custody and possession of this vessel during repair to be carried out under the contract. But the parties have come forward and given me almost a superabundance of evidence on this point, and the clear conclusion at which I have arrived after a very full discussion of the case is that in this case there was no surrender by the owners of the *Rehearo* to the repairers for the purpose of repair. One is apt to be misled by thinking of a case in which the repair is in a private dock. In that case there cannot be a shadow of doubt that the custody and possession of the vessel during the repair is in the hands of the repairer, and I hope that nothing I say in this case will do anything or have any effect in minimising the plain duty which lies on repairers in such cases to exercise proper care of the chattel in their possession. But in this case the evidence was strongly the other way.

We endeavoured in argument to test the matter by cases dealing with possessory lien. These cases afforded some assistance, but in so far as they afforded me any assistance here I think they favoured the defendants. The cases that were put before me were *Ex parte Willoughby; Re Westlake* (1881, 16 Ch. Div. 604; 44 L. T. Rep. 111), and the case of *Earle's Shipbuilding and Engineering Company Limited* v. *Akt. D/S Gefion and others* (1922, 10 Ll. L. 305). But in those cases the possessory lien was found in favour of the repairer. The accommodation had been arranged for and paid for by the repairer and the ship had been entered in the books of the public dock in the repairer's name. In this case the procedure was otherwise, and I am particularly impressed by the fact that everyone on the part of the repairers had left the vessel quite openly and quite ostensibly by noon on Saturday. There is no suggestion that anyone was expected to remain and no question seems to have been raised at the time at all. Mr. Doig went into the box and gave me most excellent evidence of his view of the contract. He impressed me as a most candid and painstaking witness. He struck me as a man who was giving the very best of his knowledge and belief in the account of what happened in this case. Against that the plaintiffs were people who also had had very great experience. They had had in the course of quite a short time over 600 cases of repair and they were quite unaware, as they said, of any custom such as was put forward on behalf of the defendants. But Mr. Doig's evidence particularly impressed me in that he said he quite believed that someone ought at least to inspect the bulkhead and indeed in his experience it always was inspected. But so far as he was concerned it never crossed his mind to inspect someone else's bulkhead at all and it seemed perfectly clear to me that Mr. Doig was stating nothing more than the truth in saying so far as he was concerned he occasionally had a contract in which the responsibility was expressly and in express terms put upon his shoulders, and in those cases he did inspect the bulkhead if he had any occasion to float the vessel upon the bulkhead, but where there was no such special term he never had taken this view at all. It never occurred to him that he should inspect the bulkhead, for which, as he put it, he was in no way responsible. That is the evidence of one man only. But quite apart from the question of custom I think it is very useful evidence if one accepts it as I do to show what is the state of business between these parties. Mr. Doig's view of the business between the parties was: "I was nothing but the man who was hired to come upon this ship and do the exact job I intended to do. What the owners did with their ship in the meantime and how they looked after it had nothing to do with me. The ship was not bailed to me in any sense. I was not responsible for her in any way. I was responsible only for the work I had to do." If that is the right view of the contract between the parties quite apart from the question of custom it would be difficult to say that the repairers were to blame for the damage which had occurred through a failure either to inspect or watch the bulkhead which admitted the water. If they were in truth and in fact nothing more than repairers who were invited on the premises over which they had no control I see great difficulty in putting upon them any responsibility. That is the first and I think the strongest ground of defence. I think the matter does not go beyond that if one is satisfied that is the position between these parties. To my mind it is quite an unusual position, but I believe it to be the actual position in this case. I think the facts I have stated all go to show that this was the real agreement in this case. Therefore, I do not imply an agreement such as is pleaded in the statement of claim, and which would be in normal circumstances a proper implication to make, that the repairers should safely keep the vessel during the execution of the repairs.

That is only one aspect of the case. The main case pleaded, and on which evidence was heard at great length, is the custom which has been set up that at this particular dock with this particular class of vessel there is a custom that the owners' representative, or someone acting on behalf of the owners, shall inspect the bulkhead and, if necessary, and the owners desire it, watch the bulkhead during the material time. I watched the evidence on behalf of that custom with jealous care, and I paid very great attention to Mr. Somervell's analysis of it, in which he pointed out that the cases to which the witnesses were able to speak in fact were not very numerous. No one was able to speak to more than four or five cases in which they had known vessels floated on their bulkheads in this manner. But against that there was evidence of people, repairers' insurance surveyors, who had acted as owners' surveyors, and these people spoke to a custom whereby either the owners' representative or the insurance surveyor was the person to whom the duty was entrusted to inspect the bulkhead and make sure that the bulkhead was ready to stand the strain to be imposed upon it in the dock. Mr. Somervell made another excellent point there that the whole matter is obscured by the eruption of the insurance surveyors into this class of case, and Mr. Dickinson at one time put forward a difficulty, which did not commend itself to me, that the repairer was entitled to rely upon the fact that the vessel was a classed vessel and had been passed as having watertight bulkheads by the insurance surveyor. That did not commend itself to me. The repairer has to take care or he has not. If he has a duty to take care I cannot see he could excuse himself from that duty by saying: "I believed someone else was taking care." That is not a doctrine to which I personally can feel inclined to accede.

Mr. Somervell's other point contained a considerable amount of truth, because it may well be if there is this custom it has grown up by reason of the more prominent part which insurance surveyors take nowadays than they used to take when the business of insurance was much less developed. It seems to me a quite possible theory for the origin of this custom that, in view of the fact that insurance surveyors always as a matter of practice inspect these bulkheads before repairs

are carried out, the owners and repairers neither of them thought there was any duty lying upon them. From that may have developed the practice that the repairer may say to himself: "This is not an expense for which I need budget at all, because this is a matter which is carried out either by the insurance surveyor or someone else and for which I need therefore make no provision." I thoroughly agree that the mere fact that laxity had grown up and that the repairer had chosen to rely upon the insurance surveyor would not be any reason for holding that any custom such as pleaded here was established. I do not think I am much concerned or should be of any assistance to the parties in endeavouring to discover what the origin of the custom was. I am not here to conjecture about these matters. However it may have originated, I am of opinion that so far as this dock was concerned and this class of vessel was concerned, and I expressly limit it to that because I have had no real evidence that the custom exists apart from that, there is a custom of the character pleaded in the defence, and I think it is a custom so far as these small vessels are concerned that the owner or insurance surveyor acting for that purpose as a friend or agent of the owner does undertake the duty of either assuring himself before water is poured in that the bulkhead is able to stand the strain, or, if that is not done, that he is present at the actual incursion of the water and satisfies himself there and then that the bulkhead is standing the strain. I do not think that excludes the possibility that if the owner is a careful man he sees both done.

However it may be, I accept the evidence of the various people who have been called to assure me that, whatever may have been done in the remote past as the duty of the repairer in Grimsby in this respect, it is not a duty which rests upon him to-day in the absence of those express terms which had been pointed to in some of Mr. Doig's contracts. I should not omit to notice that, in contradiction of the evidence of the numerous people who have been called for the defendants, there was one strong witness called on behalf of the plaintiff. Plaintiffs called a Mr. Oldham, who had an almost unique experience in the matter of employment by various firms, for he had been in the employment of such well-known people as Workman, Clark, and Co., Cammell Laird, and others, and was in a responsible position in the employment of those firms. But Mr. Oldham was speaking, as I understood the evidence, quite generally when he said that repairers took the elementary precaution of seeing a bulkhead was doing its duty, and I cannot help thinking that to-day in the vast majority of cases in the contracts which one ordinarily hears of, and certainly in all contracts in which the custody and possession of vessels is handed over to repairers, this duty is undertaken by the repairers. But Mr. Oldham did not purport to speak as a Grimsby man or to deal with any special incidents of the Grimsby dock. Otherwise was the evidence of Mr. Powell. He was an old and tried repairer of Grimsby and engaged for over fifty years in shipbuilding. He said he was quite familiar with floating ships on their bulkhead, and beyond a doubt in every case he used to instruct his foreman boiler maker to make a thorough examination of the bulkhead. His evidence was, therefore, in strong contrast to all the evidence called on behalf of the defendants. One boiler foreman who was in his employment was called, a Mr. Blakey. He really did little to shake the evidence of Mr. Powell because he said out of five cases in which he floated vessels on the bulkhead he, while in Mr. Powell's employment, had had orders from Mr. Powell to inspect the bulkhead. But he qualified that by saying that the orders were express orders to do it for the owner. I don't think I should take the evidence of Mr. Blakey against that of Mr. Powell if I thought there was any strong conflict between them. I think Mr. Powell had always taken this precaution he says he took, and it may well be this custom, spoken to so strongly by all the witnesses for the defendants, was a custom which has grown up without touching Mr. Powell's procedure in the matter, and of which he may personally either be completely ignorant or wish to ignore. As I understood his evidence, he was ignorant of it, and I am mindful of the fact that to establish a custom one must be satisfied that it is universal and it is known. But I do not think I should be justified on Mr. Powell's evidence as weighing against the very considerable weight on the other side in saying a custom is negatived merely because Mr. Powell did not agree with it, and he, being a very old man did not recognise it or know of it. I have weighed his evidence against the rest of the evidence, and weighing it I think they succeed upon the defence.

There is one other matter on which a certain amount of time has been expended, again a not altogether easy point. That is, even supposing the defendants were responsible for the incursion of water through the bulkhead the vast majority of this damage would never have occurred had it not been for the negligence of the plaintiffs in not themselves taking proper care of the vessel while in the dock. Quite shortly the facts in that connection are that the water was let into the dock commencing in the early part of the afternoon of Saturday, the 29th Oct. A watchman was on board while this water was being let in. The dock was about full up about 6.30 p.m. in the evening, and the watchman discovered nothing as to the condition of the vessel until an hour after 5 a.m. on the morning of the 30th. The watchman is a former master of some thirty years' experience, and it does not look upon these facts that he can have been exercising a very vigilant outlook or care on the vessel to have noticed nothing before that time, because when shortly after the time he noticed she had lost her list the vessel had foundered. But I don't think that concludes the matter at all. Mr. Dickinson cited one or two cases to me upon this rather difficult question of the duty of a shipowner to exercise proper care of his vessel while in dock. He has cited the case of *The Creterope* (1921, 9 Ll. L. 450), decided by Hill, J. in this court, which afterwards went to the Court of Appeal, where the judgment of Hill, J. was affirmed. In that case the vessel was a concrete tug and was holed by a bolt whilst lying in dock in Hull. It was proved that there was no one on board at the time. Hill, J. in that case, with the assistance of the Elder Brethren, took the view that it was negligence on the part of the tug owner to leave the vessel with no one on board, and I don't suppose that anyone could be astonished at the learned judge and the Elder Brethren arriving at that view. But that is not this case at all, because we have a man on board in this case in charge, and therefore the facts are not so simple. It is not quite easy to state what is the duty of a shipowner in these circumstances. Perhaps one gets some light from the other case which Mr. Dickinson cited of *Grant* v. *Egyptian (Owners): The Egyptian* (11 Asp. Mar. Law Cas. 388; 102 L. T. Rep. 465; (1910) A. C. 400), in which the watchman in charge of one trawler undertook to bring another trawler into the same dock where the owners' vessel was lying, and in so doing damaged the owners' vessel, made

no examination of the damage done, and the trawler sank. The circumstances are not at all parallel. Lord Shaw says there in his speech: "The defendants are liable for the damage which is a natural and direct consequence of their wrongful act; that would cover the slight injury to which I have alluded. The second principle is that the defendants are not liable for any further damage which could have been avoided or minimised from the exercise of reasonable care on the part of the plaintiffs."

If I am right in the conclusion I have arrived at concerning the incidence of the duty in this case of looking after the trawler it was a duty which lay on the plaintiffs in this case. But I have to remember she was a trawler in a trawler dock, and that the purpose of a watchman as declared by the plaintiffs was that they should have someone on board able to do the small amount necessary to tend the ropes and protect the vessel against theft. That they considered in the circumstances sufficient. Seeing how these vessels lie in the dock, and seeing the circumstances generally, I don't know that I ought to put any higher duty upon them than that. I don't think they have any duty to have upon her a person of any high degree of skill, even though in this particular case they happened to have a master mariner in charge. It is a very striking comment that a master mariner should not during all these hours have noticed the vessel had altered her trim to the extent to which this vessel must have altered her trim, but that seems to me an accident rather than the substance of the matter. I don't think they were bound to have a person on board who could and ought to have taken such care and have such knowledge as to be immediately aware of the fact that the vessel was changing her trim and was thereby in danger. Mr. Dickinson laid great stress upon that point, and called certain witnesses to show that the ropes of this vessel were not properly tended. On that I got the ship's husband, Mr. Burgess, and I am satisfied from what Mr. Burgess and Mr. Hollingworth say as to the necessity of tending these ropes. I think the way in which these ropes were made fast left quite sufficient play to deal ordinarily with the variation which occurred during the time the dock filled and emptied if there was someone there to tend them. Mr. Hollingworth is the watchman, and his evidence was that he made periodical rounds during the night, and notwithstanding that and the fact that the vessel must have been going down quite steadily by the head during the whole night, he never perceived there was any variation of trim. I think Mr. Dickinson is on clearly the strongest ground when he says: "I don't think much of that watchman." I think Mr. Hollingworth is probably telling me a good deal more than the truth when he tells me he made so many periodical rounds and inspected quite so carefully, but I have to bear in mind that he was not a mere night-watchman but a man who had to keep his watch both day and night, and I am not prepared to say that taking him, not as a master mariner, but taking him as an individual who was there to look after what was necessary and nothing more for this ship in ordinary circumstances, I think I cannot say he was lacking in the performance of his duties. No one imagined for a moment that this bulkhead was going to give way by leaking water. In fact, in the experience of all the people no one seems to know of a case in which a bulkhead has given way. It was a wholly exceptional circumstance. The sinking was of a gradual character which took place during the night, and though a more vigilant man with his experience might have perceived the vessel was altering her trim I don't think I ought to say that a watchman whom it is incumbent upon the plaintiffs in this case to have upon their vessel was lacking in his plain duty in failing to perceive in these circumstances a fact that in broad daylight and in other circumstances might have been staring him in the face.

Therefore, on this second defence, I am against the defendants, and I don't think they make any defence on that ground. But upon the first two grounds, that the contract did not put the vessel in any way into the hands of the defendants or impose upon them any special duty to take care and upon the ground of custom, I have found in their favour. Upon those two grounds this claim fails, and there must be judgment for the defendants.

Solicitors for the plaintiffs, *Pritchard* and *Sons*, agents for *H. K.* and *H. S. Bloomer*, Grimsby; *Price*, *Roscoe*, *Wilson*, and *Glover*, agents for *A. M. Jackson* and *Co.*, Hull.

June 27 *and* 30, 1933.

(Before BATESON, J.)

The Minerva. (*a*)

Action in rem—*Jurisdiction*—"*Damage done by a ship*"—"*Damage received by a ship*"—*Grain elevator*—*Part of elevator being hoisted by ship's derrick*—*Broken derrick*—*Damage to elevator*—*Supreme Court of Judicature* (*Consolidation*) *Act* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 22, *sub-s.* (1) (a) (*iii.*) (*iv.*), *s.* 33, *sub-s.* (2).

The plaintiffs, owners of the grain elevator N. P., *claimed damages in respect of injuries sustained by the* N. P. *The plaintiffs alleged that when a part of the elevator was being hoisted out of the defendants' steamship* M. *lying alongside a wharf in the docks at Birkenhead, by means of the derrick of the* M., *the span of the derrick broke and in consequence the part of the elevator fell, doing damage to the* N. P. *The plaintiffs accordingly commenced an action* in rem *against the owners of the* M. *The defendants appeared under protest, and moved to set aside the writ and proceedings on the ground that the court had no jurisdiction to entertain an action* in rem. *The district registrar at Liverpool held that the* M. *was not at the time of the accident being navigated, and that there was, therefore, no jurisdiction to entertain an action* in rem.

Held (*reversing the order of the district registrar*), *that the damage sustained by the* N. P. *was* "*damage received by a ship . . .*" *within the meaning of sect.* 22, *sub-sect.* (1) (a) (*iii.*), *of the Supreme Court of Judicature* (*Consolidation*) *Act* 1925, *and that there was therefore jurisdiction to entertain an action* in rem *against the* M.; *and, further, that the damage having been caused by part of a ship was* "*damage done by a ship*" *and that there was also jurisdiction under sect.* 22, *sub-sect.* (1) (a) (*iv.*). *It was not necessary that the ship*

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

should be the active cause of the damage. The M. whilst discharging her cargo was still in process of navigation.

APPEAL from order of district registrar at Liverpool.

The appellants (plaintiffs), the Grain Elevating and Automatic Weighing Company of Liverpool, who were owners of the grain elevator *New Perseverance*, claimed damages in respect of injuries to the *New Perseverance* caused by the fall of a part of the elevator which was being hoisted out of the Norwegian steamship *Minerva* in Birkenhead Docks on the 10th Jan. 1933. The span of the derrick of the *Minerva* broke whilst the part of the elevator by which the damage was done was being hoisted, causing the damage in question.

The plaintiffs issued a writ *in rem* in the Liverpool District Registry claiming for the damage sustained by the *New Perseverance*. An appearance under protest was entered by the owners of the *Minerva*. Upon a motion by the defendants to set aside the writ and subsequent proceedings, the district registrar at Liverpool set the writ aside on the ground that the *Minerva* was not at the time of the damage being navigated.

The plaintiffs appealed.

Brightman, for the appellants.—There is jurisdiction to entertain an action *in rem* for damage done by a ship under sect. 22, sub-sect. (1) (*a*) (iv.). This was damage done by the ship. The rope which broke was part of the ship. It was a bad rope, and it is alleged that it was negligent to have a bad rope. There is clearly jurisdiction to entertain such a claim. The district registrar was wrong in thinking that the vessel at the time of the damage must be in the course of navigation. There is no authority for such a proposition; but assuming that his view was right, this ship was in fact being navigated. Whilst she is discharging her cargo she is still being navigated, for the voyage is not yet complete. If this was not "damage done by a ship" it was certainly "damage received by a ship," and there was, therefore, jurisdiction to entertain the action under sub-sect. (1) (*a*) (iii.).

Willmer, for the respondents.—"Damage done by a ship" means damage done by a ship as the active cause of the damage. This was really the ground upon which the district registrar proceeded. A ship cannot be the active cause of damage whilst she is tied up alongside a wharf; she is not being navigated under such conditions, but is being merely used as a floating warehouse. In *The Chr. Knudsen* (*ante*, p. 347; 148 L. T. Rep. 60 (1932) P. 153), the court assented to the proposition that "damage done by a ship" means damage done by the negligent navigation of a ship. It is submitted that this is correct, and that here the ship was not being navigated. As to the point that this was damage received by a ship, it was submitted that sub-sect. (1) (*a*) (iii.) must be read subject to some limitation; otherwise it would include damage done to a ship by collision with a dock owing to the negligence of the owners of the dock. In such a case the result of construing the sub-section without some limitation would be to give a right of action *in rem* against the dock owner, involving a right to arrest the dock, which would be absurd. It is submitted that the proper limitation is this, that the damage must be done by a ship or by something capable of being arrested, so that the jurisdiction *in rem* can be exercised.

Brightman replied.

Cur. adv. vult.

Bateson, J. — I think this appeal succeeds. It is an appeal from the district registrar of Liverpool, who set aside the writ in the action on the grounds, as I understand, that there was no jurisdiction to arrest a foreign ship in the circumstances of the case.

I assume the allegations contained in the indorsement of the writ and in the affidavit which was read to be true. The indorsement of the writ is: "The plaintiffs' claim is for damages for injury sustained at Birkenhead during the month of Jan. 1933 by their grain elevator *New Perseverance* by reason of the negligence of the defendants or their servants in the navigation and management of the defendants' steamship *Minerva* and (or) owing to the negligence or breach of duty of those in control of her."

The affidavit of Mr. Fitzsimmons, the man in charge of the *New Perseverance*, says that: "At about 4 p.m. on the 10th Jan. 1933 the *New Perseverance* completed the discharge of a cargo of grain from the after hold of the above-named steamship *Minerva*, which was lying at East Tower, Seacombe Warehouses, Birkenhead. The elevator was thereupon taken down in order that it could be stowed on the *New Perseverance*. In the course of this operation one-half of the elevator remained on board the *Minerva* whilst those on board the *Minerva* made the necessary preparations to enable them to transfer the half elevator to the *New Perseverance* by means of the wires and derricks belonging to the *Minerva*.

"When those on board the *Minerva* had got everything ready, the half of the elevator which had remained on board the *Minerva* was hoisted from the *Minerva* by her derrick, but before it had been safely placed on board the *New Perseverance* the wire broke and the half elevator fell on to the deck of the *New Perseverance*, doing damage to the *New Perseverance* and to the half elevator." Then he says: "The wire which broke was an ordinary $2\frac{1}{4}$ in. wire, such as most vessels carry, and formed part of the equipment necessary for working the derrick."

In addition it was agreed that I was also to assume that the wire which broke on the *Minerva* was the span. That is, as I understand it, the wire which connects the derrick to the mast and holds it up. If the span breaks the derrick and its burden fall in a heap.

On this material it is clear that the case is one in which the claim is that the *New Perseverance* received damage to her deck and her elevator by the negligence of the defendants' servants in handling and using the gear of their ship *Minerva*. It also seems that the damage to the *New Perseverance* was done by the faulty gear of the *Minerva*, that is, by a part of the *Minerva* herself. The dropping of the elevator by the gear, and the dropping of the elevator and the gear together, did damage to the *New Perseverance*, her deck and her elevator.

The Supreme Court of Judicature Act 1925, s. 22, sub-s. (1) (*a*) (iii.) and (iv.) and s. 33, sub-s. (2) are the sections in point. Sub-sect. (1) (*a*) of sect. 22 says that "the High Court shall in relation to Admiralty matters have the following jurisdiction, that is to say, the jurisdiction of hearing and determining all the following questions or claims." Sub-sect. (iii.): "Any claim for damage received by a ship," and sub-sect. (iv.): "Any claim for damage done by a ship." Sect. 33, sub-sect. (2), says: "The Admiralty jurisdiction of the High Court may be exercised in proceedings *in rem* or in proceedings *in personam*."

In my view, the words of the statute in sub-sect. (1) (*a*) (iii.), "damage received by a ship"

are clear, and are as wide as could well be conceived, as Lord Herschell said in *The Zeta* (7 Asp. Mar. Law Cas. 369 ; 69 L. T. Rep. 630 ; 93 App. Cas. 477) : "This is undoubtedly damage received by a ship. The plaintiffs allege it was received owing to the negligence of the defendants' servants in and about the navigation and management of defendants' ship. They may proceed *in rem* under sect. 33, sub-sect. (2), or *in personam*, that is to say, against the defendants' *res*, or against the defendants in person."

This writ is against the *res* by, from, and on which the cause of the injury to the plaintiffs' vessel arose. The *res* is here and can be arrested, and it seems to me that it is within the four corners of the Act. There is no limitation on the words. Decisions on other words, or other sub-sections, or clauses, do not seem to me to help.

Further, I think the claim can be put under sub-sect. (iv.) as damage done by a ship. I think the damage here may be said to be done by the derrick and its load falling on the ship *New Perseverance*. That is damage done by defendants' ship. If part of the ship does the damage I think that is enough—if it were done by an anchor or by a propeller.

It is common enough, in this Division in its Admiralty jurisdiction—and, indeed, in the old Admiralty Court—for such cases to be tried and for a vessel to be arrested. I quite agree with Mr. Willmer in saying that "done by a ship" connotes the ship as the active cause of damage, *i.e.*, if he means the ship or part of it. It will not do, I think, to say that sub-sect. (iii.) only applies if the damage is done by a ship, otherwise there would be no need of sub-sect. (iii.) at all.

I think the reason why the old Admiralty Court Act of 1840, confined as it was to damage received, was amended by the Act of 1861 was because it was thought right to preserve all the old jurisdiction, and extend it to cases within the body of a county which would have been within the jurisdiction if occurring on the high seas. If on the high seas a mast or a jibboom had fallen on another ship no question could have arisen as to the jurisdiction *in rem* and the right to arrest the ship. Nowadays, such an accident might easily happen in refuelling a ship at sea. In this case there was damage received by parts of one ship through failure to act properly of a part of another ship in the hands of the defendants' servants. I think I am only giving effect to the plain words of the statute passed as recently as 1925.

Several cases and dicta were cited. In *The Clara Killam* (3 Mar. Law Cas. (O. S.) 463 ; 1870, 23 L. T. Rep. 27 ; L. Rep. 3 A. & E. 161) the claim was by the owners of a telegraph cable against a ship whose mate had cut the cable. That was held to be damage done by a ship. It seems to me that if there were jurisdiction in such a case and the ship may be arrested—as it was in that case—this is a good deal stronger a case. In 1871, in *The Industrie* (1 Asp. Mar. Law Cas. 17 ; 1871, 24 L. T. Rep. 446 ; L. Rep. 3 A. & E. 303) the claim was for injury received by a ship forced ashore by another vessel under way. Under the words "damage received by a ship" it was held that there was jurisdiction in such a case, and the ship was arrested. I rather think that is the one case where the words "damage received by a ship" arose among the cases cited to me.

In the same year—1871—in *Good* v. *London Steamship Mutual Protection Association* (L. R. 6 C. P. 563), which was a case where a seacock was left open so that the cargo became damaged, Willes, J. held that "improper navigation" covered something improperly done by a ship or a part of a ship in the course of the voyage. It is a decision which seems rather far away from the matter that I have to consider, but it does show that in considering what is a ship in such circumstances, part of a ship is, of course, all that is necessary.

In 1884 *The Warkworth* (5 Asp. Mar. Law Cas. 326 ; 51 L. T. Rep. 558 ; 9 Prob. Div. 145) was a case where the steering machinery went wrong for want of a pin, and the collision due to the vessel failing to steer properly was held to be "improper navigation" under the limitation section. That, again, does not seem to be very much in point, because it is on the limitation section and not on the sections in question.

And also in 1884, *The Vera Cruz* (5 Asp. Mar. Law Cas. 270 ; 51 L. T. Rep. 104 ; 9 Prob. Div. 97) was decided. That was, again, an action under Lord Campbell's Act, and it was held that an action under Lord Campbell's Act does not come within the Act of 1861 where the words are the same, namely, "damage done by a ship." There was no actual injury to the person who was claiming and on whose account the action was brought. This is what Brett, L.J. laid down and Bowen, L.J. said : "Injury to the family is not done by the ship." Bowen, L.J. also said, "done by a ship" means "done by those in charge of a ship"—that the ship is the "noxious instrument," Brett, L.J. spoke of the ship as being "the active cause." Of course the words "done by a ship" mean that it must be done by the ship. The House of Lords also had that case before them, and they followed the decision of the Court of Appeal, and that is reported in 5 Asp. Mar. Law Cas. 386 ; 52 L. T. Rep. 474 ; 10 App. Cas. 59.

In 1894 *The Theta* was decided (7 Asp. Mar. Law Cas. 159 ; 71 L. T. Rep. 25 ; (1894) P. 280). That was the case of a man falling down the hold of a ship, and it was held that that was not "damage done by a ship." That seems to be pretty obvious.

Then in 1895 *The Sneyd* (29 Ir. L. T. Jour. 317) (that is, in a note, I think, in a newspaper, the *Irish Law Times*, but whether it is a newspaper or a report, I am not quite sure), it says : "Personal injury to a stevedore by derrick breaking." It was held that the ship was not the active cause. In the old days such a report would not have been listened to—certainly not by Brett, L.J., as I have heard him say more than once—but there it is. There are no arguments reported ; there are no reasons given ; I do not know who decided the case ; and, at any rate, it is only a decision on the words "damage done by the ship." I should imagine—but, of course, it does not appear—it could hardly have been on the words "damage received by the ship." It is a decision under the Irish Act which, I am told, contains the phrase "damage done by and damage received." But it does not touch the argument as regards "damage received by a ship." Of course, if there had been a report of a case which could have been read to see what the facts and reasons were, and what the argument was, I should have paid considerable attention to it, but, under any circumstances, I do not think it would bind me, and it does not, to my mind, by any means conclude this case.

In 1896 *Currie* v. *McKnight* (8 Asp. Mar. Law Cas. 193 ; 75 L. T. Rep. 457 ; (1897) A. C. 97), also known as *The Dunlossit*, was a case where some of the crew of the ship cut the cables of another ship in order that they might get away to sea, and the question there was whether there was a maritime line or not. There was no question of jurisdiction

or of remedy *in rem* except, I think, that the argument was that the remedy *in rem* was enough for a maritime lien. Damage done by a ship in navigation is what seems to have been considered, but the real question was whether *The Bold Buccleugh* (19 L. T. Rep. (O. S.) 235 ; 7 Moo. P. C. 267)—under which the maritime lien for damage done by a collision was held to exist—applied to such a case or not, and it was held that it did not.

In 1901 in *Re Margetts and Ocean Accident Corporation* (9 Asp. Mar. Law Cas. 217 ; 85 L. T. Rep. 94 ; (1901) 2 K. B. 729) it was held that a collision with a ship's anchor to which another was riding was a collision with the vessel within the meaning of the clause in that case. It does not seem to assist very much in construing the clauses in this case, but it does show that the anchor to which a vessel was riding was considered to be a part of a vessel within the meaning of the clause in that case.

Then the last case of all was *The Chr. Knudsen* (*ante*, p. 347 ; 148 L. T. Rep. 60 ; (1932) P. 153), where I was faced with an *obiter dictum* of my own—which, of course, I can disregard. The substance of that case was that I held that the sinking of a barge in dock by a ship was damage done by the ship to the dock owner who had to clear it away.

These are all the cases which were cited before me except in reply Mr. Brightman did refer to *Hayn, Roman, and Co.* v. *Culliford and Clarke* (4 Asp. Mar. Law Cas. 4, 128 ; 1878, 40 L.T. Rep. 536 ; 3 C. P. Div. 410), which I do not think it is necessary to discuss.

Practically all these cases except the one I have mentioned turn on the words " damage done by a ship." Even if I am wrong in my view that this is, or may be, a claim for " damage done by a ship " to the elevator and deck of a ship, it leaves the claim for " damage received by a ship " still good, and nothing that I can see prevents me holding that the jurisdiction which can be exercised *in rem* is properly exercised by arresting the *Minerva*.

Mr. Willmer's argument seems to involve adding words to the statute which are not there. He says you cannot have damage " received by a ship " unless it is done by a ship, with the ship as active cause. The section does not say so. The plaintiffs, he says, must show that the ship caused the damage, but I cannot find that in this particular sub-sect. (iii.), or anywhere. He also says that the remedy *in rem* and the maritime lien are the same thing—at least, that is what I understand. That idea has been exploded, I think, since the case of *The Heinrich Bjorn* (6 Asp. Mar. Law Cas. 1 ; 1886, 55 L. T. Rep. 56 ; 11 App. Cas. 270), the necessaries case ; the towage case—*Westrup* v. *Great Yarmouth Steam Carrying Company* (6 Asp. Mar. Law Cas. 443 ; 1890, 61 L. T. Rep. 714 ; 43 Ch. Div. 241) ; the master's disbursements case—*The Sara* (6 Asp. Mar. Law Cas. 413 ; 1889, 61 L. T. Rep. 26 ; 14 App. Cas. 209), though I think I am right in saying that that is a case which has since been remedied by statute. These last three cases I have mentioned were argued largely on the basis that maritime lien and remedy *in rem* were convertible terms—an argument which completely failed. No doubt there are a great many cases where there is a remedy *in rem*, and there is no maritime lien where the jurisdiction of this division on the Admiralty side is exercised—by arresting the ship. Mr. Brightman pointed out that the *Minerva* was being navigated as she was completing her discharge in the course of the navigation to deliver her cargo. And that the cases show that there is no need of movement of the ship to entitle him to sue.

Appeal allowed.

Solicitors for the plaintiffs (appellants), *Botterell* and *Roche*, agents for *Weightman, Pedder*, and *Co.*, Liverpool.

Solicitors for the defendants (respondents), *Hill Dickinson*, and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

June 19, 20, 21 *and July* 3, 1933.

(Before SCRUTTON, GREER and ROMER, L.JJ., assisted by Nautical Assessors.)

The Kaituna. (*a*)

ON APPEAL FROM ADMIRALTY DIVISION.

Collision—Steam vessels approaching at night so as to involve risk of collision—Alterations of heading and to "yawing"—Both side-lights sometimes visible—" End on " Rule—Crossing Rule—Regulations for Preventing Collisions at Sea, arts. 18, 19, 21.

Art. 18 *of the Regulations for Preventing Collisions at Sea does not apply to steam vessels approaching one another at night so as to involve risk of collision unless both side-lights of each vessel are more constantly visible to the other than any other combination of lights ; it is not sufficient to render art.* 18 *applicable that one vessel may very occasionally see two side-lights, though generally seeing one side-light only.*

The S. *and the* K., *both steam vessels, were approaching each other at night on courses which proved to be crossing at a fine angle. The* K. *was in light draught, and in the prevailing conditions of wind and swell was " yawing " in such a manner that both her side-lights were almost constantly seen by those on board the* S. *The green side-light only of the* S. *was generally visible to those on the* K., *though occasionally both side-lights might be visible.*

Held (*reversing Langton, J.*), *that art.* 18 *did not apply, and that the* K. *was not therefore to blame for having failed to act in accordance with it. Art.* 19 *applied, and the* S. *was alone to blame for having failed to keep out of the way.*

APPEAL and cross-appeal from a judgment of Langton, J.

The plaintiffs, owners of the Norwegian steamship *Selje*, claimed damages in respect of a collision between the *Selje* and the British steamship *Kaituna*, belonging to the defendants, which took place off the south coast of Australia to the

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

westward of Cape Otway on the night of the 29th March, 1929.

The *Selje* was a steel screw steamship of 6598 tons gross, 420ft. in length, and was on a voyage from Williamstown (near Melbourne) to Las Palmas for orders, laden with a cargo of wheat. The *Kaituna* was a steel screw steamship of 2042 tons gross, 279.5ft. in length, and was on a voyage from Adelaide to Melbourne. The collision took place shortly after 10 p.m. in fine, clear weather. The vessels had previously sighted each other at a distance of eight to ten miles, the *Selje* then being on a course of N. 86 W. magnetic, and the *Kaituna* on a course of S. 78 E. The vessels were, therefore, on courses covering an angle of 8 degrees.

On behalf of the *Selje* it was alleged that in these circumstances they saw two white lights of the *Kaituna* bearing nearly ahead, withal fine on the starboard bow. The lights afterwards disappeared from view, but later they again came into sight, together with both side-lights of the *Kaituna*. On behalf of the *Kaituna* it was alleged that the masthead lights of the *Selje* were made out bearing about one-and-a-half points on the port bow. The *Kaituna* kept her course and speed, and as the vessels approached, the lights of the *Selje* were observed narrowing on the port bow of the *Kaituna* and the green light of the *Selje* was made out. The lights of the *Selje* thereafter drew ahead of the *Kaituna* at a distance of two to three miles and crossed on to her starboard bow. The *Kaituna* continued to keep her course and speed.

On behalf of the *Selje* it was contended before Langton, J. that art. 18 of the Regulations for Preventing Collisions at Sea ("end on" rule) applied, and that the *Kaituna* improperly failed to port her helm so as to pass the *Selje* on her port side. For the *Kaituna* it was contended that art. 19 of the regulations ("crossing" rule) applied, and that the *Selje* was to blame for failing to pass starboard to starboard when in a position to do so, and for improperly porting.

Langton, J., after consultation with the Elder Brethren, held that it was a case of nearly end on. The advice given by the Elder Brethren was stated by Langton, J. in his judgment as follows: "They do not pretend to say that in any case or in all circumstances of vessels crossing at 8 degrees it must be a case which seamen would treat as a matter coming within art. 18. But they say: 'Take into account these circumstances—the vessels are meeting at night, and they are meeting in an ocean swell, and in conditions where there is some squally weather. Take all these conditions'—and they think that they ought to take all conditions into account in judging whether a case is to be treated as a crossing case or not—'taking all these conditions into account this case falls within the "end on" rule.' They say: 'Suppose you had a perfectly flat calm and two vessels meeting in broad daylight, it might be that with the two vessels proceeding as they ought, practically on railway lines, a competent seaman would be able to determine exactly, with a long range of view, that the two vessels were actually crossing, although at so fine an angle. But different considerations apply when you have to take into consideration an ocean swell, night, and the fact that one vessel—except for 105 tons in her stern—is practically flying light and has, as her draught, 6ft. forward and some 13ft. aft.' In their view there must have been considerable yawing on the part of that vessel, and probably on the part of both vessels, and therefore there must have been times at which if a continuously competent and vigilant look-out had been kept the two side-lights of each vessel must have been, at times, open to the other vessel." The learned judge accepted this advice, and held that art. 18 applied. He then considered the subsequent navigation of the *Selje* and found that the *Selje* was to blame for porting to the green light of the *Kaituna* and stopping her engines. The learned judge held both vessels to blame, apportioning blame as to one-quarter to the *Kaituna* and as to three-quarters to the *Selje*, and directed that the plaintiffs should pay half the defendants' costs.

The owners of the *Kaituna* appealed, and the owners of the *Selje* also appealed.

Raeburn, K.C. and *Pilcher* for the appellants, owners of the *Kaituna*.

Digby, K.C. and *Stenham* for the respondents and cross-appellants, the owners of the *Selje*.

Reference was made to *The Orduna* (1921, A.C. 250), *The Beryl* (5 Asp. Mar. Law Cas. 321; 51 L. T. Rep. 554; 9 Prob. Div. 137), *The Nichols* (1868, 7 Wall. 656), *The Constitution* (10 L. T. Rep. 894; 2 Moo P. C. (N. S.) 453), *The Ava* (2 Asp. Mar. Law Cas. 182; 1873, 29 L. T. Rep. 781), *The Jesmond and Earl of Elgin* (1 Asp. Mar. Law Cas. 150; 25 L. T. Rep. 514; L. Rep. 4 P. C. 1), *The Cleopatra* (1856, Swa. 135), *Crown Steamship Company* v. *Eastern Navigation Company* (1918, S. C. 303), *The Otranto* (144 L. T. Rep. 251 (1931) A. C. 194).

Cur. adv. vult.

July 3, 1933.—**Scrutton, L.J.**—This appeal concerns a collision at night off Cape Otway on the south coast of Australia between the Swedish steamer *Selje* and the British steamer *Kaituna*. The *Selje* was the larger of the two, 6598 tons gross and 420ft. long; the *Kaituna* being 2042 tons gross and 280ft. long. The *Selje* was laden with a draft of 28ft. 3in. forward and 28ft. 6in. aft; the *Kaituna* was light 6ft. 3in. forward and 13ft. 9in. aft. The *Selje* had masthead lights on two masts, the *Kaituna* on only one mast. The courses were crossing at an angle of 8 degrees, the *Selje* N. 86 W.; the *Kaituna* S. 78 E.; both magnetic. Under these circumstances the two steamers came into collision at right angles, a result which indicates something very wrong somewhere. Each says she saw the other eight to ten miles away. The judge has found that art. 18 applied, the ships being "nearly end on" within the meaning of that rule; that the *Kaituna* was to blame for not porting so as to comply with rule 18 by passing the other vessel port to port, and that the *Selje* was to blame for altering her helm without giving a whistle signal, and for porting to a green light. He puts the principal blame on the *Selje*, who admits helm action without a whistle signal, and finds the *Selje* three-quarters to blame and the *Kaituna* one-fourth. Each ship appeals. The case depends in the first instance on whether the "end on rule" (art. 18) or the "crossing rule" (art. 19) applies. There was eight degrees difference in courses, but the *Kaituna* was very light forward and there was a south-west swell and wind on her starboard bow. Under these circumstances there was probably yawing, which might alter her heading from time to time, and affect the visibility of one or other of her side-lights to the approaching ship. The judge below has taken what I think is the rather unusual course of asking the Trinity masters in effect whether art. 18 or art. 19 applied. "In these circumstances would a competent seaman act and treat the matter as within the 'end on' rule or the 'crossing rule'"? They answered: "It is

undoubtedly and quite clearly a case of 'nearly end on,'" *i.e.*, art. 18. They gave their reason: "But different considerations apply when you have to take into consideration an ocean swell, night, and the fact that one vessel—except for 105 tons in her stern—is practically flying light and has, as her draught 6ft. forward and some 13ft. aft." In their view there must have been considerable yawing on the part of that vessel, and probably on the part of both vessels, and, therefore, there must have been times at which if a continuously competent and vigilant look-out had been kept the two lights of each vessel must have been, at times, open to the other vessel. It will be observed that they say "at times." Now the addition which was made to art. 18 attempts to define when vessels are meeting "nearly end on," in itself a vague and not very helpful description by prescribing as "the only conditions to which the rule applies," the case where at night "each vessel is in such a position as to see both the side-lights of the other." It will be noted "*each* vessel," not one vessel only. As a matter of construction it appears to me that it will not be sufficient to make art. 18 apply that one vessel may, though generally seeing one side-light only, very occasionally see two side-lights. Difficult questions may arise while the conditions of one side-light only, or two side-lights, visible, each exist for a substantial time. There may be an ambiguous and varying condition in which the other ship seeing repeated changes of visibility may be well advised to take off her speed and wait till she can clearly understand what the changes mean. But if one condition substantially prevails, and there is only a brief interval of the other condition, in my opinion the requirement that each vessel shall be in such a position as to see both the side-lights of the other is not complied with. Now the probable extent of yawing, if any, of a vessel very light forward with swell and wind on her starboard bow is a matter of nautical experience for which the court must rely on its assessors, and we have asked our assessors, not the construction of the rules, which is not in my opinion for them, but the probable results of given data.

We asked them the following questions:

Would the result of the pleaded courses, speeds, drafts, S.W. swell and wind, with one of the ships very light forward be: (*a*) That each ship would see both side-lights of the other constantly? They answer: "No." (*b*) "Or for a substantial time though not constantly?" They answer (*b*): "*Kaituna* might possibly see both *Selje's* lights occasionally, but not necessarily, and *Selje* would see both *Kaituna's* lights more frequently." (*c*) "Or"—the question goes on—"would each ship generally be only seeing one side-light of the other?" Answer (*c*): "The *Kaituna* would be generally seeing the *Selje's* green light. The *Selje* would almost constantly see both *Kaituna's* side-lights. The last question was: "(*d*) Would one ship only be in that position, seeing one side-light, if so, which ship?" Answer (*d*): "*Kaituna*."

It will be seen that they reply that each vessel would not constantly see the two side-lights of the other; that the *Selje* would see both lights of the *Kaituna* "almost constantly" or "more frequently," but that the *Kaituna*, though she might possibly see both *Selje's* lights occasionally but not necessarily, would generally be seeing the *Selje's* green light only.

I should, myself, come to the same conclusion. It follows, in my opinion, that this was not a case in which "each vessel was in such a position as to see both side-lights of the other," and that consequently there is no ground for finding *Kaituna* to have broken art. 18.

Turning from probabilities to evidence, Thorson in charge of the navigation of the *Selje*, when asked whether the *Kaituna* could see both his side-lights, says twice: "I could see his, but I do not know that he could see mine." It is suggested that he said at the inquiry in Australia soon after the collision, "He should have seen my green light," but he says he does not remember. The inquiry was three years ago, and the evidence given there was not proved, its agreed admission only applying to these *Kaituna* witnesses.

The navigator in charge of the *Kaituna* says he only saw the two lights of the *Selje* for a brief moment when the *Selje* showing green on his starboard bow swung round and he lost the green and saw the red, at a time when the collision could not be avoided, and he, the *Kaituna* did then port and stop his engines. In my opinion, the ground on which the judge has held the *Kaituna* to blame cannot be supported.

The *Selje*, however, attacked the *Kaituna* on another ground, that the right-angled blow shows that the *Kaituna* must have starboarded, as without her starboarding there must have been an impossible amount of porting on the *Selje* to get a right-angled collision. The *Selje* is helped in this contention by the well-meant but rather unfortunate excuse of the *Kaituna's* witness in making the *Selje* cross his bows at an angle of 60 degrees and get three points on his starboard bow before suddenly porting to a green light. I have considered whether this means bad look-out on the *Kaituna* or merely an excessive estimate in a sudden emergency. The *Kaituna's* witness has steadily denied starboarding, and the judge finds he never did starboard. I appreciate that if he did he would apparently be repeating the mistake for which the *Orduna* (*Owners of the steamship Orduna* v. *Shipping Controller* (1921) A. C. 250) was held liable of starboarding to help the *Selje* to go clear at a time when the *Selje* could go clear without his assistance, but I can find no ground for interfering with the judge's acceptance of the *Kaituna's* evidence. The *Selje's* story was one of persistent porting for a considerable time without even giving a whistle signal of what she was doing. We were told that the Norwegian owners felt aggrieved that their officers in whom they had confidence were held to blame; but Thorson admitted that he altered his helm three times without giving a whistle signal, and the judge has found that he got on the starboard bow of the *Kaituna* and then ported to a green light.

In my opinion, the *Kaituna's* appeal should be allowed, the *Selje's* appeal dismissed, the judgment below altered, and the *Selje* held alone to blame for the collision. The *Kaituna* must have the costs here and below.

Greer, L.J.—The litigation with which we are concerned in this appeal arose out of a collision between the Norwegian steamship *Selje* and the British steamship *Kaituna* shortly after 10 p.m. on the 29th March, 1929. Each of these ships put the entire blame for the collision on the other. The learned judge who tried the actions in the Admiralty Division found that both ships were to blame, and assessed the relative blameworthiness in the proportions of three to one, adjudging that three-fourths of the total damage should be borne by the *Selje*, and one-fourth by the *Kaituna*.

The *Kaituna* is a steel screw steamship of 2042 tons gross and 1208 net registered, 279.5ft. in length, and 40.1ft. beam, with engines of 194 h.p. On

the night of the collision she was on a voyage from Adelaide to Melbourne. Her load was light, her draught being 6ft. forward and 13ft. aft.

The *Selje* was a much larger vessel (6598 tons gross and 420ft. in length), on a voyage from Williamstown, near Melbourne, in Australia, to Las Palmas for orders.

About half an hour before the collision, when the ships first sighted one another, their courses were: *Selje*, N. 86 W. magnetic, the *Kaituna*, S. 78 E. magnetic. They were then eight to ten miles distant from one another. These courses were crossing courses at the fine angle of 8 degrees. It is obvious that if these courses were kept they would intersect sooner or later; the point of intersection would depend on the speed of the two ships. It seems probable that, as the proved speed of each vessel was eight-and-a-half knots, if they had both kept their course and speed, they would not have met at the point of intersection of their courses, but would have crossed in safety. If this be right, it would follow that one or other or both of the vessels must have done wrong to bring them into collision. The evidence on behalf of the *Selje* was taken by the trial judge on the 26th April 1932, more than three years after the event. The defendants' witnesses were not available in this country, and in order to avoid the expense of a commission to Australia the parties agreed by their solicitors and counsel that the evidence of the captain, the third mate, and the engineer of the *Kaituna*, given at two inquiries at Melbourne—one on the 9th April, 1929, the other on the 24th April, 1929—should be used as evidence at the trial. At the first inquiry the owners of the *Selje* were represented and so had the same opportunity of cross-examining the witnesses with the view of establishing that the cause of the collision into which the court was inquiring was the bad navigation of the *Kaituna* as they would have had if the witnesses had been examined in the action; they availed themselves of that opportunity. The questions in the action mainly turned on the evidence of the third officer of the *Selje*, and that of the third officer of the *Kaituna*. The trial judge saw and heard the third officer of the *Selje* in the witness box, and declined to accept his evidence as being within any measurable distance of a reliable account of what happened during the material time when he was on the bridge in sole charge of the navigation of the *Selje*. I am inclined to think that the learned judge was perhaps a little hard on the third officer of the *Selje* when he described him as "a man of very low intelligence and with a poor notion of the Rules," and in another part of his judgment as "a mental defective," but it is impossible to read the transcript of the shorthand note without agreeing with the learned judge's view that the evidence of this witness cannot be relied upon, and should not be accepted as affording anything like an accurate account of the events preceding the collision. On the other hand, the third officer of the *Kaituna* gave his evidence in Australia when the events of the night of the 29th March, 1929, were fresh within his recollection. He gave a clear and intelligible account of what happened. His evidence is not in conflict with the evidence of any witness except that of a witness whom the judge has refused to believe; for my part, I think the court ought to accept his evidence as in the main truthful and accurate, though subject to the critical attitude that should always be adopted to evidence of a navigator given in his own favour, and in favour of the ship he was employed by. I have come to the conclusion that our judgment in these appeals should be to the effect that the *Selje* was solely to blame. I think the most probable explanation of the collision between these two vessels may be stated as follows. When they sighted one another at a distance of about eight miles, their courses were such that they would in all probability have crossed at a safe distance from one another. However this may be, the *Selje* did in fact safely cross ahead of the *Kaituna* from port to starboard. Both vessels were then proceeding in safety, green to green. The *Selje* then, through some unexplained aberration on the part of her third mate who, imagining his ship would be in danger if she continued her course, ordered his helm hard-a-port, again crossed the bow of the *Kaituna*, possibly for a moment during the swing showing her two side-lights to the *Kaituna* at a time when it was impossible for the latter to save the situation by acting on the end-on rule. There is a part of Langton, J.'s judgment in which he appears to have adopted this view of the facts. He says: "But even on the supposition that she first saw the *Selje* much nearer than I think she would have me believe, still she did see the *Selje* crossing her bows, and she did see the green light of the *Selje* on her starboard bow. I think it must have been fine on the starboard bow—nevertheless it was a position of safety. In those circumstances I do not think she could be blamed for keeping her course. What she did do was, when she appreciated that the *Selje* was performing this suicidal manœuvre of porting to a green light, and actually showing her red light, she then not unnaturally put her engines full astern and did what she could to lessen the collision."

The account given by the third officer of the *Kaituna*, confirmed by the captain, is to the effect that when the ships on their stated courses approached within a distance of two miles of one another, the course of the *Selje* led her over from the port side of the *Kaituna* to about a point or point and a half on the starboard side. She then straightened up by what he thought might be merely a sheer, but it turned out to be the result of helm action as she came round and ultimately showed her two side-lights when it was impossible to avoid collision. Vincent, the third officer of the *Kaituna*, stated at the first inquiry that he first saw the *Selje's* green light about ten minutes before he took the bearing of Cape Otway. When he took the bearing of Cape Otway it was about three minutes to ten. He saw that the masthead lights of the *Selje* were widening out, she was a point on the port bow and appeared to be about to cross the bow of the *Kaituna*. She did so cross when the ships were about two or three miles apart, and she then seemed to steady on her course parallel to the *Kaituna*. When she was about six ships' lengths away—about a quarter of a mile—she swung round, and he then saw both red and green lights and immediately ordered his engines hard astern and shouted to the captain. The captain of the *Kaituna* said in his evidence at the same inquiry that he came off the bridge at ten minutes to ten, that the *Selje's* lights were then a point on the port bow, masthead lights well open, and green light showing. He remained on the bridge until she crossed. The third officer then took a bearing of Cape Otway, and the captain then went below to his cabin. It seems to me incredible that the captain would have gone to the cabin unless he had satisfied himself that there was then no risk of collision. He was called up at 10.3, and then saw the *Selje* across the *Kaituna's* bow. He observed that the telegraph was at full speed astern, and asked the third officer, "Are the engines full speed astern and the helm hard-a-port?" and received an affirmative reply. In my judgment, if these ships were ever

on courses in which the "end on" rule applied, they had got out of danger into safety, when the *Selje*, having the *Kaituna* on her starboard hand, crossed a second time in front of the *Kaituna*, brought the "crossing rule" into operation, broke it, and became responsible for the collision which resulted in her total loss. The *Kaituna*, in my judgment, was not to blame. She kept her course and speed until a collision became inevitable, and then unsuccessfully tried to avoid a collision, or in any case to mitigate the damage it would cause. I agree with the learned judge's finding that the *Kaituna* did not starboard.

Langton, J., after consulting the Elder Brethren, decided, I think with some reluctance, that the case was one in which the duty of both ships was to act under art. 18 of the Rules for the Prevention of Collisions at Sea, which is known as the "end-on" rule, and not under art. 19, known as the "crossing" rule. Art. 18 states quite distinctly how an "end-on" case is to be judged by night. By night it applies only to cases in which each vessel is in such a position as to see both side-lights of the other. It does not, of course, mean that when the vessels are, say, five or six miles apart they are then to act under the rule, but only if they are meeting end on in such a manner as to involve risk of collision, and it does not apply to two vessels which will if both keep their respective courses pass clear of each other. In my judgment, when these two vessels sighted one another they were vessels which if both kept their respective courses would in all probability pass clear of each other; I am also satisfied that before any risk of collision arose they had in fact, as the judge says in the passage I have quoted, passed clear of one another into a position of safety. If this be right, I cannot understand how any blame can attach to the *Kaituna* because she failed in time to anticipate that the *Selje* was going to convert the safe green to green position into a case in which the vessels would momentarily be end on at a time when obedience to the end on rule could not prevent the collision. I agree that in all probability the *Kaituna's* witnesses in Australia may have failed accurately to estimate the distance of the *Selje* from the *Kaituna* when she first crossed, and the distance which her lights got on to their starboard bow, but these distances must necessarily be only approximate. Notwithstanding the fact that they may have over- or under-estimated these distances, I think their evidence should be accepted to the extent that the *Selje* had crossed into a position of safety before she ported her helm and came round across the course of the *Kaituna* and so brought about the collision. There is nothing in the assessors' answers to the questions submitted to them inconsistent with this view of the cause of the collision between the two ships.

For these reasons, I think the *Selje* was alone to blame for the collision, and the appeal of the *Kaituna* should be allowed with costs here and below, and judgment should be entered declaring the *Selje* alone to blame, and the appeal of the *Selje* should be dismissed with costs here and below.

Romer, L.J.—The first and the most important question arising on this appeal is whether the two vessels involved are to be considered as having been meeting end on or nearly end on within the meaning of art. 18 of the regulations, or as having been crossing within the meaning of art. 19. In view of the explanatory portion of the former rule the question may be stated thus. Was each vessel in such a position as to see both the side lights of the other at the material time—the material time being the time when the necessity for precaution begins; that is to say, when there is a probability of a risk of collision?

In order to determine this question it becomes necessary in the first place to ascertain what is the meaning to be attributed to the words "in such a position." In ordinary cases in which each vessel is kept constantly upon its course as will happen when the water is reasonably smooth and the helmsman knows his business no difficulty can arise. But supposing that by reason of a heavy swell or otherwise one of the vessels, while in general only showing one of its side-lights to the other, yaws from time to time so that it now and then shows both its side-lights, is that vessel at the moment of yawing to be deemed to be in such a position as to show both its side-lights to the other within the meaning of the rule? In my opinion it is not. The regulations are, after all, regulations for preventing collisions at sea, and may properly be construed in case of doubt in such a way as to prevent collisions rather than to make them inevitable. If, for instance, two vessels are sailing on parallel courses showing green to green, and both suddenly yaw so that each vessel momentarily sees both lights of the other and thereafter sees the green only, it would seem extravagant to treat them as being both obliged to port their helms by reason of a rule designed to prevent collisions at sea. And yet in one sense each vessel is at the moment of yawing in such a position as to see both the side-lights of the other. If, however, the words "in such a position" are read, as I think they should be read, as referring to the ship's general course there would be no necessity for porting under reg. 18. The fact of the yawing, however, would be a circumstance imposing upon each vessel the necessity for caution. Reg. 18 is expressly stated not to apply to two vessels which must, if both keep on their respective courses, pass clear of each other, and the subsequent reference to the side-lights would seem to be inserted for the purpose of indicating a method of ascertaining at night what the respective courses are. Even a vessel that is yawing can have no difficulty in knowing in substance what its own course is and to what extent (say) its port light may be visible to another vessel on its starboard bow. Its estimate of the course of the other vessel will depend upon the extent to which it sees both side-lights of that vessel. If in either case one of the side-lights of the vessel is only occasionally seen, the vessels are not, in my opinion, meeting end on, or nearly end on, so as to involve risk of collision. If this be so, the answers given by the assessors on the present appeal to the questions put to them by the court clearly indicate that the two vessels were not within reg. 18, but were crossing vessels within the meaning of reg. 19, the *Selje* having the *Kaituna* on its starboard side. For we are told by the assessors that the *Kaituna* might possibly see both *Selje's* lights occasionally, though not necessarily, and that *Kaituna* would be generally seeing *Selje's* green light, by which they obviously meant would be seeing her green light only. And these answers of the assessors deduced merely from the pleaded courses, speeds, draughts, swell and wind, and the fact that *Kaituna* was very light forward are, in my opinion, confirmed by the evidence of the witnesses. For the witnesses on board the *Kaituna* swore that they did not see the red light of the *Selje* until the latter ported shortly before the collision; while Thorson, who was the officer of the watch on the *Selje* at the material time, said that he did not know if the

Kaituna could see both the *Selje's* lights. Now the *Selje* was not yawing much. Thorson said she yawed half a point at the most. She had obviously crossed *Kaituna's* bows some little time before the collision, and on a course at an angle of 8 degrees to that of the *Kaituna*, Mr. Vincent, on the *Kaituna*, estimating this distance at the time as being two or three miles. Even when yawing to the maximum extent, therefore, the *Selje's* red light could not have been visible on the *Kaituna* unless that light could be seen across *Selje's* bows to the extent of 2½ degrees. If it could, it means that the light was not screened to the extent required by reg. 2 (*d*). If, however, this regulation had not been complied with, and I understand that some slight departure from it is not uncommon, it was for Mr. Thorson to prove the existence of and extent of such departure seeing that the onus lay upon the plaintiffs to prove their allegation that the case fell within the "end on" rule. If the red light of the *Selje* could have been seen across her bows to the extent of 2½ degrees, Mr. Thorson must have known it. I therefore deduce from his evidence that it could not. The case, therefore, not falling within the "end on" rule, the only other question of fact is whether or not the *Kaituna* starboarded before the collision, as suggested by the respondents. This suggestion was rejected emphatically by Langton, J. and, in my opinion, rightly so. It is no doubt difficult to see how, with the admitted courses of the two vessels, the *Selje* could have got at right-angles to the *Kaituna* unless the latter had starboarded. But the estimate as to distance, bearings and times is most unreliable on both sides, and it is impossible to say with certainty what were the relative positions of the two vessels at any particular time before the collision. If, for instance, the *Selje* crossed the bows of the *Kaituna* at a considerably greater distance than three miles she might conceivably have got to such a position on the starboard bow of the *Kaituna* as that by porting she would bring herself in front of the *Kaituna* nearly at right angles. But in any case I do not think that any mathematical difficulty in accounting for the existence of a right angle that is itself somewhat problematical should induce the court in face of the explicit denials of those in charge of the *Kaituna* to hold that they performed so extraordinary and so unnecessary a manœuvre as starboarding her helm.

In my opinion the appeal of the defendants should be allowed, and that of the plaintiffs dismissed, with the consequences stated by Scrutton, L.J.

Appeal allowed.
Cross-appeal dismissed.

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

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

June 22, 23, 26 *and July* 3, 1933.

(Before Scrutton, Greer, and Romer, L.JJ.)

The Baarn. (*a*)

ON APPEAL FROM THE ADMIRALTY DIVISION.

Collision—Chilean vessel—Repairs carried out in Chile—Action in rem*—Bail—Admission of liability subject to reference to assess damages—Tender in Chile of sum in Chilean pesos exceeding amount of plaintiffs' claim in pesos — Depreciation of Chilean peso — Tender rejected—Deposit of sum tendered in Chile in satisfaction of debt in accordance with Chilean law—To what extent satisfaction of claim in action.*

The plaintiffs, a Chilean company, owners of the Chilean steamship B. B., *claimed damages in an action* in rem *in which the owners of the Dutch vessel* B. *were defendants for loss arising out of a collision between the* B. B. *and the* B. *An undertaking for bail was given by the defendants' solicitors, and bail in the sum of 3750l. was subsequently completed. The defendants admitted liability subject to a reference to the registrar and merchants to assess the amount of the damages, but before the reference was held they tendered in Chile a sum in Chilean pesos which was sufficient to discharge payments actually made in Chile by the plaintiffs in Chilean pesos for repairs to the* B. B., *which had in fact been repaired in Chile. The Chilean peso having in the meanwhile depreciated, the plaintiffs accordingly rejected this tender. By Chilean law it is not essential for the validity of a payment that it shall be made with the consent of the creditor, but it may be made against his will by the process known as "consignation,"* i.e., *formal payment or deposit of the amount of the debt in accordance with the direction of the court. The defendants accordingly had recourse to this procedure, and a sum in pesos, exceeding the amount of the plaintiffs' claim at the rate of exchange prevailing at the date of the loss, was by direction of the Court of Chile, and in opposition to the wishes of the plaintiffs, deposited with a bank in Chile.*

The registrar, upon being informed of the above circumstances, refused to fix a day for the hearing of the reference, and the plaintiffs accordingly applied to the judge. Langton, J. held that the deposit of the sum in Chilean pesos by the process of "consignation" was a sufficient discharge of that part of the plaintiffs' claim.

Held (*reversing Langton, J.*), *that there was no decision of the court in Chile that the payment by "consignation" in Chile in depreciated pesos was a sufficient discharge of the plaintiffs' claim whilst proceedings were pending in England. The proceedings in Chile, though amounting to an effective payment by the debtor to his creditor, had not decided that such payment was a sufficient payment, and had no bearing upon the value in sterling that an English court could place upon such payment. The reference ought, therefore, to proceed, and the registrar should treat the payment in Chile as a payment on account of damages to be assessed in sterling in accordance with the decision in* The Volturno (15 *Asp. Mar. Law Cas.* 374; 126 *L. T. Rep.* 1; (1921) 2 *A. C.* 544).

Appeal by the plaintiffs from a decision of Langton, J. The defendants, owners of the Dutch steamship *Baarn*, who had admitted liability for a collision

(*a*) Reported by Geoffrey Hutchinson, Esq., Barrister-at-Law.

which took place in the territorial waters of Ecuador between the *Baarn* and the Chilean steamship *Bio Bio*, belonging to the plaintiffs, moved that the action should be dismissed and the defendants and their bail discharged, or alternatively that the proceedings should be stayed.

The motion was heard by Langton, J., who gave the following judgment, in which the facts and contentions of the parties and the conclusions of the learned judge are fully stated.

Langton, J.—This is a motion by the defendants, the owners of the Dutch steamship *Baarn*, asking for an order that the plaintiffs' action be dismissed and that the defendants and their bail be discharged or, alternatively, that the action and all proceedings thereunder shall be stayed. It seems quite possible, in the circumstances, that this matter may go further and, therefore, for the convenience of the other courts that may have to consider it, I think it would be well that I should recite shortly the various steps in the proceedings.

The collision out of which the action arises took place on the 15th Aug., 1931. It took place within the territorial waters of the state of Ecuador and at a moment when the plaintiffs' vessel, the *Bio Bio*, was at anchor. The plaintiffs are a Chilean company and the *Bio Bio* is a Chilean steamship.

In the following month of Sept., 1931, the repairs to the *Bio Bio* were completed in Chile, and in the following year—that is, January of this year—the Dutch vessel—the *Baarn*—was found within the British jurisdiction. I am not sure whether she was actually arrested, but whether she was or no a solicitors' undertaking was given by the defendants' solicitors to appear and put in bail. On the 25th of Jan., 1932, the writ in the action was issued. On the 27th Jan. the undertaking was given in the sum of 3750*l*., and on the 3rd Feb. the defendants entered an appearance. On the 17th Feb., 1932, the defendants made a formal admission of liability, and that formal admission, signed by both the solicitors—the plaintiffs' and the defendants' solicitors—was filed in the registry together with a consent to a reference.

It is, I think, material to notice here, as Mr. Hayward for the plaintiffs has pointed out, that under Order LII., r. 23 : "Any agreement in writing between the solicitors in Admiralty actions, dated and signed by the solicitors of both parties, may, if the Admiralty Registrar thinks it reasonable, and such as the judge would under the circumstances allow, be filed, and will thereupon become an order of court, and have the same effect as if such order had been made by the judge in person." There is, therefore, I think no doubt in the circumstances that this consent—this admission of liability and consent to a reference—has the effect of an order of the court within the terms of that rule. That may have a considerable bearing upon the position of the parties to-day and I, therefore, lay stress upon it at this stage.

On the 11th March—to continue the narrative of the proceedings—of this year, a summons was issued by the defendants calling upon the plaintiffs to file their claim and vouchers in the reference and on the 17th March with what one may call praiseworthy dispatch, that order was complied with and vouchers were duly filed. On the 18th March bail was completed and lodged in the Admiralty Court in the sum of 3750*l*. and thereafter, in the succeeding weeks, the usual discussion took place between the solicitors as to various items of the claim. It is the custom, as those of us who have practised in the Admiralty know, for the solicitors in those circumstances to endeavour to secure some measure of an agreement, at least for the less controversial items, in order to diminish the time and the consequent expense that would be expended at the reference. Therefore, these *pourparlers* between the solicitors followed in the ordinary and customary course. On the 14th Oct. of this year —an early date after the resumption of the sittings —the plaintiffs applied for a day for the reference to be fixed. But on that day the defendants brought to the notice of the registrar the fact that in the intervening months since the claim had been filed certain steps had been taken actually which they, the defendants, claimed made it unnecessary for a reference to be held. To put the matter in a word they said : "We have paid in Chile." The registrar, confronted with that asseveration on the part of the defendants, did not fix a day. The course he took was to adjourn the summons to fix a day in order that the defendants might, if they saw fit, apply for a stay of proceedings. In that position the matter came before me by the plaintiffs saying : "We want a reference." Now it immediately appeared to me—in fact it was stated to me—that an application for a stay could not possibly be made by summons at that stage. Mr. Miller did not so contend. But I thought the matter was one which ought to be dealt with, if at all, by way of motion, in order that the plaintiffs should not be put to the expense of a reference when there might be a sufficient answer which the defendants wished to put forward. And it seemed to me that the convenient course to pursue would be to fix a day for the reference for the plaintiffs, and fix it at such time ahead as would not prejudice them in any way seriously by delay, and at the same time give to the defendants an opportunity of raising this plea of payment by way of motion. It is in those circumstances that the matter is now before me.

The first point that falls to be determined is whether any payment such as is claimed by the defendants to have been made is, or could be, an effective payment in the circumstances, and so far as I know this proceeding is an entirely new one. I cannot find—and counsel who have been most industrious in assisting me on either side have not been able to find—anything in the nature of a precedent for the action which has been taken by the defendants. Again, so that those who may have to reconsider this matter may have it perfectly plain as to the course of events, the action taken by the defendants has been to go to Chile in the month of June and there tender to the plaintiffs a sum somewhat in excess of the actual total claims in Chilean pesos, and, when the tender was refused, to take such steps as they were advised would be accepted under Chilean law to complete payment against the will of the plaintiffs. It might be asked why were the plaintiffs, the owners of the *Bio Bio*, unwilling to take and accept in their own currency money which would be sufficient to reimburse them for expenditure in their own currency, and the answer, of course, is that during this year there has been a steady downward trend—perhaps I might even flatter the Chileans when I say that it has been a "steady downward trend," it has been a disastrous and calamitous downward trend, in the exchange value of the Chilean peso. It is not, therefore, surprising that the plaintiffs vastly preferred to have their claim quantified in sterling rather than accept the actual sum in pesos which would cover the various items, if quantified in Chilean currency.

There is no mystery about the matter, and although Mr. Hayward made one or two very natural attempts to move me to compassion for the

plaintiffs on the ground that they were being presented with worthless currency by the defendants I am bound to say that I remain completely unmoved by those appeals. I do not think there is any question of merit in this case, in the common use of the word, as to there being either a sort of moral or sentimental advantage on one side or the other. It seems to me to be purely a dry matter of law whether a payment in Chilean currency to Chileans for expenses which they have incurred in Chile is a good discharge in law. That, shortly, is the point, and the only point, that I have to determine. But I have to bear in mind, in so determining—and that is why I thought it worth while to recite in some detail the steps that have been taken in these proceedings—I have to bear in mind the fact that admission of liability has been obtained; bail has been completed, and a consent to a reference, which is an order of the court, has been filed. And it is upon that ground that Mr. Hayward laid the stress of his objection. Without admitting in any way that when that stage had been reached the payment would be a good one; without admitting in any way that the payment which was made, or purported to have been made in accordance with Chilean law was a good payment, still he said, I think, as the main ground of his defence, that whatever might be done in other circumstances and in other places he stood there with an order of the court which was in effect a direction to the registrar to assess; he had nothing more to do than to perform a ministerial function of the court in assessing; and it was too late for anyone to come forward and say: "Now I ask that this action should be dismissed because at this late stage I am in effect putting in a plea of payment." To put it in another way, he said the time for plea was before defence; in this case there was no defence; if there was no defence there was no room now for plea. I have not at all overlooked the force of these contentions in arriving at the judgment at which I have arrived.

First of all I have to consider whether there has been any guide and whether I can derive any guide from previously decided cases in matters of this class. And to begin with, no one shuts out of consideration for a moment this stage of judgment having been reached. Apart from that, of course, I have a perfectly clear guide in respect of the payment of a foreign debt in the currency of that foreign country accompanied by a plea of payment in the case which is generally referred to as the *Le Touquet* case, the full title of it being *Société des Hotels Le Touquet Paris-Plage* v. *Cummings* (126 L. T. Rep. 513; (1922) 1 K. B. 451). The circumstances of that case are very familiar to all practitioners, and quite shortly they are these—that a lady who had incurred a debt in France to a well-known hotel in Le Touquet, in the year 1914, sought to discharge that debt, after action brought, but before judgment, by paying to the hotel in the year 1919 the sum sued for in francs. Avory, J. thought that that was not a good discharge of the debt, but the Court of Appeal—a strong and unanimous Court of Appeal—thought (although one member of it was not altogether pleased with the particular manner in which the proceeding was initiated and carried through) that it was a good discharge. That, so far as it goes, is a clear and binding authority upon me, and if I may most respectfully say so, not one from which I should want to differ, even if I could. The mere fact that the currency of a country has suffered a depreciation in relation to foreign countries is by that judgment an irrelevant circumstance, when payment is made of the actual sum in that currency, in that country, at a time which is proper.

But, as I say, that decision does not carry me the whole way in this case, because there is here the further circumstance that judgment has, in a sense, passed. I am not quite sure that it would be right to say that Mr. Hayward claimed that this consent is in form a judgment, but, again, I do not know that anything turns upon the form of the matter. It has the effect, according to the rule, of an order of the court, and, therefore, there may not be anything in a distinction between a judgment and an order.

The question, therefore, now resolves itself into this form: having the authority of the *Le Touquet* case—and for the moment assuming that the payment in Chile was an effective payment as to which, again, I shall, of course, have to say something—does the fact that this order of the court exists make a material difference to the position? Now there, at that stage, I have, as I say, no direct authority at all. The nearest direct authority that can be found is a case which Mr. Miller put before me—a short case, shortly reported—*The Consett* (4 Asp. Mar. Law Cas. 230; 42 L. T. Rep. 33; 5 Prob. Div. 77). Now that case dealt, and dealt only, with the question of a reference in a damage action in the Admiralty Court, it being contended on the one side that the costs of the reference must follow the event of the decision as regards liability. The Court of Appeal—not as I think, very surprisingly—decided that that was not so at all, and that the costs of the reference might well be determined in quite a different manner to the costs as to the issues on liability, and the Master of the Rolls (Sir George Jessel) went so far as to say this: "When the trial takes place and there are cross-claims, and both parties claim the full amount of damages, and the judge holds both to blame, he may well act upon the rule that there shall be no costs. But the investigation before the registrar is a new litigation. It may be stopped at the outset by the defendants tendering a reasonable sum." Now pausing there for a moment one is tempted to wonder whether even Sir George Jessel might not have gone a little far in describing the proceedings before the registrar as a "new litigation." This, quite clearly, is not a considered judgment; it is a judgment given, no doubt, in the stress and hurry of work dealing, probably, with interlocutory matters. But even supposing that on reconsideration that very great judge might have lessened the force of the expression, "a new litigation," I think that the trend of his mind on the matter is quite clear, and it is illuminated by the following phrase, "it may be stopped at the outset by the defendants tendering a reasonable sum." Of course, it is perfectly clear that the Master of the Rolls is dealing with the question as to whether costs were in the discretion of the judge, and is not applying his mind quite directly and fully to the kind of question I have to consider to-day, and, in that sense, his observations here might be said to be *obiter*. But as Mr. Miller pointed out, they are the gravamen of his reasoning, they are the *ratio decidendi*, and it is difficult to say that there is anything which one could really criticise there other than perhaps the extreme form of the expression, "a new litigation." To my mind I see a difficulty in imagining a reference to damages, after liability had been determined, as properly characterised by the words "a new litigation," but nobody could, I imagine, criticise the sense in which the Master of the Rolls says that—if he means as he goes on to say—it is a new litigation in the sense that it may be stopped at the outset

by the defendants tendering a reasonable sum. And when one faces it in that way, and in the light of that judgment, it is difficult to see why this order should act in any way to stop or bar the defendants from taking the course of thereupon meeting their enemy by payment. If they can meet their enemy by tender as the Master of the Rolls says they can, and as all of us who have practised in Admiralty know full well that they can, I, for my own part, see no reason why they cannot also meet him by payment. If that is the right conclusion the only point that remains for consideration is whether this proceeding which took place in Chile does, or does not, amount to a payment of the plaintiffs' claim? I have considered—for the matter was very fully argued before me—all the various incidents of the bail, and the undertaking, and the position which is there being secured to the plaintiffs in this case. But the kind of consideration which moved the court in cases of the class of *The Christiansborg* (5 Asp. Mar. Law Cas. 491; 53 L. T. Rep. 612; 10 Prob. Div. 141), where a plaintiff, having obtained bail in one country, sought to initiate litigation in another—does not at all apply here. There can be no conceivable case here of breach of faith. There is no case of plaguing one party by any kind of double litigation. It is true the plaintiff elected to initiate his suit here, but if he had been paid here he could have had no objection. Does it, therefore, make any difference that instead of being paid here in sterling he is paid (he was paid, of course) in pesos in Chile? I do not think it does. If he was properly paid in Chile it seems to me that his claim, whether paid in whole or in part, is paid in respect of the part—if it is a part—and of the whole—if it is a whole. Therefore, I have finally to address myself to the question whether this payment in Chile was a good payment. Now for my assistance there Mr. Miller, on behalf of the defendants, has filed affidavits, principally the affidavit of a Chilean lawyer of eminence who advises the Embassy here, a M. Carlos Manuel Pereira. M. Pereira puts his evidence in the convenient form of exhibiting the relevant articles of the Civil Code of the Chilean Republic. If properly translated—and there has been no challenge as to their translation—they are, to my mind, sufficiently clear. Art. 1598 of the Chilean Code says this: "For a payment to be validly made, it is not necessary that it should be made with the consent of the creditor; the payment is valid even if made against the will of the creditor, by the 'consignation' of the value or thing owed." The word "consignation" is in inverted commas, and is, as I understand it, an attempt to render into English a difficult Spanish expression. But there is no doubt, I think, as to what is meant by this word "consignation," which, for my part, I hardly recognise as being a customary expression in the English language. I think it is better expressed by the word "deposit" as long as "deposit" is understood in the sense in which this deposit was made in Chile. But perhaps I ought to state here what was done in Chile in order that it may be understood how this article is applied according to the evidence from Chile. The plaintiffs having stated their claim in a sum which, calculated in pesos at the time, came to a sum of 71,000*l.* odd in pesos, the defendants, bearing in mind that interest also was payable, went to Chile and offered their opponents, the plaintiffs, a sum considerably in excess of 71,000 odd—I think something in the nature of 80,000—pesos. The plaintiffs having refused what seems, on paper, a generous offer (but which, if it was merely paper perhaps not so generous as it seems), the defendants in that proceeding—again under the Chilean law—offered to make a payment by, as it is called in this translation, "consignation," but, as I prefer to call it, by deposit. The method is that the parties go—or the party wishing to make the consignation goes—before a judge in Chile and formally pays in this money which is then deposited in a bank named by the court—in this instance, I think, the Bank of Chile was the bank named. The plaintiffs for their part were not wholly inactive because they took, no doubt under legal advice in Chile, objection to the jurisdiction of the court, and the same judge who had accepted this payment by consignation considered the point then at the instance of the plaintiffs as to whether he had jurisdiction to act in the way in which he had acted. He decided that he had. The plaintiffs, not content with that decision, went to the Court of Appeal which, as I understood it, is the highest tribunal to which they could go in Chile, and the Court of Appeal by a majority of two to one decided that the judge of first instance was right and that he had jurisdiction to act in the way that he did.

In these circumstances, M. Pereira in his affidavit assures me on the strength of arts. 1598, 1599 and 1600 (I need not read them all), 1601 and 1602, that this payment is a good payment, according to Chilean law. Against that I have an affidavit somewhat belatedly put forward—but none the less put forward—on behalf of the plaintiffs by a M. Humberto Jara Videla, who criticises the view of M. Carlos Pereira. Unfortunately, however, he does not tackle what appears to me to be the real point in the case; that is he does not tackle the articles of the civil code; he does not tell me what, for example, art. 1598, which I have read *in extenso*, means, if it does not mean what M. Pereira contends for, and I have to make up my mind on this question of fact (and it is a question of fact) what is the foreign law as regards payment in Chile, and for my part, weighing these two affidavits, weighing also what appeared to me to be the plain meaning of art. 1598 of the Chilean Code, I have no doubt at all that this payment is a good payment, according to Chilean law. Be it understood at once that it has never been contended by Mr. Miller for the defendants in this case that this matter was in any sense *res judicata* because a question of Chilean law and a question as to the jurisdiction of a Chilean court happen to have been introduced. He does not for a moment contend that the question is *res judicata*. He says: "All I use the judgment of the Chilean court for is this: to prove that I made, according to Chilean law, a good payment of 80,000 pesos." Whether that is a proper payment in satisfaction of the plaintiffs' claim is, Mr. Miller frankly and clearly admitted, a matter for this court to determine, and not, in any sense, a matter for the Chilean court to determine, so that there has been no confusion upon that score. Now I find myself, after determining that question of fact in favour of the defendants, in this situation. A claim has been put forward by the plaintiffs. Their claim has been quantified in sterling; it could only be the subject of a final judgment in this court in sterling because this court knows no other currency in which to give judgment. But before the case has gone to the official who has to assess the amounts of the various items the defendants have come forward and have offered, in satisfaction of the whole of the claim, a certain sum in Chilean pesos. So far as the Chilean law is concerned they have actually paid the pesos, and I must treat it according to my finding, as a payment.

But even that does not conclude this somewhat involved and difficult transaction, because when

one turns to the claim it is seen that although by far the bulk of the claim was in respect of expenses incurred in Chile, in Chilean currency, there were certain very small—but certain—items which were not so incurred. As I said at the beginning, the collision took place within the territorial waters of the state of Ecuador, and the first three items of the claim are items of expenses incurred at Guayaquil, in Ecuador, and were items that were incurred, not in Chilean pesos, but in the currency of Ecuador, namely, in sucres. I have also had to think whether a payment in Chilean pesos is necessarily a good discharge of a liability incurred by the plaintiffs in another currency altogether, namely, in the sucres of Ecuador. If, as I understand it, the currency of Chile to-day has a merely nominal value, it seems to me to follow that the payment of even a large excess of the plaintiffs' claim in Chilean pesos may be quite inadequate to reimburse the plaintiffs for a payment that they may still have to make in sucres of Ecuador. I do not know at the present moment whether they have made those payments and whether, therefore, it would be possible to quantify them in pesos because they made them at the time when pesos and sucres had a relation which could be ascertained, or whether they have not made the payments and may be in great difficulty in making them at all if they are held to have been duly given pesos only with which to make them.

Similarly, at the conclusion of the claim, there are two items, 15 and 16, which are said to have been incurred in London. A somewhat lengthy experience which I now have in Admiralty matters leads me to believe that those items—to put it as favourably as I can for the plaintiffs—might not receive quite the full and real consideration in the registry that some of the other items will receive. Therefore it is possible that when the registrar has dealt with them they will not figure so largely in the claim as they do at present. However, again, I think it would be unfair and most unwise on my part to speculate on that. It is possible that the plaintiffs will recover all, and even more possible that they will recover some, of these claims, and those claims will be in sterling. The same considerations apply to a debt which they have incurred in sterling by reason of this collision if they have not yet discharged it as apply to the currency of Ecuador, and they may not be fairly or properly reimbursed for debts in sterling by any payments of Chilean pesos. Having arrived at that determination, I have had to think whether I was wise in the course I took of giving the defendants an opportunity of coming to put the whole of their points as to the discharge of the whole of the claim before the reference was held. On the whole, at the moment, I see nothing to regret. I think it was the businesslike course that this very important and entirely novel point should be fully debated here before the registrar was confronted with the difficulty. I cannot believe that either side, in the circumstances, would not have wanted to debate it at least here—if not in the highest court—at some time, and it may have been instrumental in saving the plaintiffs a great deal of unnecessary expense that we should deal with the matter in the way that it has been done. At any rate, I am optimistic enough to hope so.

But having arrived at those conclusions I must be careful, I think, not to put the plaintiff in a position that would be worse than the position he would have been in if he had had his reference first and then had come here at the instance, shall I say, of an appeal by one side or the other from the registrar's decision, and I think the way I can put him in as good a position as he would otherwise have been is to safeguard his interests, is this: I shall direct that the reference fixed for the 1st Dec., if the plaintiffs so desire it—I do not force them to do it—but if the plaintiffs so desire it, shall proceed, and it shall proceed in respect of items 1, 2, and 3 of the claim, and also items 15 and 16. As regards items 4, 5, and 6, these represent disbursements in United States dollars, and the reference should go on in respect of these items.

In addition, the question of interest should be considered by the registrar, but should be considered in the light of the direction I have given as regards the way in which the payment of Chilean pesos is to be held in this case. That is to say, there must be no reopening before the registrar of the principle that a payment has been made, but I would like the assistance of the registrar to let me know, and to ascertain for the benefit of the parties, whether the payment in pesos covered the rate of interest—assuming it to be a good payment—covered the proper rate of interest as it would be normally determined in the registry. That means to say that if the amount of pesos, say, at the rate of 5 per cent.—or whatever the rate the registrar thinks reasonable to adjudge—is reckoned—if the payment in pesos sufficiently covered that then he will say so, but he will not have to go back to this point that I have already determined as regards whether the interest should be in sterling or in pesos. It will be sufficient if he says—assuming that the pesos payment, as has been ruled, is a good payment—"there was a sufficient sum in pesos to cover the rate of interest which I adjudge." So these will be matters to be determined before the registrar.

If, of course, the parties come to terms without going before the registrar upon these items which are really minor matters, then, as I said, I put no term upon anybody that they are bound to go to a reference, but the plaintiffs are to have all their rights of going to a reference on the points I have determined undisturbed by the decision at which I have arrived.

The plaintiffs appealed.

Hayward for the appellants.—The appellants are entitled to have their damages assessed in sterling and not in pesos. If the claim is for payments discharged in pesos, the proper rate of exchange for conversion to sterling is the rate prevailing at the time of the loss: (*The Volturno*, 15 Asp. Mar. Law Cas. 374; 126 L. T. Rep. 1; (1921) 2 A. C. 544). As to the proceedings in Chile, the Chilean court never decided on the merits of the case, or upon the sufficiency or otherwise of the payments made in Chile. [He referred to: *Société des Hotels Le Touquet Paris-Plage* v. *Cummings* (126 L. T. Rep. 513; (1922) 1 K. B. 451), *The Christiansborg* (5 Asp. Mar. Law Cas. 491; 1885, 53 L. T. Rep. 612; 10 Prob. Div. 144), *McHenry* v. *Lewis* (47 L. T. Rep. 549; 22 Ch. Div. 397), and *The Consett* (4 Asp. Mar. Law Cas. 230; 42 L. T. Rep. 33; 5 Prob. Div. 771).]

Cyril Miller for the defendants.—The proceedings in Chile amount to a discharge of the defendants' debts. If the sum had been paid before action brought it would have been a good discharge. If by Chilean law it was a good discharge it does not matter that it is not equally so by English law. The effect of the transaction in Chile has to be determined by Chilean, not by English law. [He referred to *Republica de Guatemala* v. *Nunez* (136 L. T. Rep. 743; (1927) 1 K. B. 669), *Re Maudslay, Sons, and Field* (82 L. T. Rep. 378; (1900) 1 Ch.

602), *Emlivicos* v. *Anglo-Austrian Bank* (92 L. T. Rep. 305 ; (1905) 1 K. B. 677), and *Cumber* v. *Wane* (1719, 1 Stra. 426).]

Hayward replied. *Cur adv. vult.*

July 3, 1933.—The following judgments were read:

Scrutton, L. J. — This appeal is against an order of Langton, J. He was asked to dismiss an action *in rem* in the Admiralty Division on the ground that the claim of the plaintiffs, domiciled in Chile, had been satisfied by a good payment in Chile under the laws of that country. He stayed the action so far as it related to expenses and losses incurred by the plaintiffs in Chile for repairs and detention of their ship, but allowed the reference to proceed as to certain small expenses in Ecuador and England. Both sides appeal against this order, but as the latter small expenses have since been satisfied by payment here the cross-appeal was not argued, and the case came before us as the appeal of the plaintiffs against the order depriving them of a reference on their claim for the Chilean expenditure and losses.

The real point in dispute between the parties arose from a fall in value of the Chilean peso, as compared with sterling, with the result that, to pay the claim in pesos at the time when it was said to be paid, would give the claimants a smaller amount in sterling than they would get if they received in England judgment in sterling in the action.

The relevant facts are these: The plaintiffs are a Chilean company owning a steamer, the *Bio Bio*. In Aug., 1931, the Dutch steamship *Baarn* ran into and damaged the *Bio Bio*, while she was lying at anchor on the high seas, and therefore within the jurisdiction of the English Admiralty Court, off Guayaquil, in the Republic of Ecuador. Small expenses amounting to 26*l*. 5*s*. were incurred in Ecuador by the plaintiffs in Ecuador and United States currency. The plaintiffs then took the *Bio Bio* to Valparaiso, in Chile, for repairs, and incurred there expenses of repair and losses by detention amounting to 70,000 Chilean pesos, which, if turned into sterling according to the decision in *The Volturno* (15 Asp. Mar. Law Cas. 374; 126 L. T. Rep. 1; (1921) 2 A. C. 544) at the time when they were incurred, amounted to 2205*l*. Further small expenses in England were claimed at 28*l*. 2*s*. 6*d*.

The claimants could then take one or other or both of two steps: (1) They could sue the owners of the *Baarn* either in Holland, where they were domiciled, or wherever they could find them; (2) they could arrest the *Baarn*, *in rem*, wherever they could find her. Unless the owners were sued in England or the *Baarn* was arrested in England, sterling could have nothing to do with the assessment of damages. They took the latter course, and in February, 1932, arrested the *Baarn* in England, thus founding an action in the English Admiralty Court. The solicitors for the *Baarn*, on the 17th Feb., 1932, admitted liability and consented to the damages and interest due to the plaintiffs being referred to the registrar and merchants for assessment. This consent on being filed became an order of the court. During the spring of 1932, the *Baarn's* solicitors apparently considered that the decision of this court in *Société des Hotels Le Touquet Paris-Plage* v. *Cummings* (126 L. T. Rep. 513; (1922) 1 K. B. 451), in which a defendant successfully paid a French debt in depreciated francs while an action was pending in England to recover it in sterling assessed at a time when francs had more relative value, might be of some service to them. They accordingly ascertained that there was a proceeding under Chilean law by which a person owing might tender to the creditor the "value or the thing owed" and if the creditor would not accept it might, with the sanction of the court, deposit the "thing owed" in a bank, so that it would be payment to the creditor of the thing owed. But (art. 1606) the debtor might withdraw the deposit before the creditor accepted it, or "before the deposit has been declared by a judgment *res judicata* (final judgment)." On the 15th June, the representatives of the *Baarn* offered the plaintiffs the sums they claimed in the currency in which they were incurred, and asked the plaintiffs "to send for them." The plaintiffs declined and said the matter must be settled in London.

Thereupon those representing the *Baarn* started Chilean proceedings apparently in June and asked the judge "to order that the offer of payment by delivery as above be made for all legal purposes." The judge ordered "Let the offer be made." The offer was accordingly made and declined. The *Baarn* asked the judge that the delivery of the sum stated to the Bank of Chile be authorised. Thereupon the judge on the 25th June, "authorised the delivery and let notice be given to the Bank of Chile, in whose possession the money will remain, and let summons be served upon the creditor and the 27th June is fixed for the deposit." Notice was accordingly given, and the sum paid into the Bank of Chile, and notification given to the plaintiffs advising them to receive the deposit. This the plaintiffs declined to do.

The plaintiffs then took action, and in July raised objection denying jurisdiction, stating that "the matter was being ventilated in London" and that "the *Baarn* desired to take advantage of the depreciation which has occurred in our currency, so as to settle for a miserable sum losses which we suffered a year ago and which for the most part we had to pay then in the gold currency which was then current." The plaintiffs then asked the judge to accept their opposition to the aforesaid payment by deposit and to declare his incompetence to settle the question at issue as to whether the amount offered by the other side was or was not sufficient to discharge its debt, because this case was being ventilated by the parties before the British courts. The *Baarn* opposed, saying, *inter alia*, that "if the plaintiffs still wished to discuss the sufficiency of the payment made they had a suitable means of doing so by bringing the necessary action in the ordinary courts, which are of wide experience, which is the only legal method of discussing this question." The judge's judgment is "Holding that it is not for these proceedings to deal with the request made, it is declared there is no ground for the same without prejudice to any other rights of the plaintiffs." Thereupon the plaintiffs appealed, and the Court of Appeal, the final court in this matter, by a majority dismissed the appeal. The reasons of the majority are not stated; the dissenting judge appears to have thought that the lower court should have decided the place of payment. The question of sufficiency of payment is not mentioned, and probably the court never heard of the decision in *The Volturno* case (*sup.*) or the *Le Touquet* case (*sup.*)

I am of opinion, having considered the evidence, that there is no final decision by the Chilean courts that the payment in depreciated pesos is sufficient while proceedings are pending in London. There is no such express decision; the judge appears to assume that the question can still be raised in the ordinary Chilean courts and reserves the right of the plaintiffs to do this. This, in my

view, is sufficient to decide the case in favour of the appellants.

But I should desire to say a word or two as to other difficulties which may arise. I take the decision in *The Volturno* case (*sup.*) to be that damages in tort are to be assessed at the time of breach and not at the time of the judgment.

Now the damage to the *Bio Bio* was done in the waters of Ecuador, and repairing it would inflict damage on the owners, Chilean subjects domiciled in Chile. If these owners had sued in Chile, either by successfully serving in Chile the owners of the *Baarn* there through their agents, or by arresting the *Baarn* in Chile *in rem*, it is not clear that the question of depreciated pesos would assist the plaintiffs. I take it that if a tort had been committed in England before England went off the gold standard the plaintiffs could not say: "We insist, after England has gone off the gold standard and the pound has depreciated in international purchasing power, on being paid the value of the gold standard pound at the time of the commission of the tort." A pound in England is a pound whatever its international value. So, according to the *Le Touquet* case (*sup.*), "the plaintiffs who were owed 18,035 francs payable in France must be content with 18,035 francs paid in France," though the franc had depreciated internationally between 1914, when the debt was incurred, and 1921 when it was paid, and though there were proceedings in England.

I notice that P. O. Lawrence, J., in the case of *Re British American Continental Bank Limited; Ex parte Crédit Général Liégeois* (127 L. T. Rep. 284, at p. 287; (1922) 2 Ch. 589, at p. 596), was of the opinion that this court in the *Le Touquet* case (*sup.*) held there was accord and satisfaction; there is clearly some misunderstanding here, as all the members of the court (Bankes, L.J., myself, and Atkin, L.J.), rightly or wrongly, held there was no accord and satisfaction. I have some difficulty in seeing how a domiciled Chilean, suffering damage measured in Chilean pesos, can rely on the depreciation of his own currency by electing to sue in a country whose currency is not subject to such depreciation.

The difficulty may be tested by considering an action in Germany for a foreign tort brought to judgment during the period when the German mark had become practically worthless, though it was of value when the tort was committed. It is not necessary to decide the point, as I have held that there was here no payment by Chilean law, and therefore the English proceedings cannot be stayed; but I mention it because I do not think that the results of the decision in *The Volturno* case (*sup.*) have yet been thoroughly elucidated.

In my opinion, the appeal must be allowed, and the order appealed from set aside, with costs here and below.

Greer, L.J.—The plaintiffs are a Chilean company whose ship, the *Bio Bio*, came into collision with the *Baarn* near Guayaquil, Ecuador, on the 15th Aug., 1931. The defendants are a Dutch company who own the last-named vessel.

The plaintiffs, finding the Dutch vessel within the jurisdiction of the Admiralty Division, by writ dated the 25th Jan., 1932, commenced an action *in rem* against the steamship *Baarn*, serving the writ in the usual manner on the ship, then in this country. Appearance was entered in due course on the 3rd Feb., 1932, and thereafter, on the 17th Feb., 1932, the solicitors for the plaintiffs and defendants signed an undertaking under which the defendants admitted liability and consented to the damages and interest due to the plaintiffs being referred to the registrar and merchants for assessment. This admission was duly filed in the registry. Thereupon by Order LII., r. 23, the said agreement became an order of the court and had the same effect as if an order had been made by the judge. I think this means, according to the practice of the court, that it was equivalent to an order referring the assessment of damages to a registrar, and if he desired the assistance of merchants, to the registrar and merchants, for a report. It was not equivalent to a judgment for such damages as should be found by the registrar and merchants. It was only an order for reference and report, and judgment would not be drawn up and would not be dated until after the report had been made and confirmed by the court. In this respect the practice is equivalent to that which sometimes prevails in the King's Bench Division, where an order is made sending the case to a referee to report, and is not equivalent to a judgment for such sum as may be found by a referee. In the latter case the practice is that the judgment should be dated at the time when the judge made the order of reference, the amount being inserted at a later date. No doubt in this case the liability would be merged into a judgment debt at the date of the judgment, but in the present case there has been no judgment, and, therefore, no merger. Bail was given by the defendants in the sum of 3750*l.* on the 18th March, 1932, the plaintiffs having filed their particulars of claim on the 17th March, 1932.

Before any reference was held an application was made to the judge to dismiss the action and discharge the bail on the ground that the defendants had paid the claim. The judge thereupon made the order of the 25th Nov., 1932, which in effect declared that the items of the claim numbered 7 to 14 could no longer be considered by the registrar inasmuch as they had been paid, and the reference could only proceed with regard to the other items. The grounds on which the application was made were as follows: The items of the plaintiffs' claim filed in the action consisted of items of actual expenses incurred by reason of the necessary repairs to their vessel, together with a claim for detention during the period of repair. All the items of the claim were stated in Chilean dollars, items 7 to 13 having in fact been paid in Chilean dollars and item 14, having been incurred during the time lost in consequence of repairs, was also stated in Chilean dollars. Items 1 to 5 were incurred in other currencies, and in the particulars were converted into Chilean dollars, and all the items of the claim except some small items of expenses in London were then converted into sterling at the rate of exchange prevailing at the date at which they were incurred by the plaintiffs. If the plaintiffs were right in principle in their contention that they were entitled to claim the sterling equivalent of their expenses at the rate of exchange prevailing when they incurred the loss by payment of those expenses, the dates which they have taken for the purposes of making the conversion into English money would in all probability not be questioned. The defendants, however, said that during the progress of the action they had offered to pay to the plaintiffs the amount claimed in Chilean dollars, and they had paid that amount into a Chilean bank at Valparaiso into which they were authorised by the judge at Valparaiso to pay it, and under circumstances which under the law of Chile made it a payment to the plaintiffs to the same extent as it would have been if they had actually paid the

money to the plaintiffs and the plaintiffs had received the money, but without any agreement to accept it in satisfaction. They relied on the affidavit of M. Pereira and the articles of the code to which he referred as establishing their claim.

Par. 5 of M. Pereira's affidavit is in these words: "5. By order of the Court made on June 28th, 1932, the said deposit was duly notified to the Compania Sud Americana de Vapores in accordance with art. 1602 of the said code. Such notification completed the procedure required by Chilean law to effect a valid payment by 'consignation' from the Royal Dutch Line to the Compania Sud Americana de Vapores."

He points out that there was an appeal by the plaintiffs against the order of the judge on the ground of want of jurisdiction. The order of the judge was confirmed on appeal, and in par. 7 of his affidavit the learned deponent says: "The said decision of the Court of Appeal is final and there is no further appeal, and the effect thereof is that the court in Chile has finally decided that there was jurisdiction in the court to make the orders referred to authorising payment by 'consignation,' and that the Compania Sud Americana de Vapores has been duly paid in accordance with the Chilean law." The defendants filed an affidavit in answer by M. H. J. Videla, who points out that the decision of the Chilean court states that the deposit is without prejudice to any other rights of the plaintiffs, and that there is no decision by the court that the amount is sufficient. He also points out that where the payment has not been declared enough by judgment of the court, the debtor can withdraw the deposit. This affidavit does not dispute the proposition that the deposit when made is a payment. The payment does not cease to be a payment because it turns out that it is not enough; it still remains a payment though it turns out only to be a payment on account. Further, it does not seem to me to cease to be a payment, because if he chooses the debtor making the payment may, if it is not accepted, undo the transaction and get his money back. I think it was established by the affidavits that under the law of Chile a payment by "consignation" is the equivalent of payment to the creditor.

In my judgment the result of the evidence as to the effect of the payment according to the Chilean law is that it is a payment to the Chilean company of the number of pesos paid into the Chilean bank, but the decision of the Chilean court does not affect the question whether the payment is sufficient to extinguish or satisfy the debt, and it has no bearing on the question what value in sterling the English court in which the action *in rem* is pending should attribute to the payment.

It was successfully argued before Langton, J. that the payment so made was a payment in full of items numbered 7 to 14, and he ordered that the reference should be confined to the other items. The payment was in fact a payment in excess of the aggregate amount of pesos stated in the particulars of claim, and I do not myself understand why, if it was a good payment of items 7 to 14, it should not be deemed to be a good payment of the whole, because if the proceedings had been taken in Valparaiso, where the owners of the *Bio Bio* are domiciled, the liability for all the items would have had to be met by a payment in Chilean currency; but, be this as it may, the question we have to determine is whether a payment of this kind made on the 28th June, 1932, in Chilean currency can be credited to the defendants against their liability by striking out of the claim the terms of damage incurred in Chilean currency at Valparaiso. I have come to the conclusion that the learned judge's judgment ought to be reversed. There can be no doubt that a claim in an action for damages for collision is a claim for unliquidated damages, the different items being put forward as evidence in support of the amount that the court is asked to award. The claim is not a claim for each item as a debt, but one for damages measured by the expenses and losses incurred by the owners of the ship by reason of the collision. I think the decision of the House of Lords in *The Volturno* (*sup.*) shows that the duty of the court is to ascertain the damage suffered by the plaintiffs, whether a foreign company or an English company, in sterling, and if the reference had been allowed to proceed the registrar would have had to ascertain the amount of damages in sterling, and in doing so he would have been bound to convert the various currencies into sterling not at the date of his award, but at the date when the expenses were incurred. It is conceded that if he did this he would have awarded a sum, which the judge in due course would have confirmed, in excess of the value of the Chilean currency paid in to the Valparaiso bank in the proceedings for payment by consignation. In my judgment, treating what has happened in Chile as a payment on account, it will be the duty of the registrar to credit that payment by its equivalent value in sterling at the rate of exchange prevailing on the date when the payment was finally approved by the Chilean judge. I do not think that a foreign debtor can get rid of the liability to pay damages awarded in sterling in an English court by a payment of anything that is not in fact the equivalent of that which he is awarded by the English court. Assuming for the sake of simplicity that a claim is made in an English court for damages for tort or breach of contract happening in France, say to the extent of 1000 francs, and the damages were incurred when the exchange was 25 francs to the £, a judgment in accordance with the decision in *The Volturno* case (*sup.*) would necessarily be for 40*l.* Proof by the defendant that he had paid to the plaintiff in France 1000 francs at a time when they were depreciated and were only worth 8*l.* could not be regarded by an English court as payment in full of the damages proved to have been sustained in accordance with the principles laid down by the House of Lords in *The Volturno* case (*sup.*). The defendants, however, relied upon the decision of the Court of Appeal in the case of *Société des Hotels Le Touquet Paris-Plage* v. *Cummings* (*sup.*). It is not, in my opinion, easy to reconcile this decision with the decision of the House of Lords in *The Volturno* case (*sup.*), but, however this may be, it is only a decision in relation to an action for debt, and, in my judgment, is not binding on this court, where the action is, as it was in *The Volturno* case (*sup.*), an action for unliquidated damages. If the damages consisting of expenses are to be taken at the exchange value at the time they were incurred it seems to me a sum paid on account of these damages must be taken at its exchange value at the date of payment.

In my judgment, the order of Langton, J. should be reversed, and the reference to the registrar and merchants allowed to proceed as to the whole of the claim. The plaintiffs should have the costs of this appeal and of the summons before Langton, J.

Romer, L.J.—The case of the defendants on this appeal appears to me to involve the proposition that at the time when they made the deposit of money in Chile they were indebted to the plaintiffs in the sum of 76,000 pesos or thereabouts. This, however, is a complete fallacy. There was no sum in pesos owing to the defendants by the plaintiffs

at that or any other material time, nor have the plaintiffs ever claimed that there was. The position of the parties at the time of the issue of the writ in this action was as follows: The defendants had caused damage to the plaintiffs' vessel in circumstances that, according to English law, would appear to have constituted a tort on the defendants' part for which the plaintiffs were entitled to recover damages in the English Court of Admiralty. The liability of the defendants being established by decision of that court or by the admission of the defendants, a reference to the registrar would normally be directed to determine the amount of the damage sustained by the plaintiffs, and that amount would, of course, be expressed in sterling. As a matter of fact, the defendants did admit liability. But such admission could only amount in the circumstances to an admission of their liability under English law and of their liability to pay in sterling such a sum by way of damages as the registrar should determine.

Now the plaintiffs in their statement of claim had set out particulars of the damage alleged to have been sustained by them, and included in those particulars were certain sums of pesos said to have been expended by them in and about the repairing of their vessel at Valparaiso and another sum of pesos in respect of the detention of their vessel while the repairs were being effected. These particulars, however, mean no more than this, that the plaintiffs had sustained a loss of so many pounds sterling by reason of the fact that they had been obliged to expend pesos upon and in connection with the repairs, and had been deprived of the opportunity of earning pesos while the repairs were being effected. To ascertain how many pounds sterling had been thus lost the pesos would be converted into sterling at the rate of exchange prevailing at the time when the pesos were paid or lost, as the case may be.

This, in my opinion, is the effect of the decision of the House of Lords in the case of *The Volturno* (*sup.*). For the pesos would be regarded for this purpose merely as a commodity, and the damage sustained by the plaintiffs would be taken to be the value of that commodity in sterling at the time when the plaintiffs transferred it to the repairers, or were prevented from receiving it by reason of the vessel being laid up, as the case might be. This aspect of the matter is particularly dealt with in the speech of Lord Wrenbury. But the fact that the plaintiffs claimed to recover damages from the defendants because they had been compelled by the defendants to expend pesos, or had been prevented by the defendants from receiving pesos, in no sense amounted to a claim by the plaintiffs to be paid pesos by the defendants, nor did the defendants, when admitting liability in the action, thereby agree to pay, or admit liability to pay, pesos to the plaintiffs. Whether the defendants could have been successfully sued for damages in the courts of any other country I do not know. We have had no evidence on that question. Least of all have we had any evidence as to whether they could have been successfully sued in Chile. If they could the plaintiffs would no doubt have asked for and obtained a judgment for damages expressed in pesos. But they did not. They elected to bring their own action in this country, and I cannot understand how it can be supposed that the plaintiffs in this action sought to establish, or have by admission or otherwise established, the liability of the defendants under Chilean law to pay them anything whatsoever. But if they did not, how can the deposit made by the defendants in Chile of a sum of pesos amounting at the present rate of exchange to very much less than the plaintiffs' claim to damages have satisfied that claim? It is said on the part of the defendants that the claim has been satisfied by reason of certain articles of the Civil Code of Chile, of which translations were provided by M. Pereira, who made an affidavit on the defendants' behalf. It is, however, plain that those articles, and the additional Article 1606, of which a translation has been provided by M. Videla, are dealing with cases where the relation of debtor and creditor prevails between the two parties to the transaction according to the law of Chile and can have no application to such a case as the present, where no such relation exists or is claimed to exist. Had the defendants' liability to pay the plaintiffs damages according to Chilean law been established by admission or otherwise, it is quite conceivable that the deposit made in Chile would have satisfied the plaintiffs' claim to damages in that country in respect of the matters to which I have referred, though even as to this there is no agreement between M. Pereira and M. Videla in view of the provisions of Art. 1606. Had that been done, the question whether after such deposit the plaintiffs could have proceeded with their action in this country would have deserved serious consideration.

In the circumstances, however, the deposit has not, in my opinion, any effect at all upon the plaintiffs' claim in this action. It was contended on behalf of the defendants that this conclusion is inconsistent with the decision of this court in what has been called the *Le Touquet* case. But this is not so. In that case a defendant under a French contract was liable to pay to the plaintiffs in France a certain sum in francs. Default in payment having been made by the defendant, the plaintiffs sued her in the courts of this country. While the action was pending the defendant went over to France and there paid to the plaintiffs in francs the whole amount of the debt. It was held that the debt being originally a French debt payable in France in French currency had not lost the character by reason of its being sued for in England, and that after the payment the plaintiffs accordingly were not entitled to recover anything more in the English action than nominal damages for non-payment at the due rate and certain costs, no interest being payable according to French law. The whole point of the case was that a sum in francs was payable in France under a French contract. It can have no relevance to the present case, where no sum in Chilean currency is due or even claimed by the plaintiffs as being due to them from the defendants.

In my opinion, the appeal of the plaintiffs should be allowed with costs. The defendants' appeal was abandoned by them, and must be dismissed.

Solicitors for the plaintiffs, *Ince, Roscoe, Wilson, and Glover*.

Solicitors for the defendants, *Middleton, Lewis, and Clarke*.

Friday, July 7, 1933.

(Before SCRUTTON, GREER and ROMER, L.JJ.)

Burnett Steamship Company Limited v. Joint Danube and Black Sea Shipping Agencies. (*a*)

Charter-party — Berth contract — Construction— Lay days—Demurrage—" Time lost whilst steamer is in loading berth "—" Owing to work being impossible " — " Through rain " — " Amount of actual time so lost "—Work rendered impossible through rain—In fact, no cargo alongside to load—No lost time in loading.

By a contract in the Chamber of Shipping Danube berth contract form, known as " Dancon," a ship was chartered to call at one or more places on the Danube for a complete cargo of grain. The time available for loading was fifteen days, thirteen hours. By clause 4: " Should any time be lost whilst steamer is in a loading berth owing to work being impossible through rain, snow or storm, or by the steamer being ordered by the port authorities to ' break out of berth ' to let other vessels in or out, the amount of actual time so lost during which it is impossible to work owing to rain, snow or storm, or by ' breaking out of berth ' to be added to the loading time, but in no case shall the allowance for any or all of the foregoing circumstances exceed, in the aggregate, time amounting to three days."

Whilst the ship was lying in loading berths at two places ready to receive cargo, rain occurred during working hours to an extent which would make it impossible to work cargo into the ship for periods amounting, in all, to two days. But when such rain occurred though cargo was available in the sense that the charterers could have obtained it from various shippers, yet in fact the charterers had not booked cargo with the shippers at the periods when the rain occurred and no cargo was at these periods alongside the ship. The question at issue was whether the two days were to be added to the loading time.

Held by Greer and Romer, L.JJ. (Scrutton, L.J. dissenting) that on these facts the two days were not lost " owing to work being impossible through rain." That time would have been lost had these rainy periods been fine.

Per Scrutton, L.J., dissenting: The time during which it was impossible to work owing to rain was a definition of " actual time so lost." Had the charterers had cargo alongside, they could not have loaded it owing to the rain. The two days should be added to the loading time.

Decision of MacKinnon, J. affirmed by a majority.

APPEAL from a decision of MacKinnon, J. on an award stated in the form of a special case by Mr. F. C. Lohden, as umpire.

The owners of the steamship *Burnhope* and the charterers entered into a contract dated the 9th April, 1931, which in the words of MacKinnon, J. was " scarcely distinguishable from a charter-party " in the Chamber of Shipping Danube Berth Contract form known as " Dancon." The steamer was chartered to call at one or more places on the Danube for a complete cargo of grain. It being a berth charter, the charterers did not primarily provide the cargo, but " put the vessel on the berth " and there made individual contracts with shippers. By the said contract it was provided that the cargo should be loaded at the average rate of 400 units per running day (Sundays and non-working holidays excepted). The time available for loading under this provision depended upon the capacity of the steamer, and in this case worked out at fifteen days, thirteen hours. By a paragraph of clause 4: " Should any time be lost whilst steamer is in a loading berth owing to work being impossible through rain, snow, or storm, or by the steamer being ordered by the port authorities to break out of berth to let other vessels in or out, the amount of actual time so lost during which it is impossible to work, owing to rain, snow or storm, or by ' breaking out of berth,' to be added to the loading time, but in no case shall the allowance for any or all of the foregoing circumstances exceed, in the aggregate, time amounting to three days."

The steamship *Burnhope* voyaged to the Danube and loaded at three ports. The shipowners claimed six-and-a-half days' demurrage at 30*l*. a day, or 195*l*., the charterers having paid one day's demurrage or 30*l*. The umpire found that, while the vessel was lying in a loading berth at Braila and Galatz ready to receive cargo, rain occurred on certain occasions during working hours to an extent which would make it impossible to work cargo into the ship, amounting to two days in all; but he also found that when such rain occurred though cargo was available in the ports in the sense that the charterers could have obtained such cargo from various shippers, yet in fact the charterers had not booked cargo with the shippers at the particular times when rain occurred, and no cargo was then alongside the ship.

The question at issue was whether under clause 4 of the contract the two days should be added to the loading time (fifteen days, thirteen hours). The umpire held that two days' time was lost whilst the steamer was in a loading berth owing to work being impossible through rain. MacKinnon, J. reversed this decision, holding that there was no amount of actual time so lost, as no cargo was alongside available for loading. The charterers appealed.

Sir *Robert Aske* for the charterers.

W. L. McNair for the shipowners.

Scrutton, L.J.—This case raises a short, but difficult question. A very experienced commercial arbitrator, who has probably as many charter-party cases as any judge on the bench, has decided one way, and a very experienced commercial judge has decided the other way, and there is a division of opinion in this court. I have come to the conclusion that the arbitrator was right, but I can quite understand the view taken by those who think the learned judge was right.

This is a Danube berth charter, which means that the charterer is not the person who is providing the cargo primarily. He is going, as it is called, to put the vessel " on the berth " and make individual contracts with shippers by which he hopes to fill up the ship at a sub-contract freight, which will leave him a profit on the charter freight, and it was intended that the vessel should call at two or possibly three ports on the Danube; it was going to move about and pick up its shipping cargo where it could. One of the most important

(*a*) Reported by C. G. MORAN, Esq., Barrister-at-Law.

matters for which provision has to be made is the length of time allowed to the charterer in which to do that. He is entitled to keep the ship at the loading places for a certain amount of time by paying freight. If he exceeds that time he will have to pay demurrage, and there are different kinds of provisions for estimating how long he may keep the ship loading before he pays any demurrage. One very common way of doing it is by giving him a fixed number of days to load. When he has that fixed number of days, under the ordinary provisions he is not bound to load on every day; so long as he loads in the total number of days, he need not load on one, two or three of the days. He is under no obligation to put cargo on board on these individual days so long as he loads the ship in the specified number of days that has been allotted to him. There may be cases, and *Vergottis* v. *William Cory and Son Limited* (17 Asp. Mar. Law Cas. 71; 135 L. T. Rep. 254; (1926) 2 K. B. 344) is one where the ship has got to go into a particular dock under particular regulations, and these regulations require the charterer to have cargo in the dock before the vessel is admitted; but that is quite a different case from this. The charterer may be liable for damages there for having contracted to load the ship in a dock and not having the necessary cargo which the dock regulations require before the ship can get in. There is nothing of that sort in this case.

This particular contract provided: "Cargo shall be loaded at the average rate of 400 units per running day." The words "average rate" show that the charterer need not load 400 tons on any particular day; so long as at the end of the specified number of days he has loaded his cargo into the ship, he has completed his contract, and he is not liable because, for example, on Monday, Tuesday or Wednesday he did not load any cargo at all; and as he is not liable if on a particular day he does not load any cargo, obviously he need not so far as the charter-party is concerned have any cargo there on that particular day. He will not break his contract by having no cargo there on that day; but he is to load the ship at the average rate of 400 units per running day, and the time available for loading under that provision will depend upon the size of the ship; in this case the time available was fifteen days, thirteen hours—I call it fifteen days for simplicity—Sundays and non-working holidays excepted. In the course of the fifteen running days when you come to a Sunday, you are not to count it, and if you come to a non-working holiday, whatever that may be, you are not to count it, and there is no question that it would be no answer to say, you must count the Sunday because there was no cargo alongside on the Sunday, or the non-working holiday because there was no cargo alongside on the non-working holiday.

Then there comes another calculation. What provision was made about weather? The charterer was to have fifteen days for loading. Supposing it rained on the fifteen days, was he to have fifteen days for loading, or was he to have any more? That contingency is very frequently dealt with by a clause providing that the charterer is to have so many "weather working days," In that case it is clear that it would be no answer for the shipowner to say: "Yes, Monday was not a "weather working day," but you, the charterer, had no cargo alongside that day, and so it must be counted as a "weather working day." The shipowner cannot count a day on which it rains throughout the day as a "weather working day," because there was no cargo alongside. That is quite clear, in fact counsel for the shipowners does not attempt to dispute the proposition. There are other provisions in charter-parties in which the running days are extended in the ordinary forms of charter; for instance, all along the Pacific coast of South America there are practically no harbours, and cargo is taken from shore to ship in lighters, where there is frequently surf. In charter-parties for voyages to that coast may be found the provision that "surf days" do not count, and "surf days" generally are certified by the master of the port. In such a case it would be no answer again for the shipowner to say: Oh, yes, you say this is a "surf day," but you had no cargo there, and so you cannot count it as a "surf day." The answer of the charterer, both in regard to weather working days and to surf days would be: "I am under no obligation to have cargo there every minute of every day: I do not break my contract if on a particular day I have no cargo either alongside or contracted for, so long as in the specified period of running days I load the ship. Now it may be that the charterer will load in less than the time in which he has contracted to load. Then there comes in a despatch clause for all time saved in loading the steamer, and the time saved in loading is that saved when the ship can get away before the end of the period which under the contract the shipowner has allowed the charterer within which to load the ship. It is time saved—less time than the contract time for loading.

In this contract there is a provision with regard to weather which is not for time saved, but for time lost—the opposite to time saved—where the ship is kept longer than the contract time owing to weather. The clause is "Should any time be lost whilst steamer is in a loading berth owing to work being impossible through rain, snow or storm, or by steamer being ordered by the port authorities to 'break out of berth' to let other vessels in or out, the amount of actual time so lost during which it is impossible to work, owing to rain snow or storm, or by 'breaking out of berth' to be added to the loading time,"—I must take the time during which it is impossible to work owing to rain, snow or storm as a definition of "actual time so lost"—the actual time in which it is impossible to work, and in respect of which therefore part of my fifteen days is of no use, because it is impossible to work in it, and such time is to be added to the running days which the charterer has for loading on the assumption that he can work on them.

The opposite view is this: The proposition that should any time be lost the amount of actual time so lost is to be added to the loading time, means that the charterer must show that the time has been lost because of the rain, and if he had no cargo alongside, though he was not bound to have any cargo alongside, and though it was no breach of his contract not to have cargo alongside, if he has no cargo alongside when the rain occurs then the time is not so lost, because he has no cargo alongside. Yet if he happened to have cargo alongside, he could not have put it on board. Now I do not agree with that contention. I think the time saved and time lost both relate to the contract time within which the charterer has to load the ship. It is assumed there are so many days which the charterer has in which to load the ship; if he loads in less he has saved the ship time, but if he occupies more days in loading the ship he has lost the ship time, and if in the running days that the charterer has within which to load the ship there are so many days on which he cannot load the ship and on which it is impossible to load the ship, because of rain, those days are to be added to the days which by contract he has within which to load the ship. That is a short statement of the two points of view. The umpire has taken one view,

and the learned judge has taken the other. Using such knowledge as I have I agree with the umpire; and I believe my brothers do not.

Greer, L.J.—In this case I agree with the view taken by MacKinnon, J., on the facts stated by the umpire in his award. The case is one of first impression. I cannot gather from the authorities any guide as to what construction should be put upon this contract except from the general principles that are always adopted in construing contracts. I agree with my Lord that this is a contract to load in a fixed time. A little arithmetic is required to find out the fixed time, but when that has been calculated the fixed time is found to be fifteen days, thirteen hours. The charterer has got to load the ship in that time unless he can find in the terms of the charter-party any excuse for not loading in that time, or any provision that the period so calculated has been extended by the terms of the charter. The question arises under clause 4 of the contract, which is in these terms: "Should any time be lost whilst steamer is in a loading berth owing to work being impossible through rain, snow or storm, or by steamer being ordered by the port authorities to break out of berth' to let other vessels in or out, the amount of actual time so lost during which it is impossible to work, owing to rain, snow or storm, or by 'breaking out of berth' to be added to the loading time, but in no case shall the allowance for any or all of the foregoing circumstances exceed, in the aggregate, time amounting to three days." As I read the award, it was a finding that it was not established by the evidence that any cargo was available during the rainy periods; it was not a case of a continuous two days' rain, but of rainy periods happening at two different places amounting, in all, to two days. I ask myself whether under those circumstances it can be said that the charterer has brought himself within the words of the charter-party which entitle him to an extension of time. I think those words mean this: there are two propositions that the charterer has to prove in order to entitle him to that extension of time, and if he fails to prove either of them he fails to establish his right to an extension of time. He has to prove that work became impossible through rain, and that in consequence of that he lost time in loading; unless he proves both those circumstances he does not bring himself within the clause. He did prove that there were hours of time, amounting in all to two days, in which work was impossible through rain, but he did not prove that that resulted in any loss of time by him, because on the facts as found he was not there ready to utilise the time, and therefore, he cannot say that he has established that it was the impossibility of loading that caused him to lose that time.

The result of that is that if I am right in my view, which I hold with hesitation, as my Lord takes a different view, it follows that the charterer has not established any right under this charter-party to an extension of his days of loading, and that, therefore, the learned judge was right, and the umpire was wrong.

Romer, L.J.—It is a little embarrassing for me to have to cast the deciding vote on a question of construction of a document that is described by MacKinnon, J., as really almost indistinguishable from a charter-party, when Scrutton, L.J. and Greer, L.J., take diametrically opposite views upon that question. But unless, and I have no reason to suppose it is so, different principles of construction apply to such a document from those that are applied to the construction of any other document, I confess that I find myself unable to disagree with the view that has been expressed by MacKinnon, J., and by Greer, L.J.

The question is really a very short one, and it is this: Upon the facts found by the umpire, is it possible for these charterers to say that the two days to which the umpire refers in his award were lost owing to work being impossible through rain? The test of the question is this: Would that time have been lost if there had been no rain during those two days? The answer is obviously that the time would have been lost had those days been perfectly fine, because at the time that the rain was going on there was no cargo which could be loaded into the vessel. The learned umpire has not found as was suggested, I think, by counsel for the charterers, that the charterers failed to secure cargo alongside the vessel at those times owing to the rain. I am not surprised that there is no such finding, because it would amount to this, that the charterers refrained from ordering cargo to be present alongside the vessel at these particular times, because they foresaw that at these particular times it would be raining. It is possible, of course, that they are such fine weather prophets as that, though I doubt it; if they were, their proper place, I think, would be at the Meteorological Office. But inasmuch as it appears to be quite plain on the findings of fact, that had these times been fine instead of rainy, the time taken in loading the vessel would have been exactly the same, neither more nor less, the charterers have failed to establish that the time was lost owing to rain,

For these reasons I think the decision of MacKinnon, J. was right, and this appeal must be dismissed.

Appeal dismissed.

Solicitors for the charterers, *W.* and *W. Stocken.*
Solicitors for the shipowners, *Botterell* and *Roche.*

Friday, July 21, 1933.

(Before SCRUTTON, GREER, and ROMER, L.JJ.)

Ruby Steamship Corporation Limited v. Commercial Union Assurance Company. (*a*)

Insurance (marine)—Conflict of laws—Canadian assured — American broker — Instructed in United States—To effect insurance in England —Right of American broker to cancel policy— On ground of non-payment of premiums— Without assent of assured—Law applicable.

By English law, an underwriter acknowledging in a policy of marine insurance that the assured has paid the premiums, the policy cannot be cancelled by the insurance broker on the ground that he has not received the premiums from the assured, without the authority of the assured.

But where a Canadian assured instructs in the United States an American insurance broker to effect an insurance in England, which he must do through an English broker, the law applicable on this question of right of cancellation is that of the country where the relation of principal and agent is created—that of the United States. In such a case, the English broker, who is liable to the English underwriter

(*a*) Reported by C. G. MORAN Esq., Barrister-at-Law.

for the premium, cannot sue the assured, but looks to the American broker, who, in turn, looks to the assured for payment.

Dictum of Lindley, L.J. in Maspons v. Mildred (1882, 47 *L. T. Rep. at p.* 320 ; 9 *Q. B. Div. at p.* 539) *followed. See also Dicey's Conflict of Laws, 5th edit., sect.* 179.

Held, that the question in such a case was one of foreign law—here, that of New York State—and therefore of fact; the court accordingly found that the American broker could cancel such a policy on the ground that the assured had failed to supply him with the premium, with the assent of the underwriter, but without the assent of the assured who had failed to pay the premium.

APPEAL from a decision of Roche, J. The plaintiffs —a Nova Scotian shipping company—claimed payment under certain policies of marine insurance taken out with the defendants, English underwriters, in May and Sept., 1919, on the steamship *Hurona.* These policies Messrs. Johnson and Higgins, the plaintiffs' insurance brokers, a New York firm, had in Nov., 1919, purported to cancel with the assent of the defendant underwriters, on the ground of the failure by the plaintiffs to pay the premiums due under these policies. In Nov., 1919, Messrs. Johnson and Higgins had taken out fresh policies on the steamship *Hurona* before the total loss of that vessel on the 26th Nov., 1919, and payment having been made under the November policies, the plaintiffs shared in the distribution of the proceeds. The defendants pleaded (*a*) that the May and September policies were cancelled by the cancellation of Messrs. Johnson and Higgins; (*b*) that the plaintiffs had in fact themselves authorised the cancellation ; and (*c*) that on the assumption that the plaintiffs had not authorised the cancellation of these policies, by sharing in the distribution under the November policies the plaintiffs had ratified the cancellation of the May and September policies, and were now estopped from denying the validity of the cancellation. Roche, J. agreed with all these contentions and gave judgment for the defendants. The facts are very fully set out in the judgment of Scrutton, L.J.

The plaintiffs appealed.

Chappell, K.C. and *Cyril Miller* for the appellants.

Porter, K.C. and *David Davies* for the respondents.

Scrutton, L.J.—This is an appeal from a judgment of Roche, J. in favour of the defendants. The action is brought by the Ruby Steamship Corporation Limited, a Nova Scotian company, hereinafter called "Ruby," against the Commercial Union Assurance Company, whom I call the English underwriters. It is brought to recover under policies called the "May" and "September" policies a total loss on the steamer *Hurona*, which occurred on the 26th Nov., 1919, and is a test case for claims against a number of English underwriters. The main defence is that Ruby cannot recover against the underwriters, as the May and September policies were cancelled by Johnson and Higgins, the American brokers concerned in effecting the policies, for non-payment of premiums by Ruby, and that the cancellation was either with the express consent and authority of Ruby, or within the authority given to Johnson and Higgins by the law of New York State, in which they were employed. There are other points : whether Ruby was a party for whose benefit the policy was effected ; and whether Ruby had so taken benefit under "November policies," said to be substituted for the "May" and "September" policies, that Ruby could not now claim under the latter policies.

The case to some extent turns on conflict of evidence, and is made more difficult to decide because the writ was not issued till Nov., 1925, just before the Statute of Limitations was about to take effect, and the case did not come on for trial till the end of 1932, thirteen years after the material incidents occurred. Meanwhile, at least three proceedings connected with the case, with numerous appeals, had taken place in the United States. It is not surprising that the witnesses were very uncertain and sometimes extremely inaccurate in their recollection, and some of the material documents were not forthcoming.

An English company, the Cairn Line, were in 1919 ready to sell a steamer of theirs built in 1892 and therefore twenty-seven years old. The shipping boom after the War, which ultimately resulted in heavy losses to misguided speculators, and to a crop of "scuttling" cases in attempts to retrieve such losses (an incident which is fortunately absent in this case), led people to be ready to give the ridiculous price of some 150,000*l.* for a twenty-seven years old ship. We do not know the price which the Cairn Line got for their old friend, but we do know that in April, 1919, part of that price, $377,500, was still unpaid and secured by a first mortgage on the ship. We do not know with any certainty who was the original purchaser, as a firm of Williams Steamship Company, referred to hereafter as "Williams and Co.," had apparently a number of subordinate single-ship companies hoping to buy, and had not decided which should be the ultimate fortunate purchaser of the *Hurona.* Apparently about the 20th April, 1919, the *Hurona* was registered as a British ship in the name of Barnett, a vice-president of the Williams Company, and the Williams Company could control its future destiny. About the 22nd April, 1919, Williams and Co. instructed Johnson and Higgins, well-known American brokers, to procure English and American underwriting, and, a rate of 10*l.* per cent. on hull being agreed, underwriting a slip started on the 30th April, and a large amount was written in England, the defendants being the leading underwriter, by the 2nd May. At this time Ruby had no interest in the vessel.

It is necessary here to state the difference between English and American underwriting. In England by long practice the underwriter acknowledges in the policy, often contrary to the facts, that the assured has paid him the premium, and cannot thereafter claim for it on the assured. But by ancient fiction the underwriter is supposed to have lent the premium received to the broker, and can therefore reclaim it from the broker as money lent. If the premium is for a year's insurance, it is frequently by agreement payable by the broker in quarterly instalments. It naturally follows by English law that, the assured being supposed to have paid the premium, his contract with the underwriter cannot be cancelled by the broker without the authority of the assured, on the ground that he has not received the premium from the assured. It was so decided by the House of Lords in *Xenos* v. *Wickham* (1866, 2 Mar. Law. Cas. (O.S.) 537 ; 16 L. T. Rep. 800 ; L. Rep. 2 H. L. 296).

In the United States the position is different. In the case of an American assured on a policy underwritten by an American underwriter, through an American broker, there is no contractual liability of the broker to the underwriter for premium ; the latter looks to the assured. The

broker has no further duties after he has effected the policy. He cannot therefore cancel the policy, on the ground that the assured has not paid the underwriter the premium; that is no concern of the broker's.

But a different position arises when an American assured instructs in the United States an American broker to effect an insurance in England. The American broker must do this through an English broker, who presents the slip to the English underwriter. As the English broker is liable to the underwriter for the premium, and cannot sue the assured, he naturally looks to the American broker for the premium, who must look in turn to the assured. If the assured, in the case of a premium payable by instalments, does not pay the early instalments, the American broker, of course, desires to relieve himself of liability for the later instalments, and, if the underwriter will consent, to cancel the policy without the assured's consent and so free himself from further liability for premiums.

The employment of the American broker is in the United States to do an act there which will result in the underwriting of a policy in England. The questions then arise: (1) What law is applicable to the employment as between broker and employer? (2) When the relevant law is ascertained, what are its provisions as to the power of the broker, with the consent of the underwriter, to cancel the policy without the consent of the assured and so escape further liability from premiums?

As to the relevant law, I follow and agree with the dictum of Lindley, L.J., delivering the judgment of the Court of Appeal in *Maspons* v. *Mildred* (1882, 47 L. T. Rep. at p. 320; 9 Q. B. Div. at p. 539), that in considering the nature and extent of the authority given by a Spanish principal to a Spanish agent in Spain (Cuba) the Spanish law is to be taken into account. This principle was stated by Professor Dicey in his second edition of the Conflict of Laws—I am reading from sect. 179 in the fifth edition, it is under another rule in the second edition—"The agent's authority as between himself and his principal, is governed by the law with reference to which the agency is constituted, which is in general the law of the country where the relation of principal and agent is created," and this rule has been continued unchanged by later editors. To find the authority as between Johnson and Higgins, brokers, and their principals, Williams and Co. and (or) Ruby, I therefore look to the law of the State of New York, where the employment took place.

It is first necessary to state the facts. Between the 22nd April and the 30th April instructions were being given to Johnson and Higgins in New York by the then owners of the *Hurona* to effect insurance in England on hull to the extent of 47,422*l.* and on disbursements and expected earnings to the extent of 28,866*l.* It is not clear exactly who gave these instructions, probably some representative of Williams and Co., who at that time were managing the vessel under the authority of Barnett, the registered owner, and apparently on behalf of a Nova Scotian Company, the Convoy Steamship Company, who were expected to be owners. Ruby had at this time no interest in the *Hurona*, and on the 2nd May the interested parties were Cairn Line, mortgagees, and (or) Williams and Co., as may appear, bill for premiums to Williams and Co. On the 5th May, Ruby became interested under an agreement of that date. They were to buy from Barnett, registered owner, for a purchase price of $781,550, payable as to $25,000 by a deposit of $25,000, the source of which is not certain, and as to $225,000 out of the freights of the first voyage then about to commence, secured by a promise to pay of Richards and Co., who were to manage the vessel until the last instalment but one had been paid. The second instalment was for $273,750, payable with interest on the 23rd Aug., 1919, and the last instalment for $257,000, with interest payable on the 23rd Oct., 1919. Each of these instalments was to satisfy half of the sum due on mortgate to the Cairn line, and the balance to go to defray the purchase price to Barnett. For the last two instalments, $530,000 in all, the vendor had a second mortgage. The last two instalments were secured by notes from Ruby, in fact, split up to cover respectively the Cairn Line instalment, the vendor's instalment, and interest. The agreement then contained clause 8: "The purchaser agrees that the vendor shall keep the vessel insured for the benefit of the Cairn Line of Steamships Limited, the vendor and the purchaser, as their interest may appear, for a period of one year and until the full purchase price is paid, by full marine insurance and protection and indemnity insurance, and, if required by Cairn Line of Steamships Limited, war risk insurance, loss, if any, payable to the Cairn Line of Steamships Limited or the vendor, as their interest may appear, and the purchaser shall pay all premiums thereon, and if such premiums are not so paid, the amount thereof shall also be secured by the second mortgage above referred to."

It will be seen that the vendor was to keep the vessel insured for the benefit of the Cairn Line, the vendor and the purchaser, as their interest may appear, by "full marine insurance," but that the loss, if any, was payable to the Cairn Line or the vendor as their interest may appear, and the purchaser was to pay all premiums thereon. On the 14th May, Johnson and Higgins report to Williams and Co. that on their instructions the amount insured has been increased by some 6100*l.*, this addition with loss payable to Williams and Co., and that the total amount insured is $530,000. This, it will be noted, is the amount of the last two instalments of price for which the vendor had a second mortgage. The earlier amount was payable, as to the English policies on hull and disbursements, to the Cairn Line, as to the American policies to Barnett and (or) Williams and Co. The policies so far are spoken of as "the May policies."

Ruby got some information as to this, and not unnaturally thought their interests were not fully covered. Ruby therefore took out, through another broker, P.P.I. policies. Johnson and Higgins pointed out to them that they ran the risk of invalidating the May policies by this assurance, and Ruby thereupon transformed this insurance into an additional insurance through Johnson and Higgins, known as "the September policy." According to Becker's evidence, the September policies were only placed by Johnson and Higgins after an arrangement with Berry that Johnson and Higgins might cancel the policies, if premiums were not paid on the due date.

The position as to premiums was then as follows. On the May policies: Johnson and Higgins were liable to pay to Willis and Faber some $9000 quarterly on the 12th May, the 12th Aug., the 12th Nov., 1919, and the 12th Feb., 1920. On the September policy: Johnson and Higgins were liable to pay to Willis and Faber on a broken period from the 10th Sept. to the 12th Nov., 1919, $2686, and two instalments of $3959 on the 12th Nov., 1919, and the 12th Feb., 1920. The premiums on May policies were due on orders placed by Williams and Co., and Ruby had agreed

with Williams and Co. to pay them. The premiums on the September policy were due on orders placed by Ruby. In fact, on the May policies the April premiums were not paid to Johnson and Higgins, when due, by anybody; the August premiums were not paid. On the September policy the September instalment was not paid by Ruby. When the August instalment of purchase price was due, Ruby only paid the bills necessary to provide the first Cairn instalment, and did not pay the bills covering the rest of the payment due to Williams and Co. As Johnson and Higgins were also liable to Willis Faber in the future for the instalments due on the 12th Nov., 1919, and the 12th Feb., 1920, they not unnaturally became anxious and put pressure on Ruby and Williams and Co. by threats to cancel the insurance. Ruby succeeded in procuring a loan from the Equitable Trust, which enabled Ruby and Williams and Co. to discharge the instalment due to the Cairn Line on the 23rd Oct., and the premiums due up to the 10th Sept., 1919. The latter were paid as to the May policies by Williams and Co. on the 24th Oct. to Johnson and Higgins, as to the September policy, on the 24th Oct. by cheque from Ruby. But Johnson and Higgins were naturally anxious about the payment of the instalments of premium on the May and September policies due on the 12th Nov., 1919. They obtained from Williams and Co. on the 24th Oct. a letter: "We further agree that in the event that the proportionate premiums hereinbefore mentioned, due as of the 12th Nov., 1919, and the 12th Feb., 1920, are not paid on the said mentioned dates, we will surrender to you, for cancellation, policies enumerated as above, endorsed by all of the payees and parties at interest mentioned therein, as follows: 'Losses, and returns, if any, payable to Johnson and Higgins,'" and they allege that Ruby, by the Moultons, father and son, and Mr. Berry, all the shareholders, also assented to such future cancellation in respect of non-payment. Mr. Berry had already assented to this on the 29th Aug. The 12th Nov. came when another instalment of the premiums on the May and September policies was due. It was not paid, and Johnson and Higgins, at the request of Williams and Co., and with the consent of the English underwriters, cancelled the May and September policies for non-payment of premiums. They warned Ruby they were going to take this step if the premiums were not paid, on the 7th Nov., and told Ruby they had cancelled on the 16th Nov. Ruby made no protest or payment.

Then came the tragic event that the *Hurona* was lost in the Mediterranean on the 26th Nov. At Williams's request Johnson and Higgins had effected through Willis Faber policies with English underwriters, including the defendants, to cover Williams and Co.'s interest in the *Hurona*: "Loss, if any, payable to the Williams Company." On the 27th Nov. came the news of the loss of the *Hurona*, and Ruby, who had been told of the cancelling of the May and September policies, did not know what to do. On the 29th Nov. they claimed on Barnett, their vendor, and on Johnson and Higgins. On the 31st Dec. they "formally withdrew" their claim, and on the 4th Feb. they "cancelled their release," *i.e.*, the document of the 31st Dec. They were apparently not clear what effect taking any benefit under the "November policies" would have on any objection of theirs to the cancellation of the "May and September policies." They attempted to make an agreement, set out at pages 145a and 145b of the correspondence, whereby the policy moneys then being collected under the "November policies" would be used to discharge certain debts for which Ruby were liable. As appears from the documents, these policy moneys were ultimately used to discharge the $250,000 lent by the Equitable Trust, for which Ruby were liable and for which the Trust had a charge on the ship, bills for purchase price for which Ruby were liable, and crew's wages. Litigation of various sorts went on in the United States. Ruby sued the American underwriters on the ground that the American policies, which had special provisions about cancelling, were not properly cancelled, and succeeded. Ruby were defendants in an action brought by Williams and Co. for balance of accounts in respect of the *Hurona*, and counter-claimed for sums due to them. This action ultimately collapsed for want of funds on either side. Ruby sued Johnson and Higgins for damages for wrongful cancellation of the May and September policies. This claim of Ruby was decided against them by two Federal Courts of the United States, and an attempt to get the decision reversed or quashed by writ of *certiorari* to the Supreme Court of the United States failed. The English underwriters had paid in full on their "November policies," which they had written in substitution for the "May and September policies," and which, of course, they would not have written but for their belief that the original policies were cancelled. Lastly, just before the Statute of Limitations would have taken effect the present action was started by Ruby against the English underwriters, based on the allegation that the "May and September policies" had never been cancelled so as to bind Ruby.

The defendants' chief defence is that under the circumstances, by the law of New York, Johnson and Higgins had power to relieve themselves from further personal liability for premiums which Ruby would not pay, by cancelling the policy with the assent of the underwriters, but without the assent of Ruby, who had not paid the premiums. This is a question of New York law and therefore of fact. The best evidence of the fact, in my opinion, is that Ruby has failed in two Federal Courts in an action against Johnson and Higgins for wrongful cancellation of these policies, and that the Supreme Court has declined to interfere with this decision. I decline to sit in an appeal from American courts on American law except in a very clear case. In addition, we have evidence from two American lawyers, one an ex-judge of the Supreme Court, in favour of the defendants, and one in favour of Ruby. I understand the result of the evidence to be that the courts of the United States are readier than the English to relieve one party to a contract of his obligations, when the other party has broken some of his obligations, particularly when the party asking for relief will be placed under onerous obligations to third parties, against which he will get no effective protection unless he can help himself by getting rid of those obligations. I agree with the view of Roche, J. that the relevant law, the law of New York, justified Johnson and Higgins in cancelling the policies, and that the English underwriters could accept cancellation from Johnson and Higgins for non-payment of premiums by the assured without being liable to Ruby, the assured.

It is a collateral defence that Ruby in fact assented to the cancellation by the brokers of the policies if Ruby did not pay the premiums. Roche, J. has found that those representing Ruby did so assent when the September policies were placed, and on or about the time of the meeting of the 24th Oct., when the premiums then long overdue were paid up to date and warning was given that prompt cancellation would follow further

default. The position of Williams and Co. is made clear by the letter of the 24th Oct. That letter represented the result of an oral agreement with Williams and Co. in a small room in which Mr. Becker, of Johnson and Higgins, was for a quarter of an hour discussing the matter with Williams and Co., the two Moultons and Berry, all the shareholders in Ruby, being present. [His Lordship then reviewed the evidence of those at this meeting and continued.] I agree with the view of Roche, J. on this point.

Failure on these two points defeats the plaintiffs, but, in addition, I am of opinion that their action in taking benefits under the November policies, which were substitutes for the May and September policies, prevents them from claiming under the May and September policies. The November policies were only written by the English underwriters in substitution for the May and September policies and in the belief that the latter were validly cancelled. The English underwriters cannot be liable both under the May, September and the November policies. An election to claim, followed by taking benefits under one set of policies, must prevent claims on the other. I abstain from expressing a final opinion on whether Ruby was ever a person insured under the May policies. The English decisions of *Irving* v. *Richardson* (1831, 2 B. and Ad. 193), *Watson* v. *Swann* (1862, 11 C. B. N. S. 756), and *Boston Fruit Company* v. *British and Foreign Marine Insurance Company* (10 Asp. Mar. Law Cas. 260; 94 L. T. Rep. 806; (1906) A. C. 336) establish that the point to be looked for is the intention at the time of effecting the insurance, and that is the intention of the principal at the time he instructs the insurance to be effected, not of the broker. It looks very much as if Williams and Co., whatever their contractual obligation to Ruby, at the time they gave instructions intended to insure for the two mortgagees, Cairns and Barnett, in $530,000, the amount of the two mortgages. But the matter is very complicated, and with three reasons for deciding against the plaintiffs, I need not embark on the consideration of a difficult fourth point. Ruby may have claims against Williams and Co., but has not chosen to fight them out.

I agree substantially with the judgment of Roche, J., and am of opinion that the appeal should be dismissed with costs.

Romer L.J. asks me to say that he agrees with the judgment I have just delivered.

Greer, L.J.—I have had the opportunity of carefully reading the judgment of Scrutton, L.J. I agree that this appeal should be dismissed for the reasons stated by Scrutton, L.J., and I do not find myself in a position to add anything that would be useful in this case.

Appeal dismissed.

Solicitors for the appellants, *Middleton, Lewis, and Clarke.*

Solicitors for the respondents, *Parker, Garrett, and Co.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Monday, July 3, 1933.

(Before BRANSON, J.)

Grain Union Company, S/A Antwerp v. A/S Hans Larsen, Aalborg. (*a*)

Sale of goods—Shipment from foreign port—Notice of appropriation—Mistake.

A contract for the sale of goods to be shipped from a foreign port provided that notice of appropriation, setting out inter alia *the name of the vessel in which the goods were shipped, should be given by the seller to the buyer within a specified time, and that such appropriation, when once made, should be irrevocable. The goods were in fact shipped per steamship* Triton, *but owing to a clerical error a notice of appropriation was given by the seller's agent to the buyer in which it was stated that the goods had been shipped per steamship* Iris. *The buyers refused to accept delivery.*

Held, that the appropriation of the Iris *was valid and irrevocable, and that the buyers were entitled to refuse delivery of goods in any other ship.*

SPECIAL case stated by an arbitrator. By a contract dated the 23rd Nov. 1932 the sellers (appellants) sold to the buyers (respondents) a parcel of 500 tons of maize to be shipped during November to Aalborg.

The contract provided that notice of appropriation, with ship's name, date of bills of lading, and approximate quantity loaded, should be mailed within three days or telegraphed within seven days from the date of the bills of lading. It further provided that a valid notice of appropriation, when once given, should not be withdrawn, and that all notices should be deemed to be under reserve for errors or delays in telegraphic transmission.

On the 9th Nov. 1932 the shippers at Braila telegraphed to the sellers as follows: "Per steamship *Triton* bills of lading from Braila to Aalborg one bill of lading 510 tons . . . loading finished to-day, vessel goes to Constanza to complete." That telegram was received by the sellers on the 10th Nov., and on the same day they wrote to the brokers: "Following advice received from our sellers, we beg to notify you under usual reserves and subject to rectification, that the steamer *Triton* or its more correct name bill of lading 9.11.32 has loaded about 510 tons maize in total execution of this contract and confirm to you our telegram of this date." The telegram there referred to read as follows: "Appropriate usual reserve total fulfilment contract Larsen, 23rd Sept., 510 tons maize November shipment . . . per steamer *Iris* B/L 9th Nov. . . ."

The maize had in fact been shipped in the *Triton*, and the name *Iris* was inserted in the telegram through the error of a clerk in the sellers' office. On receipt of the telegram the brokers wired to the buyers that the maize had been shipped per steamship *Iris*. On discovering the mistake, the sellers at once advised the brokers, who forwarded to the buyers the letter of appropriation of the 10th Nov. above set out, and stated that the correct name of

(*a*) Reported by V. R. ARONSON, Esq., Barrister-at-Law.

the ship was *Triton*. The buyers refused the appropriation on the ground that the *Iris* had aleady been appropriated.

A ship named *Iris* had in fact been loaded at Braila in November, but she left that port some days before the *Triton*. The question for the court was whether the buyers were entitled to refuse the appropriation of the *Triton* on the ground that an irrevocable appropriation of the *Iris* had already been made.

Willink for the sellers.

Dickinson, K.C. and *McNair* for the buyers.

Branson, J.—This is an appeal by way of case stated from an award made by the Appeal Committee of the London Corn Trade Association, dismissing an appeal by the Grain Union Company, S/A Antwerp, against an award in favour of A/S Hans Larsen, Aalborg. The dispute arose out of a contract made on the London Corn Trade Association form No. 52 and dated the 23rd Sept. 1932. Under that contract the Grain Union Company sold to Hans Larsen, through Messrs. Krusoe and Co., of Copenhagen, certain maize, to be shipped from a port or ports on the Danube, or Bulgarian ports, or Roumanian ports on the Black Sea, and so forth, bill of lading to be dated when the goods were actually on board, the quantity to be about 500 tons, and the price to be 3 florins and 85 cents Dutch currency per 100 kilos shipped.

The contract was subject to certain conditions and rules, the material one of which is No. 1, which deals with notice of appropriation. Under it the notice of appropriation, with the ship's name, date of bill of lading and approximate quantity loaded, is to be mailed within three days or telegraphed within seven days from the date of the bill of lading by the shipper of the grain tendered under the contract direct to the buyer; and that is to be passed on by the buyer and by each subsequent seller within one business day from receipt; notices of appropriation received after the three or seven days, as the case may be, are to be passed on by telegram if the seller and buyer do not reside in the same country. All notices under this clause given by telegram are to be confirmed by letter. Then it provides that on demand the buyer is to give to the seller a receipt for the notice of appropriation. The clause goes on to provide as follows: "A valid notice of appropriation when once given shall not be withdrawn." Then later it says: "A notice or tender to the broker or agent shall be deemed a notice or tender under this contract." Finally it says: "All notices under this clause shall be deemed to be under reserve for errors or delay in telegraphic transmission."

That being the material clause of the contract, I turn to the facts of the case. On the 10th Nov. 1932, the Grain Union received a telegram from Braila, saying: "Per steamship *Triton* bill of lading from Braila to Aalborg one bill of lading 510 tons, one bill of lading 609 tons, 9th Nov.: loading finished to-day, vessel goes to Constanza to complete."

Upon receipt of that telegram, the Grain Union wrote a letter to the buyers, A/S Hans Larsen, in which they said that, subject to the usual reserves and subject to rectification "the steamer *Triton*, or its more correct name, bill of lading 9.11.32, has loaded about 510 tons maize in total execution of the above-mentioned contract and confirm to you our telegram of this date."

The telegram of that date, owing to a mistake of a shipping clerk, instead of using the word "Triton" as the name of the ship, used the word "Iris," and they sent to Messrs. Krusoe, of Copenhagen, a telegram in the following words: "Appropriate usual reserves total fulfilment of contract Larsen, 23rd Sept., 570 tons maize November shipment. Appropriate also part fulfilment of contract Aalborg Foderstofimport, 28th Sept. 609 tons maize November shipment both per steamer *Iris* bill of lading 9th November."

Upon receipt of that telegram, Messrs. Krusoe took it as an authority or direction to forward the information to the buyers, and on the 11th Nov. they telegraphed to A/S Hans Larsen: "Contract 23/9 under usual reserves 510 tons maize steamer *Iris* bill of lading 9/11 telegraph modus of payment."

That telegram they confirmed by a letter of the same day, also addressed to A/S Hans Larsen. The letter of the 10th Nov., addressed by the Grain Union to Hans Larsen was not delivered until the 14th Nov. By that time the Grain Union had discovered that they had made the mistake of naming the *Iris* in their telegram to Messrs. Krusoe instead of the *Triton*. Communications were then made over the telephone, in which the Grain Union tried to put themselves right with Messrs. Krusoe, and Messrs. Krusoe tried to put the Grain Union right with A/S Hans Larsen. They, however, for reasons best known to themselves, determined to reject the cargo, relying upon the clause in the contract that "A valid notice of appropriation when once given shall not be withdrawn." The parties subsequently agreed that A/S Hans Larsen should accept the grain which came home by the *Triton* at a lower price than the contract price, and that they should arbitrate about the difference between that price and the contract price, and hence these proceedings arose.

The Appeal Committee have found the facts, I think, as I have stated them, and they have found also that the letter of the 10th Nov. was sent not direct to the purchasers but to Messrs. Krusoe, who were the sellers' agents. That finding of fact, that Messrs. Krusoe were the sellers' agents, is much relied upon by the respondents in this case. The view taken by the Appeal Committee was that by their telegram of the 10th Nov. the Grain Union authorized Messrs. Krusoe as their agents to give notice of appropriation to the buyers, and that that notice, which was given by telegram passing from Messrs. Krusoe to A/S Hans Larsen on the 11th Nov. and confirmed by letter from Messrs. Krusoe to A/S Hans Larsen of the 11th Nov., constituted a valid appropriation which cannot be withdrawn.

Unless it can be shown that that was not a valid notice of appropriation, it seems to me that the Appeal Committee were perfectly right. It is suggested that it was not a valid notice of appropriation because, as Mr. Willink contends, in order to be a valid notice there must in fact have been an appropriation and the notice must represent what that appropriation in fact was. He says that appropriation is a thing which takes place in the mind of the individual who has to appropriate, and that a notice of it, in order to be valid, must correctly reproduce the effect upon the mind of him who has appropriated. I do not think this contract means that at all. It seems to me that a notice which contains all the essentials, the ship's name, the date of the bill of lading and the approximate quantity of the goods on board, if all those three elements are in conformity with the contract, is a valid notice of appropriation, subject only to this, that the appropriation clause in the contract contains a provision that all notices under the clause are to be deemed to be made under reserve of errors or delays in telegraphic transmission.

If it could be shown here that the name "Iris" had got into the notice by reason of any error in telegraphic transmission, I should have been prepared to hold that the notice was not a valid notice. But it is found as a fact, and there really is no contest about the matter, that the mistake in the telegram, which resulted in the name "Iris" being telegraphed instead of "Triton," was not a mistake of telegraphic transmission; that is to say, it was not a mistake made by those who had to do with the transmission of the message handed in. The message was transmitted as it was received by the telegraph office. The mistake was a mistake of him who drafted the message. Such a mistake is not provided for, and the burden of such a mistake must fall upon the shoulders of the maker of it, or his principal, if the maker is an employee.

In the circumstances therefore, I think it is plain that the decision of the Appeal Committee was right, and this appeal must be dismissed.

Solicitors for the appellants, *Richards, Butler Stokes,* and *Woodham Smith.*

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

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Thursday, July 27, 1933.

(Before LANGTON, J. assisted by Trinity Masters.)

The Lady Belle. (a)

Collision—"Crossing" rule—Failure of "give-way" vessel to keep out of way—Failure of "stand-on" vessel to take any action—Regulations for Preventing Collisions at Sea, art. 21, *note.*

Two steam vessels, the M. *and the* L. B., *were on crossing courses so as to involve risk of collision. The* M. *had the* L. B. *on her starboard side, and it was, therefore, her duty under the Sea Rules to keep out of the way of the* L. B. *Owing to bad look-out the* M. *failed to take any action to keep out of the way of the* L. B. *The* L. B. *kept her course and speed in accordance with art.* 21, *but she failed to take any action under the note to art.* 21, *which provides that when the stand-on vessel "finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision." At the trial the plaintiffs, the owners of the* M., *admitted that the* M. *was partly to blame and called no evidence. They relied upon the statement in the preliminary act filed on behalf of the owners of the* L. B., *that the only measures taken by the* L. B. *to avoid the collision were to keep her course and speed, as evidence of negligence on the part of the* L. B. *The plaintiffs further contended that the* L. B. *should have attempted to attract the attention of those on the* M. *by sounding a warning blast or toots.*

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

Held, (1) *that such statements in the preliminary act had the highest evidential value and could rightly be used as admissions against the parties making them* (The Seacombe, 12 *Asp. Mar. Law Cas.* 142; 106 *L. T. Rep.* 246; (1912) *P.* 21, *followed*); (2) *that the* L. B. *was partly to blame for failing to take any action under the note to art.* 21, *but that she was not to blame for not attempting to attract the attention of those on board the* M. *by sounding any warning blast or toots, it not being the practice of seamen to do so, and such warning blast or toots not being recognised by the regulations;* (3) *blame should be apportioned as to three-fourths to the* M. *and one-fourth to the* L. B.

DAMAGE ACTION.

The plaintiffs, owners of the steamship *Mona*, claimed damages from the defendants, owners of the steamship *Lady Belle*, in respect of a collision which took place in the entrance to the Bristol Channel some ten to twelve miles to the southward and westward of the Smalls Light on the early morning of the 22nd April, 1933.

The facts and contentions of counsel fully appear from the judgment of the learned judge.

Willmer for the plaintiffs.

Hayward for the defendants.

Langton, J.—This is an unusual case, and it has come before the court in unusual circumstances. The plaintiffs' ship, the *Mona*, was the giving-way ship in a crossing case. The defendants' vessel, the *Lady Belle*, was the stand-on ship. The *Mona* was a vessel of no great size—654 tons gross and 186ft. in length—and the *Lady Belle* was smaller still—a vessel of 331 tons gross and 140ft. in length. The plaintiffs pleaded a somewhat elaborate story as their description of how this collision came to pass; the defendants pleaded an engagingly simple story. When the plaintiffs came to examine their position before the hearing they came to the conclusion that their case, as pleaded, could not be supported, and they, therefore, took the course of coming into court without any evidence at all, relying upon certain admissions in the preliminary act of the defendants and the logs of the defendants' vessel. That is not the way in which I like to try collision cases, and an argument arose as to whether the plaintiffs had in fact made out a *primâ facie* case. Mr. Hayward contended that the statements in the preliminary act were not in themselves evidence. As to that, I have no doubt that they are. I think, as Fletcher Moulton, L.J. pointed out in *The Seacombe* (12 Asp. Mar. Law Cas. 142; 106 L. T. Rep. 246; (1912) P. 21, 59), that such statements have the highest evidential value, are admissions, and can rightly be used by the other side as admissions against the parties making them. The point was not perhaps of great importance, because the same admissions are in the logs, and no one disputes for a moment that the logs are evidence.

Having said that I do not like trying collision cases in this way, it is only fair to the plaintiffs to say that I do not think, in this particular case, that their method of dealing with the matter has really either embarrassed the court or made any difference to the parties, because the defendants, when they came to put forward their case, put into the witness-box a witness who gave most transparently truthful evidence, and left the question as to what were the real facts of the case

beyond any possible doubt. But it is seldom that a single witness only can leave the court in no doubt, and it is for that reason that I say that if it is desired that the court should do justice between parties in this class of case it is highly desirable that at least one witness should be produced by each side to give the court a real opportunity of examining and understanding the respective cases.

I will now deal with the facts. The *Mona* was the giving-way vessel, with the *Lady Belle* upon her starboard hand. It is not necessary to state the matter with more precision than that. I got further precision from the plaintiffs themselves, because, calling no witnesses, their admission was that the *Lady Belle* was at all material times substantially upon their starboard hand. The *Lady Belle's* second officer, Mr. Flynn, was called before me, and gave the clearest evidence that the *Mona* was approaching her for a distance of something like four miles on a perfectly steady course on the port hand of the *Lady Belle*. In circumstances of that sort it is unique in my experience to hear from a perfectly credible witness, and the only witness called before me on either side, that neither vessel took any steps whatever to keep out of the way. That is the plain, unvarnished truth that emerged from Mr. Flynn. Mr. Flynn said, not once but over and over again, that he neither took steps nor considered taking steps. It did not occur to him, he said, even to give blasts on the whistle to wake up the *Mona*. "I was depending on her," said Mr. Flynn, "to go under my stern," and he summed up the matter in two sentences: "I think there is no use in having a rule of the road if a man does not abide by it. I thought I had done the best thing I could, to keep my course and speed." Thus the matter is beyond all possible dispute, and the only question for the court is: "What is the responsibility of the *Lady Belle* in these circumstances; and if, as I think, there is some responsibility upon her, what is the degree of her culpability as compared with the culpability of the *Mona?*"

In fighting the case in this defensive fashion it occasionally happens that the fault of the person so defending becomes a little obscure. So much time is spent in examining the exact degree of the fault of the vessel which is claimed to be without fault that the one which has admitted faults is, perhaps, a little apt to get off lightly. Now on the 17th July, a letter was written by the plaintiffs' solicitors to the defendants' solicitors in these terms: "Please take note that we formally admit that the *Mona* is partly in fault for the collision, and that in order to dispose of the case without incurring further expense, our clients would be prepared to settle on the terms of the *Mona* being two-thirds in fault and the *Lady Belle* one-third." They go on to say they do not intend to call any evidence at the trial. I am not for one moment questioning the propriety of that course. It has the merit of frankness, and has relieved the witnesses from the *Mona* from coming into court to tell a story which could hardly be accurate, and therefore I have no word of criticism upon the course which has been adopted in this particular case.

I have now to turn to the question of the degree of blame. The offending of the *Mona* must not be in any way overlooked. It is glaring, and it is high. Mr. Willmer stated it as being in effect a bad look-out. He argued that the court must not allow itself to be led away by the eloquence of the other side in enumerating or tabulating the number of regulations which have in fact been broken; they could be condensed, he said, into a simple phrase of bad look-out. I do not think it makes any difference whether one looks at it in the compendious phrase of bad look-out or in the expanded view of the various articles of the Collision Regulations which were undoubtedly broken in consequence of the bad look-out. The culpability is the same however it may be viewed. But it is a striking and useful illustration of the consequences of this particularly bad look-out that it should have resulted in a vessel which has the imperative duty of giving way doing nothing in discharge of that duty and breaking at least two further regulations as well. The *Mona* crossed ahead when she had a duty not to cross ahead; she did not put her engines astern or reduce her way when she had a duty to do that; so it is, I think, useful to expand that compendious phrase of bad look-out by examining what exactly are in this case the results of that bad look-out. For the *Mona* no shadow of excuse is offered. She saw nothing; she did nothing—that is what I am to infer from the fact that she had no witnesses here—and she came into collision with a vessel as to whom she had the clear duty to give way and keep out of the way.

As regards the *Lady Belle* the position is very different. She is a very small ship, and the *Mona* very little larger. The evidence from the *Lady Belle* is clear, and has placed beyond question the fact that she also did exactly nothing towards avoiding this collision other than the observation of her first duty, which was to keep her course and speed and keeping—and I have borne this in mind—a good look-out in contradistinction to the bad look-out which was being kept on the *Mona*.

The whole matter really lies in the small compass of art. 21 and the note to art. 21. The duty on the *Lady Belle* of keeping her course and speed has been laid down in that article, and no court has ever departed in any way from the standard that is set by these very simple words. In fact, everything that I have ever read as falling from the Bench in this matter has only emphasised the importance of this duty. But the note puts upon her a second duty, and that is that when she finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision.

Now it is not surprising that that note has given rise to a vast amount of argument in a large number of cases. It is obvious that it is difficult to say with any precision what is the moment at which the stand-on vessel, having this imperative duty of keeping her course and speed, is to depart from her course and speed and take the best action to avert collision. It has been said, with great justice and propriety, that she is to be judged very leniently in this matter in fixing the moment at which, having one duty, she should depart from it to another. Obviously it would be most unfair to judge her too harshly by saying that she failed by a fraction of a second to judge correctly the point at which she should make this departure. It is much easier after the event to say with accuracy what is the right time, and one has to bear in mind that, for a variety of reasons, to a person on the bridge the point may seem very different, and certainly much more difficult. But, so far as I am aware, there is no case in which, without any extraneous circumstances to mitigate the fact, a stand-on vessel, which in clear weather has done nothing at all to avoid a collision which she saw becoming more and more imminent, has been wholly excused. Indeed, to excuse her in those circumstances is to my mind to make nugatory

the provisions of the note to art. 21. Lord Gorell, in *The Ranza* (79 L. J. (P) 21, 22), in saying, as I have been saying to-day, that the second duty is not to be severely pressed, winds up his helpful and clear exposition in the matter in these words: "Therefore it resolves itself into this: that he must wait until the other ship cannot avoid the collision, and then he must act." That, I think, is the plain meaning of the note. He must do something. The duty of the stand-on ship is not to keep standing on until she is actually in collision and say, "I obeyed art. 21." That is obeying art. 21 and disobeying the note. Mr. Flynn has come here, and with exemplary candour has not attempted to suggest that he did, or that he even considered doing, anything else. He has read art. 21 as if there were no note to it at all: as if there never was a duty upon a stand-on vessel in any circumstances to take any kind of action except that laid down by the first part of the rule. That puts it beyond dispute that the *Lady Belle* must bear some portion of the blame for the collision.

Mr. Willmer, arguing on behalf of the plaintiffs, urged upon me that one part of the offending of the *Lady Belle* was that she did not blow any form of warning signal—either a long blast or short toots as we have often heard of in this court as being blown to draw the attention of a vessel that is apparently neglecting her duty. I wish to say nothing at all against the propriety of so doing in a number of circumstances—and even in this case I think it would have been a wise thing to do for the *Lady Belle* to have blown a whistle signal at one period or another to try to awaken those on board the *Mona* to a proper sense of their duty. But at Mr. Willmer's invitation I have put the matter to the Elder Brethren, and I have asked them whether they feel that this is a case in which they would condemn the *Lady Belle* for not blowing a signal either of a prolonged blast or a series of short blasts, and whether they would put it as high as Mr. Willmer wishes to put it, that it is unseamanlike not to do it. Mr. Willmer put it on the ground that it is the ordinary practice of seamen to do this. I have put all these matters to the Elder Brethren, and they do not agree with Mr. Willmer. They do not agree that it is the ordinary practice of seamen to blow either long blasts or short blasts, or toots, or any other form of blast to waken apparently sleeping souls upon the other vessel. In certain circumstances it may be a wise thing to do, and they agree with me in the circumstances of this particular case, it certainly would not have been an unwise thing to do, but they tell me that there are many seamen who hold strongly to the view that the blowing of a long blast in unauthorised circumstances is a most unwise thing to do. It cannot, therefore, be said that it is the ordinary practice of seamen to do anything such as that for which Mr. Willmer contended. Therefore, I want it to be quite clear that I am not condemning the *Lady Belle* for any form of negligence in not blowing a signal which is not prescribed in any of the regulations. What I am condemning her for is that she stood on into apparent, imminent visible danger and did nothing at all to help to avoid it. Mr. Hayward satisfied me that the time at which the circumstances detailed in the note to art. 21 had arisen must have been very late, and Mr. Willmer, with his usual candour, did not attempt to dispute that clear fact. I think it would have come too late. These were small vessels, and quite a small action on the part of the giving-way vessel at a comparatively late stage—comparatively when we think of ships of a larger size—would have avoided this collision. Equally, quite a small action—and particularly the action of taking off her way—on the part of the stand-on vessel, though coming at a late stage, would have had that effect. One cannot be blind to the fact that those on the *Lady Belle* had their eyes open to what was going on, whereas those on board the *Mona* had certainly not got their attention fixed upon what was happening; but the *Lady Belle*, with every opportunity of taking some action and every knowledge that some action was urgently required, did nothing at all.

Mr. Hayward argued that a vessel of this size cannot be blamed for not taking engine action in an emergency, because she has not got an engineer standing by to take that action. There must, however, be on every vessel some proper method of calling the engineer's attention, and, as Mr. Willmer pointed out, they had ample leisure in which to call the engineer's attention to the fact that some kind of action might soon be called for. In these circumstances the *Lady Belle* is clearly to blame. She is not to blame to anything like the degree the *Mona* is in fault, but she is definitely to blame and must pay her proportion of the damage, and the proportions at which I have arrived is the *Mona* three-fourths and the *Lady Belle* one-fourth. The defendants will have costs down to the 17th July, when the offer of the *Mona* was made; no costs after that date.

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

Solicitors for the defendants, *W.* and *W. Stocken.*

Thursday, Oct. 5, 1933.

(Before Sir BOYD MERRIMAN, P. and BATESON, J.)

The Champion. (*a*)

ON APPEAL FROM THE MAYOR'S AND CITY OF LONDON COURT.

County court — Jurisdiction — Collision between ship and a canal barge in tow of a tug—"Ship" or "vessel"—County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *s.* 3—*County Courts Admiralty Jurisdiction Amendment Act*, 1869 (32 & 33 *Vict. c.* 51), *s.* 4; *Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *s.* 2.

By sect. 2 *of the Admiralty Court Act*, 1861, *it is provided that the expression "ship" shall include "any description of vessel not propelled by oars." The County Courts Admiralty Jurisdiction Act*, 1868, *s.* 3, *as amended by the County Courts Admiralty Jurisdiction Act*, 1869, *s.* 4, *provides that a county court shall have Admiralty jurisdiction (within certain limits) to try any claim for damage by collision and all claims for damage to ships whether by collision or otherwise.*

The plaintiffs began proceedings in the Admiralty jurisdiction of the Mayor's and City of London Court to recover damages for injuries to their dumb barge J. received in a collision with the defendant's tug C. The J. was a canal barge,

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

77ft. 8in. in length, fitted with rowing chocks and a rudder, and at the time of the collision was in tow of the steam tug W.

The defendants moved to set aside the proceedings on the ground that the J. *not being a ship within the meaning of the Admiralty Court Act,* 1861, *the county court had no jurisdiction to entertain an Admiralty action in respect of the claim. The county court judge held that the* J., *although a vessel which was otherwise not a " ship " within the meaning of the section, was at the time of collision not being propelled by oars but by the tug, and that she was accordingly a " ship," and that the county court had jurisdiction to entertain the action.*

Held, that the effect of the above statutes was to confer upon county courts Admiralty jurisdiction (subject to limitation as to amount) in respect of all cases of damage by collision in which the Court of Admiralty had jurisdiction, and that a collision between a ship and a vessel propelled by oars, being within the jurisdiction of the Court of Admiralty, was also within the Admiralty jurisdiction of the county court. Held, further, by Bateson, J. (Sir Boyd Merriman, P. dissenting), that the county court judge was right in holding that whilst the J. *was being towed she was in fact a ship within the meaning of sect.* 2 *of the Admiralty Court Act,* 1861.

APPEAL by the defendants from a decision of the judge of the Mayor's and City of London Court (Judge Shewell Cooper).

The appellants were the owners of the steam tug *Champion.* The plaintiffs, who were the owners of the dumb barge *James*, commenced proceedings *in rem* in the Mayor's and City of London Court, claiming damages in respect of injury received by the *James* in a collision between the *James* and the *Champion* for which it was alleged that those in charge of the *Champion* were to blame. The *James* was at the time of the collision in tow of the steam tug *Weybridge.* The *James* was a canal barge, 77ft. 8in. in length, fitted with rowing chocks and a rudder. The defendants took out a summons to set aside the proceedings on the ground that the *James* was not a " ship " within the meaning of sect. 2 of the Admiralty Court Act, 1861, and that there was therefore no jurisdiction in the county court to entertain proceedings *in rem.*

By sect. 2 of the Admiralty Court Act, 1861 (24 Vict. c. 10), it is provided :

" 2. In the interpretation, and for the purposes of this Act (if not inconsistent with the context or subject) the following terms shall have the respective meanings hereafter assigned to them—that is to say, ' ship ' shall include any description of vessel used in navigation not propelled by oars. . . ."

By sect. 3 of the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), it is provided as follows :

" 3. Any county court having Admiralty jurisdiction shall have jurisdiction, and all powers and authorities relating thereto, to try and determine, subject and according to the provisions of this Act, the following causes (in this Act referred to as Admiralty causes) : . . . (3) As to any claim for damage to cargo, or damage by collision—any cause in which the amount claimed does not exceed three hundred pounds."

By sect. 4 of the County Courts Admiralty Jurisdiction Act, 1869 (32 & 33 Vict. c. 51), it is provided as follows :

" 4. The third section of the County Courts Admiralty Jurisdiction Act, 1868, shall extend and apply to all claims for damage to ships whether by collision or otherwise. . . ."

The learned judge of the Mayor's and City of London Court dismissed the summons, holding that the *James*, whilst being towed by the *Weybridge*, was a " ship " within the meaning of the above statute. The defendants appealed.

Hayward for the defendants.—The *James* was not a " ship " within the meaning of the relevant statutes. She was normally propelled by oars. Such a craft has always been held not to be a " ship." In *The Harlow* (15 Asp. Mar. Law Cas. 498 ; 126 L. T. Rep. 763 ; (1922) P. 175) the barges there in question were held to be ships upon the ground that they were not by construction or usage propelled by oars, as appears from the report in 15 Asp. Mar. Law Cas. and 126 L. T. Rep. It makes no difference that the *James* was being towed at the material time. The statute contemplates the nature and construction of the craft ; it was not intended that craft should change their character according to the mode of propulsion at the moment when the collision takes place. The decision in *The Mac* (4 Asp. Mar. Law Cas. 555 ; 1882, 46 L. T. Rep. 907 ; 7 Prob. Div. 126) proceeds upon the same lines as *The Harlow* (*sup.*). But in *Everard* v. *Kendall* (1870, 22 L. T. Rep. 408 ; L. Rep. 5 C. P. 428) it was held that two dumb barges were not ships. [BATESON, J. pointed out that the Act of 1868 gave jurisdiction in cases of collision, and made no reference to " ships."] In *Everard* v. *Kendall* (*sup.*) it was said that the collisions mentioned in the Act were collisions between vessels propelled otherwise than by oars, and it is submitted that this is the meaning of the section. [Reference was made to *The Zeta* (7 Asp. Mar. Law Cas. 369 ; 69 L. T. Rep. 630 ; (1893) A. C. 468), *The Upcerne* (12 Asp. Mar. Law Cas. 281 ; 107 L. T. Rep. 860 ; (1912) P. 160, 167), *The Normandy* (9 Asp. Mar. Law Cas. 563 ; 90 L. T. Rep. 351 ; (1904) P. 187), *The Lighter No.* 3 (1902, 18 Times L. Rep. 322), *The Mudlark* (1911, P. 116), and *The Norfolk Coast* (153 L. T. Jour. 450).]

Carpmael for the respondents.—The learned county court judge was right in holding that the *James* was a ship when she was in tow of the *Weybridge.* But in any case the decision should be upheld, for the relevant statutes confer a jurisdiction in all cases of collision, and the jurisdiction so conferred was intended to be identical, subject to the limitation as to amount, with that exercised by the Admiralty Court., The old Court of Admiralty would have had jurisdiction in the present case, since it is conceded that one of the vessels concerned in the collision was a ship. The county court has therefore jurisdiction. In *Everard* v. *Kendall* (*sup.*) neither vessel concerned was a ship ; in *The Normandy* (*sup.*) and *The Upcerne* (*sup.*) the objects with which the collision in question took place were not ships. These decisions can be distinguished upon the above grounds. [Reference was also made to *Reg.* v. *Judge of City of London Court* (7 Asp. Mar. Law Cas. 140 ; 66 L. T. Rep. 135 ; (1892) 1 Q. B. 273), and *The Malvina* (1862, Lush 493).]

Hayward replied.

Sir Boyd Merriman, P.—This is an appeal from the learned judge of the City of London Court, sitting in Admiralty, and, as the case was opened, it appeared to raise one very interesting point. But as the argument has developed it is apparent that it raises two very interesting points, one of which is of vital importance on the general jurisdiction of county courts in Admiralty. Unfortunately, on the latter point, we have no assistance from the learned judge below, because the point was not developed before him, but it was a point which is clearly open to the respondents in this case, who can always defend a judgment by any point of law which is open to them.

The matter arises in this way. The defendants' tug *Champion* ran into—I deliberately avoid the use of the word "collided," for reasons which will appear later—ran into the plaintiffs' dumb barge *James* at the time when the latter was in tow of a steam tug. The question is whether, in those circumstances, the county court judge had jurisdiction to hear the claim. He decided that he had, on the only point which was argued before him, namely, that at the time of the collision the *James* was a ship. Whatever her ordinary character might be at other times she was then a ship, because being in tow of a steam tug it could not be said of her at that moment that she was "a vessel used in navigation propelled by oars." In other words, she was at that time "a vessel used in navigation not propelled by oars," as she was propelled by a tug. On that ground the learned county court judge decided that he had jurisdiction as the claimant vessel was "a ship." But in the course of the discussion before us, it has become apparent that there is an even wider and more fundamental question, which, as I have said, was not dealt with before the learned county court judge. That question is this: Whether, even assuming that this vessel retained her character of a barge propelled by oars, and never became a ship at all by reason of the fact that she was at the moment in tow, nevertheless, her owner still has the right to claim under the Admiralty jurisdiction of that court on the following ground, namely, that the damage was inflicted by a vessel which it is conceded was a ship; that, therefore, the old Court of Admiralty would have had jurisdiction and it is that jurisdiction, at any rate, which has been transferred to the county courts by the various statutes to which reference has been made.

Mr. Carpmael for the respondents submitted that it was immaterial whether he could support the decision on the basis on which the learned county court judge gave judgment, and that he was entitled to support it on the ground that, assuming the judge was wrong in saying this vessel was a ship, nevertheless she was a vessel; she collided with another vessel which was admittedly a ship. That would have given the old Admiralty Court jurisdiction and, therefore, given the county court jurisdiction. As I have said that is a much wider and the more general question of the two, and we are both of opinion—for reasons which I will endeavour to state presently—that Mr. Carpmael's submission in that respect is right. In a sense, therefore, it is immaterial what view we take on the matter which was discussed before the learned county court judge, and on which he has given a very carefully considered judgment. But, out of respect to him (because it is not his fault that the other matter was not argued and discussed), and also because, unfortunately, my learned brother and I do not see this point in the same way, I must try to put into words my reasons for disagreeing both with the learned county court judge. and with my brother Bateson. I may say that having regard to the fact that both of them are infinitely more experienced in these matters than I am I express my opinion on the subject with the very greatest diffidence; but I have arrived at a definite conclusion, and I think I ought to express it.

I am going to deal first with the question that was argued in the court below. It really comes to this: it is conceded that at many other times this barge was "a vessel propelled by oars." But it is said that because on the occasion in question she was in tow, and there was no question of propulsion by oars, she was at all material times "a vessel not propelled by oars." That really raises this very interesting question whether quite apart from any physical change in the structure of the vessel—a conversion say into steam, or anything of that sort, about which I think there could not be any possible question—the mere fact that a dumb barge habitually, or frequently, propelled by oars is at a given moment being towed, or is not at a given moment being propelled by oars, enables her to change her character or her description within the definition.

Now I have come to the conclusion, after reading all the various cases which have been fully and clearly cited before us, that you cannot found jurisdiction upon a chameleon-like change of that sort. In my opinion, the authorities which have been cited before us show that the question turns on what was the general character, or description of the vessel, and not upon what was her particular user at a given moment. To take the extreme case, I do not think anybody has seriously suggested that, given a vessel which is habitually propelled by oars, it can possibly matter that at the given moment she is either tied up, or takes her oars inboard, or does something which prevents it being possible to say that at that given moment she is propelled by oars. That, of course, would be an extreme and absurd illustration. But, in my view, what we have got to find is, is this vessel an oar-propelled vessel—and if so can it make any difference to her general character of an oar-propelled vessel that, at a given moment, she is in charge of a tug? Now I confess freely that when the learned county court judge's judgment was first read to us this morning—I thought that the cases which he cited, and in particular the case of *The Harlow* (15 Asp. Mar. Law Cas. 498; 126 L. T. Rep. 763; (1922) P. 175), would tend to show that the fact that a vessel normally propelled by oars was being towed changed her character. After considering those cases I have come to the conclusion that their effect is exactly the other way, and I think the thing can be illustrated without going through all the cases by considering two of those which have been cited to us. I take first the case of *Ex parte Ferguson* (1 Asp Mar. Law Cas. 8; 24 L. T. Rep. 96; 6 Q. B. Div. 280) on which Mr. Carpmael relied in support of the learned county court judge's judgment. The point in that case, it is sufficient to say, was whether a certain fishing coble was a ship in spite of the fact that it was conceded that from time to time she was propelled by oars. In other words, what was said was "you cannot say of this vessel that she is not propelled by oars, because from time to time, in the ordinary course, she is propelled by oars." What Blackburn, J, as he then was, said, was this: "It is said on behalf of the master and mate that the fishing coble cannot be a 'ship.' She is twenty-four feet long; she is not entirely decked over; she has two masts and a rudder which are removable, and she may be propelled by four oars. She goes out well to sea; and though the oars are used to get her out of

harbour, they are merely auxiliary to the use of sails. It is said on behalf of the Board of Trade that is a 'ship.' The chief argument against that proposition is by referring to the interpretation clause (sect. 2 of 17 and 18 Vict. c. 104), which says, '"ship" shall include every description of vessel used in navigation not propelled by oars.' And the argument against the proposition is one which I have heard very frequently, namely, where an Act says certain words shall include a certain thing, that the words must apply exclusively to that which they are to include. That is not so; the definition given of 'ship' is in order that 'ship' may have a more extensive meaning. Whether a ship is propelled by oars or not, it is still a ship, unless the words 'not propelled by oars' exclude all vessels which are ever propelled by oars. Most small vessels rig out something to propel them, and it would be monstrous to say that they are not ships. What, then, is the meaning of the word 'ship' in this Act? It is this, that every vessel that substantially goes to sea is a 'ship.' I do not mean to say that a little boat going out for a mile or two to sea would be a ship; but where it is its business really and substantially to go to sea, if it is not propelled by oars, it shall be considered a ship for the purposes of this Act."

Now there, of course, they were deciding that the thing was a ship, though, from time to time, propelled by oars; but, in substance, she was a sailing vessel, and that fortifies me in the conclusion that what one has to look at is the substance of the matter, permanently, and not what is the user at any given moment—not whether a thing which is generally propelled up and down the Thames by oars happens, at the moment, not to be using her oars, but to be in tow of a tug. I think you have to look at what is her general character or description. I think that is what Blackburn, J. is saying, that just as you cannot prevent a sailing ship from being a ship by saying that the occasional use of oars compels you to say that she cannot be a vessel not propelled by oars, so here I think it is impossible to say that a vessel which is designed to be, and is, in fact, generally speaking, a typical dumb barge propelled by oars, becomes a ship because at a given moment she is in tow of a tug.

Now I come to the case of *The Harlow* (15 Asp. Mar. Law Cas. 498; 126 L. T.Rep. 763; (1922) P. 175), which seems to me to be extremely important in this connection. The learned county court judge dealt with *The Harlow* (*sup.*) as decisive of the case in favour of the plaintiffs. He says: "In *The Harlow*, dumb barges in tow of a tug were held to be ships within sect. 742 of the Merchant Shipping Act, 1894, for the purpose of limiting their liability." Now, it is quite true that in *The Harlow* (*sup.*) the subject-matter was dumb barges in tow of a tug. But Mr. Hayward has assisted us very much as to the real facts in that case, and when the record—for which we sent—is examined it is made clear that the only point in that case was that although the vessels in question were barges, one of them was not even fitted out for propulsion by oars, and it was proved by affidavit, produced before this court, and admitted, that the other four, even if they were in a sense constructed for propulsion by oars, never had been, and never were, used otherwise than in tow of a tug. At any rate, they never were used for propulsion by oars. It appears from the report in Aspinall's Reports that that was the crux of the matter; and, indeed, it must have been, because if all that had to be said was that whatever their general character, they were, at the moment, in tow of a tug—that was common ground—there was no need to proceed any further. But I am quite satisfied in my own mind that it was a cardinal issue in that case that those particular barges were not, in the general sense—nor were any of them—barges propelled by oars. And when you read the President's judgment in this court, although it is true that no emphasis is laid on that fact in the statement of facts, it is quite plain that he was dealing with the matter on that basis, because on p. 181 he refers to *The Mac* (4 Asp. Mar. Law Cas. 555; 46 L. T. Rep. 907; 7 Prob. Div. 126), a case of a mud hopper which was never, and could not be, propelled by oars, and says that the barges in the case he was deciding were like in construction and mode of navigation to the barge in *The Mac*. The case, therefore, was decided, in my opinion, on the basis that they were not barges propelled by oars in their general character or description, and not that they were, at the time, not being propelled by oars, but by attachment to a steam tug.

In my view, therefore, and I am deliberately not going to examine all the cases on the subject, because, in one sense, the point is academic having regard to the question about which we are both agreed. The learned judge in the court below was wrong in holding that this barge became a ship, or was a ship at the moment when this collision happened by reason of being in tow of a tug.

Now we come to the more difficult question whether, on the assumption that this barge was not a ship, the judgment of the learned judge of the City of London Court can, nevertheless, stand. Now I have come to the conclusion—indeed, we have both come to the conclusion—that this is not decisive of the question. I will re-state the position. The barge was in tow of a ship—she was run into by a ship. Let us assume that she herself was not a ship; the question is whether, nevertheless, the court had jurisdiction to entertain her claim. Mr. Carpmael argues that depends on whether the old Court of Admiralty would have had jurisdiction to entertain her claim. County courts have a jurisdiction within certain pecuniary limits, which was at least co-extensive with the jurisdiction of the old Court of Admiralty, except that in one respect it is larger. His point is that the old Court of Admiralty clearly had jurisdiction, at any rate, where two vessels collided even though one of them was not a ship. I have come to the conclusion that Mr. Carpmael is right in that submission. The submission, in the main, is based upon *The Zeta* (7 Asp. Mar. Law Cas. 369; 69 L. T. Rep. 630; (1893) A. C. 468) and on *Reg.* v. *Judge of the City of London Court* (67 Asp. Mar. Law Cas. 140; 66 L. T. Rep. 135; (1892) Q. B. 273). In the earlier case, Lopes, L.J. says this: "In my opinion, the cases are clear to show that the jurisdiction which has been conferred upon the county courts is the jurisdiction of the Admiralty Court, except in one particular which I will mention presently, but only a limited jurisdiction—a jurisdiction up to 300*l*. The cases are, to my mind, clear that no larger jurisdiction has been given to the county courts than that which was possessed by the Admiralty Court, that jurisdiction being limited to 300*l*., and no larger jurisdiction, except with regard to charter-parties, and that is a matter with which we have nothing to do now. Now the authorities upon which reliance was placed to establish that proposition are three—*Everard* v. *Kendall* (1870, 22 L. T. Rep. 408; L. Rep. 5 C. P. 428), *Allen* v. *Garbutt* (4 Asp. Mar. Law Cas. 520*n*; 6 Q. B. Div. 165), and *The Dowse* (3 Mar. Law Cas. (O.S.) 424; 22 L. T. Rep. 627)—and

they go strongly, and I think conclusively, to support the proposition that no larger jurisdiction with respect to collisions has been given to the Admiralty side of the county courts than was possessed by the Admiralty Court itself." There are other passages in the same case to the same effect and Mr. Carpmael just at the close of his argument called our attention to another case of *Reg.* v. *The Judge of the City of London Court* (8 Q. B. Div. 601), which certainly does not conflict with the judgment which I have just read, and I think that he is justified in saying that the jurisdiction of the county court in Admiralty is—with an immaterial exception or addition which does not matter for our present purpose—at least co-extensive with the jurisdiction of the old Court of Admiralty. The next question, therefore, is: Would the old Court of Admiralty have had jurisdiction in this case? It is said that *Everard* v. *Kendall* (*sup.*) says not. In my opinion *Everard* v. *Kendall* (*sup.*) decides nothing of the sort. In my opinion *Everard* v. *Kendall* decides no more than this, that where you have got two things, neither of which is a vessel, then the county court has no jurisdiction because—rightly, I think—it was conceded in that case that the Court of Admiralty itself would not have had jurisdiction. Where you have two things which float but neither of which is a ship, there is no Admiralty jurisdiction. That is of no assistance in deciding whether, where one of them is admittedly a ship, though the other may be only a vessel, the Admiralty Court would have had jurisdiction. In my opinion *The Zeta* (*sup.*) makes it reasonably plain that the Admiralty Court has jurisdiction. I think the passage which has been read more than once in Lord Macnaghten's opinion—and there is certainly nothing inconsistent with it in Lord Herschell's opinion—makes it quite plain that where there are two vessels and one of them, at any rate, is a ship, the Admiralty Court has jurisdiction in respect of a contact between the two—I deliberately have not used the word "collision"—and it does not matter if either the body receiving, or the body doing the damage, was not a ship, provided that the other body was a ship. Now Mr. Hayward, while acknowledging that that is the effect of Lord Macnaghten's opinion and also of Lord Herschell, says that that was *obiter* in the particular case and cannot prevail against the express words of the two County Court Jurisdiction Acts, and he says that the words "damage by collision" in sub-sect. (3) of sect. 31 of the Act of 1868 must be read as restricted by—not as enlarged by—the words of sect. 4 in the Act of 1869. Now it is quite clear that the learned Lords in *The Zeta* (*sup.*) thought that the words "damage by collision" were satisfied if either the damaging or the damaged vessel was a ship. Mr. Hayward argued that since 1869—though *The Zeta* (*sup.*) was decided in 1895—that is not possible because sect. 3 is to be read, if not with regard to other matters, at any rate with regard to damage by collision, as if it extended and applied only to claims for damage to ships. I do not so read sect. 4 of the Act of 1869. I think that the effect of the Act of 1869 is this: the Legislature had realised that they had only allowed shipowners to claim for damage by collision and in the intervening year it was realised that there were more ways of hurting a ship than by a collision between herself and another vessel; and consequently they said that with regard to ships, sect. 3 of the earlier Act would apply to all claims for damage, whether by collision or otherwise, but it did not cut down the words as they already stood. It did not say that a claim for damage by collision can only be brought in future where both the vessels are ships, regardless of the general law that, provided one of them was a ship, it can at present be brought. I do not think that that was the effect of the Act at all, and, in my opinion, Mr. Carpmael has made good his point that the old Admiralty Court would have had jurisdiction to deal with this case; that the county courts which have Admiralty jurisdiction have a jurisdiction co-extensive in this respect with that of the old Admiralty Court; and that, therefore, on that ground, the City of London Court had jurisdiction to deal with this particular collision.

I think that the judgment of the learned judge should be supported upon that ground.

Bateson, J.—I agree with my Lord on this point, and I do not want to add anything to what he has said upon it, but I will say a few words—because I am very sorry that I am not at one with him—about the other point upon which the learned judge in the court below has decided.

I think that what one has to consider, sitting as a county court judge, is whether one has jurisdiction to try the particular case which is being presented, and the case that was being presented was the case of a vessel in tow of a tug being brought into collision with another tug under way. Whether this vessel which was in tow of the tug is more often in tow of a tug than not, does not seem to me to matter in the least. It is said that she is a barge that goes up canals, and may be towed by horses or another barge, but in this particular case the question is: Had the judge jurisdiction in Admiralty to try a case where a vessel in tow of a tug is brought into collision with another tug? I cannot see what is to prevent him having jurisdiction. It is said that, although there had been a collision between two vessels, there is no jurisdiction under sect. 3, sub-sect. (3), of the County Court Act of 1868, which says that there is jurisdiction as to any claim for damage by a collision. It is said that those words do not cover this case because *Everard* v. *Kendall* (*sup.*), and one or two other cases, have suggested that those words "damage by collision" must be confined to collision between ships. *Everard* v. *Kendall* (*sup.*) does not say so. All that case, as I understand it, says is that the Admiralty Court never had jurisdiction to try a case of collision between two barges; it never was given jurisdiction to try a collision between two barges by the Acts of 1840 and 1861. That does not seem to me to have really any bearing on this case, and but for the argument that the word "collision" in sub-sect. (3) involves a collision by a ship, there would not be anything to be said. But supposing it does involve a collision by a ship, then it seems to me that this vessel being in tow of a tug must be regarded as a ship. She is not being propelled by oars only. The definition of a ship in all the Acts of Parliament we have been referred to is "a vessel used in navigation not propelled by oars." This vessel was not propelled by oars.

I dare say she very often was propelled by oars, but on this occasion, with reference to this action, I think she was being propelled by the steam of the tug, and in that sense she was a steamer; she would be so regarded for the purposes of navigation and the rules of navigation. A vessel that is propelled by oars alone only goes about in narrow waters and for comparatively short distances. When she is being towed by a tug she can go into all sorts of waters, be towed into all sorts of positions, and get into all sorts of trouble which she cannot get into if she is propelled by oars only,

and that may be a good reason for regarding her as a ship. Therefore, in my view, this vessel was a ship, if it is necessary that it should be so held in order to bring her within sub-sect. (3) of sect. 3 of the Act of 1868.

I rather agree with what my Lord has said about the cases which have been relied on by the learned judge in the court below, that in those cases it seems pretty clear that none of the vessels were propelled by oars at all. It certainly was so in *The Harlow* (*sup.*); it certainly was so in *The Mac* (*sup.*), and in *The Mudlark* (*sup.*), and *The Lighter No.* 3 (*sup.*), and I think, also, in *The Norfolk Coast* (153 L. T. Jour. 450). I think in all those cases they were unpropelled by oars, and therefore the definition does not apply to them. This case is not a case like those at all, except so far as there was a towage going on in all of them.

Reference has been made to *Ex parte Ferguson* (1 Asp. Mar. Law Cas. 8 : 24 L. T. Rep. 96 ; L. Rep. 6 Q. B. Div. 280). In that case the facts were that the vessel that came into collision there was actually sailing at the time and was actually regarded as a sailing ship. That seems to me to be very much like this case, except that the vessel which came into collision was being towed by steam, and I think it not improper to hold that she was a ship within the meaning of the definition to which reference has been made.

For these reasons, and much to my regret, I think the appeal should be dismissed on both grounds, not only on one.

Appeal dismissed.

Solicitors for the appellants, *Keene, Marsland, Bryden*, and *Besant*.

Solicitor for the respondents, *A. Sackville Hulkes*.

Judicial Committee of the Privy Council

Oct. 9, 10, 12, *and Nov.* 3, 1933.

(Present : Lords ATKIN, TOMLIN and THANKERTON.)

The Bathori. (a)

ON APPEAL FROM THE PRIZE COURT.

Prize—International law—Enemy vessel captured and sunk whilst proceeding under safe conduct—Hungarian owners carrying on business at Fiume—Status of Fiume—" Nationals of former Kingdom of Hungary "—Treaty of Trianon, arts. 53, 232.

The plaintiffs, an Italian company, claimed damages in respect of the loss of their steamship B., *which was captured and subsequently sunk in the Atlantic on the* 1st *Sept.*, 1914, *by one of His Majesty's ships whilst sailing under a safe conduct granted by the French and countersigned by the Great Britain authorities.*

In Sept., 1914, *the plaintiffs were a Hungarian company registered in Budapest and carrying on business at Fiume, then, and until* 1918, *a Hungarian port. In* 1920 *the plaintiffs had become domiciled in Fiume, which at the date when the Treaty of Trianon between the Allied Powers and Hungary was signed in* 1920 *was in the occupation of Gabriele d'Annunzio, who had proclaimed himself dictator. In July,* 1921, *Fiume was declared by the Italian and Yugo-Slavian Governments, with the concurrence of the Allied and Associated Powers, to be a free and independent port. In* 1924 *Fiume was formally annexed to Italy. By art.* 232 *of the Treaty of Trianon the Powers reserved " the right to retain and liquidate all property rights and interests " which belonged at the date of the coming into force of the Treaty to "nationals of the former Kingdom of Hungary or companies controlled by them " within the territories or under the control of those Powers.*

Held, that par. 2 *of the annex to art.* 232 *of the Treaty of Trianon, which provided that no claim or action shall be made or brought against any Allied Power by any Hungarian national " in respect of any act or omission with regard to his property, rights or interests during the War," which was given full force and effect as law by the Treaty of Peace (Hungary) Act,* 1921, *barred the plaintiffs' claim.*

Judgment of the Prize Court (*reported* ante, *p.* 355 ; 148 *L. T. Rep.* 353 ; (1933) *P.* 22) *affirmed.*

APPEAL from the judgment of the Prize Court (Lord Merrivale, P.) dated the 20th Oct., 1932, reported *ante*, p. 355 ; 148 L. T. Rep. 353 ; (1933) P. 22.

The plaintiffs, Adria Società Anonima di Navigazione Marittima, an Italian company, and the master and crew of the steamship *Bathori*, claimed from H.M. Postmaster-General and Captain Percival Henry Warleigh, R.N., damages occasioned by reason of the wrongful capture, seizure, loss, and destruction on the high seas on the 1st Sept., 1914, of the *Bathori* by H.M.S. *Minerva*, under command of the defendant, Captain Warleigh, whilst the *Bathori* with the licence of the British, French, American, and Spanish Government authorities was proceeding from Havre to Vigo.

The plaintiffs by their petition alleged that whilst the *Bathori*, then owned by a Hungarian company, carrying on its business at and from Fiume, was sailing to Vigo under a safe conduct granted by the French authorities and countersigned by the British Consul-General at Rouen, she was wrongfully and without probable cause captured and sunk by H.M.S. *Minerva*. It was alleged by the defendants in their answer that the sinking of the *Bathori* was justified by her suspicious conduct. At the trial this defence was not argued, and it was admitted that the *Bathori* had not forfeited her safe conduct. It was, however, contended that the sinking of the *Bathori* was an independent act of the commander of H.M.S. *Minerva*, giving no right of redress ; and that by reason of the provisions of the Treaty of Trianon, between the Allied and Associated Powers and Hungary signed on the 4th June, 1920, any right to the relief claimed by the plaintiffs was, in any case, barred. Lord Merrivale held, (1) that the *Bathori* having been granted immunity was sunk by an act of war contrary to the terms of the grant of safe conduct, and that therefore a claim resulted to the owners to recover her value as soon as their disability to sue by reason of the state of war had been removed ; but (2) that the Hungarian Government had power

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

to bind the citizens of Fiume by the Treaty of Trianon; that the plaintiffs were "nationals of the former Kingdom of Hungary" or a company controlled by such nationals, and that their claim was within the scope of art. 232 of the Treaty, and therefore failed.

The plaintiffs appealed.

Stuart Bevan, K.C. and Sir *Robert Aske* for the appellants.

Sir *Donald Somervell*, K.C. (S.-G.) and *Hubert Hall* for the respondent.

The judgment of their Lordships was delivered by

Lord Atkin.—This is an appeal from a decree of the President, Lord Merrivale, sitting in Prize, by which he pronounced against the claim of the plaintiffs, the present appellants, and condemned them in costs. The appellants are a corporation now established under Italian law. Their nationality for a period after the War has been in dispute; but it is undisputed that before and during the War they were nationals of Hungary. They are a shipping company and carry on business at Fiume. On the 25th July, 1914, the steamship *Bathori*, of 2223 tons gross register, owned by the appellants and sailing under the Austro-Hungarian flag, left Mazarelli for Rouen with a mixed cargo consisting of beans, apples, flour, paraffin, insect powder, beech sleepers, staves and elder blossoms. She reached Havre on the 5th Aug., 1914, and while there the cargo was discharged by order of the French authorities. Discharge was completed on the 28th Aug., and the next day the ship sailed in ballast for Vigo under a safe-conduct issued by the French authorities and confirmed by the British Consul-General at Havre. On the 1st Sept., when on the high seas about thirty miles from Vigo, she was stopped by H.M.S. *Minerva*. The commander (the defendant Captain Warleigh) apparently thought that the *Bathori* was violating the terms of the safe-conduct, and after removing the master and crew ordered her to be sunk. On representations made on behalf of the Austro-Hungarian Government, the British Government on the 19th Jan., 1915, admitted that a mistake had been made and undertook to consider the question of pecuniary liability on the resumption of friendly relations and "as part of the general settlement of claims on both sides which may then arise."

On the 6th May, 1930, the plaintiffs commenced the present proceedings in prize, claiming compensation for the loss of the ship and the effects of the master and crew. Before the President the question was debated whether the circumstances gave a right to claim in prize. The President determined this point in favour of the plaintiffs, and his decision in this respect was not challenged before this board. It became necessary, therefore, to consider the defences raised in the answer of the defendants, which alleged that the claim was barred by the provisions of the Treaty of Peace between Hungary and the Allied Powers (the Treaty of Trianon), or was subject to the charge created by the same Treaty and the Orders in Council made for the enforcement thereof. For the purpose of this case their Lordships find it only necessary to deal with the defence that the claim was completely barred. The Treaty of Trianon was signed on the 4th June, 1920. It provided that it was to come into force from the date of ratification. On the 26th July, 1921, ratifications were exchanged. On the 24th Aug., 1921, the Treaty was registered with the League of Nations. Part X. of the Treaty is headed Economic Clauses. It includes sect. III., "Debts," art. 231, with annex, and sect. IV., "Property, Rights and Interests," arts. 232, 233, with annex. Art. 232 provides, "The question of private property, rights and interests in an enemy country shall be settled according to the principles laid down in this section and to the provisions of the annex hereto." By the annex, par. (2), it is provided as follows:—

> "No claim or action shall be made or brought against any Allied or Associated Power or against any person acting on behalf of or under the direction of any legal authority or Department of the Government of such a Power by Hungary or by any Hungarian national or by or on behalf of any national of the former Kingdom of Hungary wherever resident in respect of any act or omission with regard to his property, rights or interests during the war or in preparation for the war. Similarly no claim or action shall be made or brought against any person in respect of any act or omission under or in accordance with the exceptional war measures, laws or regulations of any Allied or Associated Power."

On the 12th May, 1931, the Treaty of Peace (Hungary) Act, 1921, was passed by the British Legislature. It enacts:—

> (1) "His Majesty may make such appointments, establish such offices, make such Orders in Council, and do such things as appear to him to be necessary for carrying out the said Treaty and for giving effect to any of the provisions of the said Treaty." (2) "Any Order in Council made under this Act . . . shall have effect as if enacted in this Act."

On the 10th Aug., 1921, after the ratification of the Treaty of Trianon, an Order in Council was made, the Treaty of Peace (Hungary) Order, 1921, which, after reciting the Treaty of Trianon and the Treaty of Peace (Hungary) Act, 1921, ordered: "(1) The sections of the Treaty set out in the Schedule to this Order shall have full force and effect as law." It further proceeded to make provisions for carrying out the sections. Included in the scheduled sections is sect. IV., with annex, including par. 2, as set out above. The defendants maintain and the President has held that the terms of this clause bar the plaintiffs' claim. The plaintiffs contend that the annex must be read subject to the general provisions of art. 232, which is expressed to cover property, rights, and interests in an enemy country. The *Bathori*, it is said, was sunk on the high seas, and was never for relevant purposes in the United Kingdom as an enemy country. Their Lordships, however, have no doubt that the plaintiffs' right, if any, to claim in prize before an English Prize Court would be property in England, and that par. 2 operates to defeat this right of property. The plaintiffs thereupon further objected that they had, by virtue of the Treaty of Rapallo, made between Italy and Jugo-Slavia, and ratified by those two States and recognised by England before the Treaty of Trianon came into force, been divested of Hungarian nationality and had assumed the nationality of the independent State thereby established. The result was to prevent par. 2 from applying to them, for the article could only be intended to apply to those persons who were nationals of Hungary at the time the Treaty came into force. No country could, it was said, be supposed to purport to surrender private rights of persons who were not within its protection at the moment of surrender. Such a surrender would be inoperative in international law, and the language of the Treaty, however general, should be construed so as to limit its operation to cessions that could be validly made.

This contention gave rise to interesting arguments which involved the nationality of residents of Fiume at different dates after the War. It further raised the important question mentioned above as to the validity in international law of stipulations in treaties purporting to affect the private property of ex-nationals no longer nationals of the contracting States. In the opinion of their Lordships, it is unnecessary to decide these problems in the present dispute. Whether the plaintiffs were or were not Hungarian nationals at the effective date of the treaty, their Lordships have come to the conclusion that the clause in question plainly was intended to cover them. The Treaty was the treaty of peace between Hungary and the Allied Powers, and it appears reasonably clear that the intention of the parties was that for acts or omissions done to the property of Hungarian nationals during the War those nationals should have no redress whether they did or did not continue to be Hungarian nationals up to the date of the Treaty. Whether for acts done before the acquisition of new nationality the new State can or will exercise protection, or whether the former State can exercise protection, may be debatable; but in the circumstances attending a peace treaty it appears very natural that the former State should be required to renounce protection for its ex-nationals, and in the present Treaty it seems clear that Hungary did so act. This, however, only determines the question of construction. If the Treaty operated by international law only, the tribunal in prize might well have had to determine how far Hungary's attempt to affect the rights of ex-nationals could be treated as effective. But for an English court, whether in prize or not, this question is precluded by the terms of the Treaty of Peace Act. The Orders in Council made under it are to have effect as if enacted in the Act. The order provides that the scheduled sections of the Treaty are to have full force and effect as law. If, therefore, the clause in question bears the construction which has already been imputed to it, that construction must be enforced in British courts as law. It follows that the claim of the plaintiffs is barred by the clause. It does not appear that the contention as to the invalidity of the clause in international law was raised before the learned President, or that the effect of the statute was brought to his attention. The statute was not in terms pleaded, though the Orders in Council were referred to in the plea raising the question of the charge with which the board have not found it necessary to deal. No circumstances exist, however, which preclude the defendants from relying on the terms of the statute on appeal to His Majesty in Council, and no extra costs can have been incurred by reason of reliance on it being belated.

Their Lordships will humbly advise His Majesty that the appeal be dismissed. The appellants must bear the costs of the appeal.

Appeal dismissed.

Solicitors for the appellants, *Swepstone, Stone, Barber*, and *Ellis*.

Solicitor for the respondent, *The Treasury Solicitor*.

Supreme Court of Judicature.

COURT OF APPEAL.

Dec. 7, 8, 11, *and* 12, 1933.

(Before SCRUTTON, LAWRENCE, and GREER, L.JJ., assisted by Nautical Assessors.)

The Treherbert. (*a*)

ON APPEAL FROM THE ADMIRALTY DIVISION.

Thames estuary—Navigation round N.E. Spit Buoy—Practice of pilots—"Narrow Channel" rule—"Crossing" rule —Duty of "stand-on" vessel to act where collision cannot be avoided by action of "give-way" vessel alone—Regulations for Preventing Collisions at Sea, Arts. 19, 21, *and* 25.

In navigating round the N.E. Spit Buoy in the Thames Estuary a practice exists for the pilot of a vessel bound up-river to leave sufficient room in rounding the buoy for a down-coming vessel to pass port to port between his vessel and the buoy.

Held (affirming Langton, J.), that the existence of this practice does not constitute the navigation round the buoy a "narrow channel"; that vessels navigating round the buoy are not therefore required to comply with Art. 25 *("narrow channel" rule) of the Sea Rules, but that Art.* 19 *("crossing" rule) applies.*

Held, therefore, that where vessels were approaching the buoy from opposite directions the down-coming vessel, having the vessel bound up-river on her starboard side, ought to keep out of the way, and that the vessel bound up-river ought to keep her course and speed.

Held, further (reversing Langton, J.), that a vessel bound up-river which, owing to the set of wind and tide, had passed unduly close to the buoy, ought not to be held to blame for failing to take action to avoid collision under the note to Art. 21 *(which requires a stand-on vessel to take action where she finds herself so close that collision cannot be avoided by the action of the "give-way" vessel alone) if the down-coming vessel can yet by careful navigation pass between her and the buoy, or if the latter can in the circumstances safely pass inside the buoy.*

APPEAL and cross-appeal from a judgment of Langton, J.

The appellants, owners of the British steamship *Treherbert*, who were defendants in the action, appealed against a judgment holding them three-fourths to blame for a collision between the *Treherbert* and the Greek steamship *Archon*, owned by the respondents, which took place in the estuary of the River Thames, in the vicinity of the North-East Spit Buoy, on the night of the 6th Sept., 1933. In the cross-appeal the owners of the *Archon*

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

appealed against so much of the judgment of Langton, J. as held them one-fourth to blame for the collision.

The facts and contentions of the parties are fully stated in the following judgment of Langton, J., delivered on the 20th Oct., 1933.

Langton, J.—This case arises out of a collision between the *Archon* and the *Treherbert*, which took place on the 6th Sept. last in the neighbourhood of the North-East Spit Buoy in the estuary of the River Thames. The *Archon* is a Greek steamship of 3511 tons gross, 359ft. in length, and the *Treherbert* is a British steamship of slightly larger size, 4517 tons gross and 414ft. in length. I have mentioned these dimensions at the outset because the dimensions are not unimportant to the consideration of this case.

The *Archon* was an inward-bound ship to London in charge of a Cinque Ports pilot, and she was, at the material time, proceeding on a course of N. by W. ½ W. magnetic, meaning to pass the North-East Spit Buoy on her port side and go up the Thames by way of the Princes Channel. The *Treherbert* was an outward-bound ship, and having come down the Edinburgh Channel was intending to pass the North-East Spit Buoy in the regular way, keeping the buoy on her starboard hand, and so pass down to the Downs and out on her voyage to Cardiff. The *Archon* was a fully laden vessel with a maximum draught of something just over 20ft. and the *Treherbert* was partly laden and her maximum draught was, I think, 18ft. 3in.

The vessels came into collision on a fine, dark night (perhaps I had better say a dark night, because I think it was not quite satisfactorily ascertained whether it was moonlight or not), but, anyway, upon a fine, clear night, and the conditions of wind and tide—which are most important to the consideration of the case—were also not in any way in dispute. The wind was fresh from the N.E. or E.N.E., and the tide was a flood tide of one-and-a-half hours flood, and setting strongly in the same direction as the wind was blowing—that is to say, vessels in the neighbourhood where these vessels were navigating would have a strong set, by the action of both wind and tide, to the westward—perhaps something to the southward of west as well, but, generally, to the westward.

The place of collision was very strongly in dispute. The *Archon* variously placed the collision, according to the testimony of her witnesses, at a distance of from three cables to a mile from the buoy, and her witnesses were insistent that it was nothing to the westward of north of the buoy. The pleaded place of collision of the *Archon* is about three cables to the northward and eastward of the North-East Spit Buoy, and that was the pilot's evidence. The Greek evidence from the *Archon* became very elastic, and I think the nearest to the buoy that any of the Greek witnesses would allow was half a mile, extending up to three-quarters of a mile and a mile.

The *Treherbert* placed the collision very much closer to the buoy, and her witnesses were in general consensus about this, placing the collision somewhere about a ship's length to the northward of the buoy. There was some independent evidence of a credible character from a Captain Wilkins. Captain Wilkins was a very experienced Dutch master who had been in command of ships of the Batavier Line for a number of years (which it would be almost indelicate to mention); anyway, he was a most experienced man, and he gave his evidence, as I think, in good faith. I say that because I am not accepting all Captain Wilkins's estimates and I do not accept at all some of his expressed views as to seamanship and the application of the sea rule, but I think he gave his evidence before me to the best of his ability and in good faith, and although Captain Wilkins does not claim to have seen the collision he does claim to have seen the two ships very close together at a period that cannot have been antecedent to the collision by more than a few seconds, and at that time I think his judgment was that they were about two cables to the northward of the buoy.

It is quite impossible, of course, to ascertain these places of collision with anything like mathematical exactitude, but there is a further guide in this case in that the *Archon* (which was unfortunately sunk by reason of this collision) drifted on to a portion of sand, and lies sunk at the present moment in a position which is perfectly simple to determine. That position has been laid off for me, and is a position, roughly, about west by north—something of that kind—or a little higher perhaps—something like W.N.W. from the North-East Spit Buoy. If one takes the known direction of drift in that locality the evidence gives one some guide—not wholly trustworthy, but some guide—to the possible, and probable, place of the collision. I think all the trustworthy evidence in this case goes to show (it is not easy to fix the place of the collision) that the collision was nothing like so close as one ship's length from the buoy and I see no reason to doubt Captain Wilkins's estimate in this regard and I am satisfied that this collision took place somewhere about two cables to the northward of the North-East Spit Buoy. It may have been a little more, but I do not think it can have been anything less. Whether the buoy bore exactly due south from the place of collision, or a little west, or a little east of south, again I do not pretend to determine, but I am satisfied, after weighing all the credible evidence, that the collision took place to the nor'ard of the buoy, and not less than two cables from the buoy.

The courses upon which these two vessels were when they came in sight of one another—courses respectively of N. by W. ½ W. and S.E. ½ E.—are courses which cross at an angle of three points.

The vessels were found in collision with the stem and port bow of the *Treherbert* striking the port side of the *Archon* somewhere in the way of the bridge, and striking a blow which slid along the *Archon's* side some 20ft. or so towards the engine room. As to the angle of the blow, I had some very clear evidence from a surveyor—Mr. Dennis Crump—who made his maiden appearance in the court and signalised that appearance by giving evidence of a very clear character. He did not attempt to quantify the speeds upon the respective vessels, but he had prepared a very careful plan. which I think in its main points was accepted by the other side, showing that the initial angle was about forty-four degrees, or about four points leading aft on the *Archon* and the final angle about thirty-five degrees, or three points. I think it is not uninstructive in considering the final manœuvres at any rate in this collision, that vessels which were on crossing courses of three points are found in collision with an angle between the vessels of four points. It does not look as if either vessel had succeeded in taking any very drastic action before the collision, so far as helm is concerned, unless, of course, one were to accept the other view that they had taken some contrary action which neutralised the action each of the other. However, I have borne this fact in mind in considering the blame for this collision.

But before I come to this final point, one has to consider, because of the controversy which has arisen upon it in this case, which of the two rules of the road apply. On behalf of the *Archon* it is said that these vessels, upon the courses I have indicated, were undoubtedly green to red—therefore the "crossing" rule, as it is called, applies. Perhaps it would be more accurate to say that the crossing rules apply—that is to say art. 19 applies to the give-way vessel *Treherbert*, and art. 21 applies to the *Archon* as the stand-on vessel. That is the *Archon's* case; that is the rule which the pilot of the *Archon* says he was acting under; and that is the way the case has been presented on behalf of the *Archon*—"crossing" rule, and no other rule.

On behalf of the *Treherbert* it is said this place is in the way of a well-known track of steamships. The track is bounded by a buoy on the western side—to use a neutral phrase—for ships going up and down by the buoys—East Margate and North-East Spit Buoy, and so on. I do not know that there are any other buoys that absolutely determine the parts of the track but, at any rate, those two were signalled out. It is said—and said rightly—that vessels going up or vessels going down both leave these buoys to the westward. That is what they are there for—to mark the Margate sands, and to indicate to vessels navigating in these waters that they will be safe (and only safe) if they pass to seaward of these buoys.

Those who argued the case on behalf of the *Treherbert*—Mr. Digby, with his usual good temper and skill—put it in this way. "It may be that you cannot define this track of steamships as a narrow channel because it must be said that there is no eastern boundary to the channel corresponding to this western line indicated, or limited by the buoys, but nevertheless, there is a practice, and the practice is that all vessels shall leave these buoys to the westward. And, if that is so, you must not apply the crossing rule here—at any rate in the initial stages—because there is a duty cast upon all vessels by the practice, and good seamanship, to leave the buoys to the westward." Mr. Digby puts it in this way: he says that the incoming vessel by the practice leaves a very good clear berth on her port hand between herself and the buoy in order to enable the outgoing vessel to port and pass port to port, which is the only safe way in which an incoming and outgoing vessel can negotiate this difficult spot. That is the way they do daily, almost hourly, negotiate it with safety. It is an accepted, and proper, practice and, therefore, you cannot apply the crossing rule, at any rate in the earlier stages. It would not be fair to Mr. Digby to say that he made any admissions in this case, and if the case goes further I want it to be perfectly free to him to argue with the elasticity that he argued here below, the application of various rules at various times.

But I have consulted deeply with the Elder Brethren upon this point. It is a matter of deep regret that the *Archon* should lie sunk. It is a matter of great regret that this collision should have occurred, but it is a matter of very great importance to the nautical world that there should be no kind of ambiguity in future about what rule of the road at sea applies in this locality, and so far as in me lies I am endeavouring, and am going to endeavour now to make it clear that my view of the matter is quite unambiguous.

To clear the ground I would say, in the first place, that I think the introduction of art. 25—the narrow channel rule—is completely and absolutely unnecessary; I think it has got nothing at all to do with this case, or with the proper navigation in these waters. I reached this conclusion quite independently of any assistance from the Trinity Masters, but I need hardly say that I was greatly fortified in my view of the subject when I found that they held an equally strong view precisely the same way. They hold just as strongly as I do, that art. 25 has no application to the circumstances of this case at all. They have the same difficulty as I have in appreciating how you can possibly apply art. 25 to waters which are defined only by one line of buoys, and have, on the other side, the whole of the North Sea. That is not their idea of a narrow channel, and it is not my idea of a narrow channel. That gets rid quite unambiguously I hope, of any confusion between the sea rules.

This matter is not altogether untouched by authority. There was, in the first place, cited to me the case of *The Ashton* (10 Asp. Mar. Law Cas. 88; 92 L. T. Rep. 811; (1905) P. 21), decided by Lord Gorell, dealing with a collision that took place in the Humber between an outgoing steamship and an incoming trawler. I must say that for once I have some difficulty in following the precise reasoning of Lord Gorell in that case, but whether the fault is to be attributed to a lack of apprehension on my part, or to a lack of logical reasoning on his, I must say that I think the former solution is far the more likely. I do not consider that that case has got anything to do with the present case. There is undoubtedly a channel, and a defined channel, in the River Humber in that locality, and, therefore, any expressions which fell from the learned judge in determining, as he did, the rather curiously alternative grounds, can have no application, in my view, to a case such as the present where there is no channel at all.

For the present purpose I greatly prefer to rely upon another dictum of Lord Gorell's in a case to which I may be sure he devoted the closest attention because he pronounced upon it the judgment of the Board of the Privy Council, namely, the case of *The Steamship Albano* v. *Allen Line Steamship Company* (10 Asp. Mar. Law Cas. 365; 96 L. T. Rep. 335; (1907) A. C. 193). That was a case in which two vessels were both making for a pilot boat, and one vessel sought to say that because they were both making for a pilot boat (a kind of common objective) the "crossing" rule had no application. They put the case, as Mr. Digby has put it in one alternative here, as a case to which the rules did not apply at all, and that good seamanship only dictated how the vessels should act. Lord Gorell, not unnaturally I think, rejected that contention altogether and elected firmly—with the rest of the board supporting him—to decide that the crossing rule did apply. There is one passage in his judgment which seems to me to be peculiarly applicable to this case. "In conclusion," he says, "it is to be observed that the regulations are the outcome of long experience and of conferences held by representatives of the maritime nations, and, if firmly acted on and applied, are more likely to obviate the doubts and difficulties by which those navigating vessels may be assailed, for instance, in cases similar to the present case, which may not infrequently arise where vessels are making for the entrance of a port at the same time—than if the actions of those in charge are to be guided by rough estimates of courses and speeds to determine which vessel is slightly ahead of the other, and considered afterwards by the light of conflicting evidence as to whether these estimates were right or wrong."

The case put forward on behalf of the *Treherbert*, in the present instance, is a case in which, as I say, two rules are sought to be applied at different times in the same navigation, or perhaps it would be fairer to say, one rule, namely, the "crossing" rule is postponed in application because the narrow channel rule is held also to apply. Or, in another way, the case is put; good seamanship dictates that the incoming vessel should leave and give a fair berth to the outgoing vessel, and, therefore, the "crossing" rule does not apply until she has complied with that duty. As I say, that class of consideration seems to me to raise every possible form of ambiguity about as mistily as it can, and I prefer to rely upon Lord Gorell's method of solving these difficulties, that the regulations, if firmly acted upon and applied, are likely to obviate these doubts and difficulties.

The nearest case, by way of any form of analogy to the present case cited to me, is the now well-known case of *The Karamea*: (*Steamship Haughland* (*owners*) v. *Steamship Karamea* (*owners*), 15 Asp. Mar. Law Cas. 430; 126 L. T. Rep. 417; (1922) 1 A. C. 68). That case went, in the end, to the House of Lords, but the passage I am going to cite in support of my judgment here is a passage from the judgment of Scrutton, L.J., and nothing that was said in the House of Lords (which, as far as I remember, confirmed the Court of Appeal) in any way detracted from what Scrutton, L.J. said upon this aspect of the case.

In that case the vessels were on crossing courses, one intending to enter, and the other in the course of leaving, the Port of Monte Video, and they met in the neighbourhood of the buoy called the Whistle Buoy, at which vessels entering and leaving the harbour were accustomed to make their turn, the outgoing vessel to get into the open sea, the incoming vessel to make the entrance channel to the harbour. The Lord Justice says (15 Asp. Mar. Law Cas. at p. 322; 124 L. T. Rep. at p. 658; (1921) P. at p. 87) (he is discussing, as he said, whether art. 25 or art. 19 applies, the analogy is precise in that sense): "The present facts raise a sort of half-way case, where it is known that each ship is going to alter her course about the same place, but there is nothing that definitely settles where they will alter their course." Up to that point the analogy is quite exact to the present case. "They may go a little further before altering their course in each case. This is the sort of thing that constantly happens at sea when the ordinary practice is to make for a lightship, a buoy, or a headland, and then to alter course. In my view, in circumstances like that, which is the present case, the crossing rule applies, and the courses ought to be taken as prolonged, and the burden of keeping out of the way put on the vessel which has the other on the starboard side. If that is acted upon it avoids the difficulties that would otherwise arise, particularly at night, and which did arise in this case, when in doubt as to which ship is going to make the alteration in her course which you know is going to be made at some time, but as to which you are not sure exactly when it will be made." That very lucid application of the rule seems to me to be as nearly as possible exactly apposite to the present situation. Both vessels intended to turn about this buoy. Either vessel could have gone on longer on her original course without any great danger if no other vessel had been in sight, but it was uncertain, as they were approaching the buoy, at what precise moment either vessel would make the turn. It seems to me important to lay down quite clearly that, in these circumstances, the "crossing" rule, and no other rule applies.

Now let me, having arrived at that decision, apply the Rule to the present circumstances. It was not denied by the pilot of the *Archon* that the practice spoken to by those on board the *Treherbert* exists, that is to say, it has been for a long time the practice for the incoming ship (the *Archon* in this case) to leave the North-East Spit Buoy well clear on her port side, pass it at a good berth, in order to leave room for any outgoing ship to make the turn under what is now called a starboard wheel, and pass the incoming ship port to port in the usual safe and ordinary way.

At this stage I consulted the Elder Brethren as to their view concerning this practice. They not only confirmed the fact that there was such a practice, but they advised me (and I most unhesitatingly accept it) that it is a wise practice which should be continued in the future, and nothing that I say to-day as to the application of the rule (I hope I have been clear about that) is to detract, or is to be supposed to detract, in any way from the value of this practice. The incoming ship ought to pass that buoy well clear to the eastward and ought to leave a good clear berth to an outgoing vessel to pass round the buoy.

I do not think it is at all wise for me to attempt to define what I mean exactly by "a clear berth." The seamen who navigate in these waters ought to be quite sufficiently informed by the expression "a clear berth," but I may say this, perhaps, that by "a clear berth" I do not mean two cables and certainly not anything less than two cables—I mean more than two cables. How much more may depend upon the circumstances of the particular night and on circumstances of wind and tide.

Now to come back to this case, be it observed at the outset, as I say, that the whole force of wind and tide—not of any exaggerated strength but of substantial strength both of wind and tide—was setting both these approaching vessels towards the buoy. That is the cardinal fact to keep in mind in this case. Each vessel was in charge of an experienced pilot. Each vessel, on setting her course to pass round the buoy (the courses that I have indicated, crossing courses) made a substantial allowance for the set of wind and tide. That was a wise, prudent, seamanlike thing to do. It so happened that the *Archon* was, in the view I have taken of the facts, set down towards the North-East Spit Buoy more than she had intended. Her pilot says he passed the North-East Spit Buoy at a distance of about a quarter of a mile. I hardly think that can be true. I do not for a moment accuse him of attempting to deceive me about it. Distances at night are extraordinarily difficult to estimate, but putting all the facts and factors in this case together, I think the probabilities are—and I am prepared to find as a fact—that he passed the North-East Spit Buoy at some distance not more than two cables; I think he probably passed it at a distance of somewhere between one and two cables. In those circumstances, with wind and tide driving vessels approaching the buoy towards the buoy, this was not, either in the view I can form unaided, or in the view that the Elder Brethren have formed and presented to me, a clear berth which would enable the down-coming vessel to pass easily in safety between the *Archon* and the buoy. In other words, the pilot of the incoming ship had not, in the result of what happened, observed this salutary and proper practice.

To get rid of the matter at once, the first question, therefore, which arises in this case is, was there any negligence in that? Again I have the opinion of

the Elder Brethren to fortify me that that was not in the circumstances negligence. They think, and I think, that the pilot of the *Archon* made a proper and seamanilke effort to comply with the practice. Circumstances over which he had no control—a heavily draughted ship, a ship laden, a strong wind on his starboard bow, a tide setting him towards the buoy, drifted him closer to the buoy in making his run towards the buoy than he anticipated. Ships do not run on railway lines, and it is not to be accounted as negligence to a seaman that he occasionally makes, in circumstances of difficulty at night, a miscalculation of this kind. It is not a case of foolish, careless, or reckless miscalculation; it is a miscalculation which may happen—and in this case did happen—to a competent and careful seaman. Therefore, I hold that there was no negligence on the part of the *Archon* in approaching the North-East Spit Buoy as close as she, in fact, did.

In those circumstances the *Treherbert*, which had the *Archon* in view, was perfectly able to see, on a clear night, what the *Archon* was doing. I am not saying that she could judge to an absolute nicety, approaching at that angle, that the *Archon* was, in fact, drifting closer to the buoy than would be safe for her (the *Treherbert*) and leave her (the *Treherbert*) an ample berth. The position needed to be carefully watched. But I am not at all satisfied that the *Treherbert* has told me anything like an accurate story of what she saw. The case which the *Treherbert* puts forward is this. The pilot was quite explicit about it (he was given every possible opportunity), and he said that he saw the *Archon* coming on in such a position as would give him opportunity to pass in safety red to red, that is, to make his turn in the usual way. He did not see the *Archon* coming too close to the buoy in the first instance. He saw her, as he thought, leaving him ample room, and most explicitly, and testing him in every possible way as Mr. Raeburn did, and as I myself did at a later stage, he said that the cause of this collision was not that the *Archon* set an original course too close to the buoy, but that the *Archon*, at a late stage of the proceedings, ported her wheel (I should say, starboarded her helm in the old way) and ported towards the *Treherbert*. In other words, that having reached a situation of safety by quite competent seamanship in the ordinary and accepted way, she quite suddenly determined to make a position of foolish danger by directing her course towards the ship which she should have been attempting to pass. I have had to determine upon his evidence, and upon the evidence of the ship's company which supported him, whether that is true. To begin with, of course it is not at all likely, but that does not determine the case at all. Collisions, as is often said, happen because somebody does something which was not likely—in other words, somebody makes a bad mistake.

Therefore, this matter has had to be examined by me with very great care. Examining it with very great care, I take first the pilot's report—the report of Mr. James Bishop—which he made to his own authority without any suggestion from anybody else, or from any outside source. In an admirably clear report he summarises the three reasons for the collision. He is asked: how did the collision occur? A man of a loose and inaccurate turn of mind, unaccustomed to think exactly, might have said, "through the negligence of the other ship," or something of that kind—it would have been quite uninformative although it might have expressed, broadly, his view. Mr. Bishop does not content himself with that at all. "How did the collision occur?" he is asked, and he answers: (1) "by reason of the *Archon* making a course close to banks and buoys on her port hand; (2) neglecting to starboard in time to avoid collision; (3) neglecting to give any signal on the whistle."

That case is a perfectly clear case, but it is completely in conflict with the case which he presented in the box, because his case in the box, it was abundantly clear, was "no danger, no difficulty until the moment when the *Archon*, with no reason, quite suddenly ported her wheel and brought herself from a position of safety into a position of acute danger." They are quite two contrary cases. I have the evidence of the other witnesses from the *Treherbert*. I am sorry to say I find it very un convincing. None of those witnesses spoke clearly, as I thought, to the story that they had come to tell in this regard. For none of them convinced me that they saw a position of absolute safety suddenly converted into a position of danger by this action of the *Archon*.

Then I had the evidence from the Greek ship. I had, first of all, of course, the evidence of the pilot Dixon, that he never ordered a port wheel—that his wheel never was put to port; that from the moment that he set his course of N. by W. ½ W. until the collision, his ship's head had never gone to port; his wheel had never been ordered to port, and that by no mistake was it ever put to port. The witnesses from the Greek ship, as a whole, I am sorry to say, were, to my mind, a little lethargic. I do not at all accept their estimates about the place where the collision occurred, and I was not convinced that their evidence was really useful in most respects. But I make an exception in favour of the helmsman, because he struck me as being, by far, the most alert of those witnesses. It is true that a man who is alert in the witness box is not, necessarily, alert on his ship, but he gave me no impression of either a lethargic or a careless person, and his evidence on the matter was quite clear and emphatic.

Therefore, on all counts—initial improbability, balance of evidence, absence of original story in the pilot's most careful and detailed report—upon all those counts I have come firmly to the opinion that the helm of the *Archon* never was ported as described by the people from the *Treherbert*. That—to put the matter in a vivid phrase—knocks a considerable hole in the story of the *Treherbert*, and she then comes before the court in this somewhat sad case. She is a vessel who had—as I find unhesitatingly—a duty to give way.

She has told a story of action on the other ship in its most crucial particulars, which I find to be wrong. I do not say untrue, because I do not want it to be thought that I am stigmatising those on board the *Treherbert*—least of all the pilot who gave his evidence very candidly—as men who have come here to tell an untruth. I am finding it to be wrong; I say that the action which they say they took was not taken and it did not happen, but that they have persuaded themselves that it did, which is quite another story. It may be that they did so persuade themselves. It may be—as I think Mr. Raeburn pointed out—that the fact that the *Treherbert* ran on a great deal longer than she ought to have run on on her original course caused the lights of the *Archon*—which were originally seen wide open—to close to the view of those on board the *Treherbert*. That is very possible. And it may be because they closed very rapidly at the end that those on the *Treherbert* have (I think after consultation amongst themselves in view of the pilot's report) come to the conclusion that she must have ported her wheel.

There is another matter which, of course, I have borne in mind in considering this, and that is that the *Archon* at that time was getting into close quarters. She was in charge of a competent pilot, and she gave no whistle signal to indicate that she was porting her wheel—a most unlikely omission if, in fact, she was porting her wheel at such close quarters.

That, therefore, disposes of the main features of the *Treherbert's* case against the *Archon*, and the real situation is, as disclosed by the facts as I have found them, that the *Treherbert*—the give-way ship—stood-on without in any way giving way, or taking any step to keep out of the way as the give-way ship until a very late period.

And because of the correlative duty of the *Archon* under the Note to Art. 21, it is, I think, most important to determine, as accurately as I can, just how late she did stand on.

There one derives, as I suggested at the outset, perhaps some assistance—not conclusive, but some assistance—from the fact that the vessels are found in collision at an angle of 4 points when they were originally upon courses of 3. The *Treherbert* says—it is her case—I am not sure that it is stated exactly—at a distance—at no very great distance—from the *Archon*, seeing that the *Archon* was taking no steps to comply with the practice, which is what the *Treherbert* was relying on—the practice of passing port to port—she (the *Treherbert*) blew a one blast signal and first starboarded and then hard-a-starboarded her wheel. A good deal was made in cross-examination of the witnesses of the *Treherbert* that some, or one, of the original accounts—I think it was the log book account—gave no record of the starboarding, or gave no record of the hard-a-starboarding. The evidence of the helmsman of the *Treherbert* left me in very little doubt that the action of the *Treherbert*, as regards helm, was an action taken at a very late stage, and that the starboarding was very rapidly followed by the hard-a-starboarding—so rapidly that the helmsman had no time to bring his wheel back to amidships, and, therefore, the action in turning the wheel was really a continuous one—one turn of the wheel for the original starboard helm, and, immediately afterwards, two turns of the wheel for the hard-a-starboarding. The *Treherbert* is not a very large ship and, as far as I can see from the evidence—including the angle of the blow—she can have made but very little alteration under that starboard and hard-a-starboard wheel.

Similarly the *Archon* says that she took action when she heard the one blast from the *Treherbert*, but not before. She puts the distance at a quarter of a mile; I doubt very much whether it was as much. The action that she took was to get her wheel hard-a-starboard and put her engines full speed astern. Now nobody suggests to me that this vessel (the *Archon*) was sunk—as she was—by a vessel when either of them had got any substantial portion of their way off. The pilot of the *Treherbert*, who was very wild in his answers as to how far the vessels got off their courses, went some way towards exonerating the *Archon*—if I may believe him—by saying that the *Archon* got some 5 or 6 points off her course. But I am bound to say that I never attached the least credibility to that estimate. I do not think he could possibly get this collision at the known angle, the agreed angle, if the *Archon* had gone anything like that amount off her course. I do not think either of those ships got very far off their original courses, nor do I think they got any substantial portion of their way off.

I have had, in these circumstances and with these facts in my mind, to consider the proper apportionment of blame. To begin with the *Treherbert*, the offending of the *Treherbert* is simple and easy to see. She was the give-way ship, and she did nothing until a period of time which I find was a little more than a minute—if anything more. She did nothing at all to give way. She says (her pilot says): "I agree I was late in giving way, but then I do not think I was the give-way ship. I thought—and I still think—that the proper navigation is determined by this practice and not by the rule of the road of the sea." I hope he will never think so again after what I have said to-day, because I think that it is not determined by the practice, but is determined by the rule. Therefore his offending is perfectly clear. It may be some consolation to him as a seaman to think: "Well, anyway, I was not found as a careless and negligent seaman who was not attending to his duties; I am only condemned because I took a wrong view of the rule of the road at sea." If that is a consolation to him, I am very glad to be able to afford it to him, but that he took a totally wrong view, I have no doubt at all, and therefore he is by far the greater offender in this case.

Now I have considered very carefully the much more difficult question of the *Archon*, and I hope it will be quite clear—I mean it to be quite clear—that I am going to condemn the *Archon* in some portion of blame here, but not because she did not succeed in conforming to a practice which, I am satisfied, she attempted to conform to. It is not because she passed closer to the buoy than I think in the circumstances of that night, would have left a really clear berth for the *Treherbert*—it is not for that reason that I am condemning her at all. I have said there is no negligence in that. That was a misfortune such as may happen to a careful man. But I have this in mind—that the pilot on board the *Archon* was in the best possible position to know that he was being set towards the buoy, and that that was making an additional difficulty to the crossing vessel that was approaching him. Therefore there was, if it is possible, a higher duty even than usual to be vigilant, and to be certain to take action, under the note to Art. 21, in due time, and it is because he failed to take action in due time, under the note to Art. 21—and for no other reason—that I am condemning him in this case.

Translating that into terms of action under the rules, it means this: The approaching *Treherbert* had the duty of keeping out of the way, and obviously she was taking no steps to do anything of the kind. There is an imperative duty on the *Archon*—and I am saying nothing to lessen that imperative duty—to keep her course and speed. I fully appreciate the force of Mr. Raeburn's argument. "How can you say I did wrong? If I eased my speed because I was driven towards the buoy, I should be breaking art. 21 and I might be driven further. If I had kept further away I should be offending under art. 21 because I have to keep my course and speed." I fully appreciate the force of that, but there is a note to art. 21, and it is under the note that I am condemning him. She also has got that most difficult duty (no one, I think, has ever suggested that it is not a most difficult duty) to take action herself to avoid collision at a time when she is satisfied—or ought to be satisfied—that the action of the give-way vessel alone will not avoid the collision.

I always arrive—speaking for myself—at any condemnation of the stand-on vessel, in these circumstances, with the utmost reluctance. I think the determination on that point—when she ought to take action—is extremely difficult. But in this case she had every reason to be on the

alert. She knew that she was being drifted towards the buoy—must have known it. If she was keeping a proper look-out she must have known she was making a difficulty for the other vessel, and yet she did nothing at all until this extremely late moment, when she admits she never succeeded in getting her engines astern at all, although she gave the order, and the best she could do was to get her head off a point or two against a head wind and sea—there was a head wind and sea on her starboard beam. That was all she ever succeeded in doing, and that was her only contribution—apart from stopping her engines—on her own case, to avoid a collision which must have been staring her in the face for a very long time.

When you come to consider that the *Treherbert* did nothing at all until this happened about a minute before the collision, or a few seconds more than a minute before the collision, the later one puts the action of the *Treherbert* (and I am satisfied that it was very late indeed, and that is why I condemn her so strongly) the more does it become apparent that the other vessel (the *Archon*) cannot escape under the note. I think that makes clear, at any rate, the ground upon which I am condemning her. She is much the less offender of the two—the *Treherbert* much the greater.

The proportions which I adjudge are: Three-quarters to blame for the *Treherbert* and one-quarter for the *Archon*.

Both parties appealed.

Digby, K.C. and *Willmer* for the appellants and respondents in the cross-appeal.

Raeburn, K.C. and *Hayward* for the respondents and cross-appellants.

Scrutton, L.J.—This is a troublesome case; there is considerable difficulty as to the facts, and it is not made easier by the suggestion that it really is an international controversy between the Channel pilots and the Cinque Ports pilots. I think that the extent of that controversy has been considerably overestimated when one hears that as far as the knowledge of experienced counsel goes there has never been a collision at this Spit Buoy before the present one, so that there does not seem to have been any great practical difficulty in the past between the two schools of pilots.

The collision took place on a very clear night. The *Treherbert* was outward bound from London by the South Edinburgh Channel, and proposed to turn round the North Foreland, when she got to the N.E. Spit Buoy. The *Archon* was inward bound, and proposed, when she got to the Spit Buoy, to turn up the Thames. The *Archon* had the green light of the *Treherbert* on her port bow, the *Treherbert* had the *Archon* on her starboard bow. They contrived to run into each other somewhere to the north—I am intentionally using the vaguest phrase—somewhere to the north of the N.E. Spit Buoy. They completely contradict each other as to the distance, and the learned judge has taken, not a fixed distance, but a distance "at least two cables from the N.E. Spit Buoy."

Now the first question is: what rules apply? The *Archon*'s case is that the *Treherbert*, whose green light was seen on the port bow, was a crossing ship, and the give-way ship within art. 19, and that she, the *Archon*, was a stand-on ship which had to keep her course and speed. The *Treherbert's* case is that the crossing rule does not apply. When asked why it does not apply, it is said, in the first place, that the water in question is a narrow channel. The *Archon* was coming past the N.E. Spit Buoy, and the plaintiffs naturally ask: "What is the other side of the narrow channel, is it the West Hinder Lightship or the coast of Belgium, or what sort of narrow channel is this about which you, the defendants, are talking?"

I think it is quite clear that the *Archon*, coming up and rounding from the southward and eastward of the N.E. Spit Buoy, is not in a narrow channel. If, then, the narrow channel rule (art. 25) is barred by that, on what else can the *Treherbert* rely? She says that there is a practice of pilots who are on the one hand going to round the buoy and go south; or on the other hand, going to round the buoy and go west, to pass port to port. I am quite unable to see how that excludes the crossing rule; in fact, it is the direct consequence of the group of rules of which the crossing rule is one. It begins with art. 19: "When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side"—*i.e.*, the *Treherbert*—"shall keep out of the way of the other." As to that, it might have been said that they were not crossing, because passing port to port they would not cross each other. In my view, that construction of the article has been ruled out by the decision in *The Karamea* (15 Asp. Mar. Law Cas. 430; 126 L. T. Rep. 417; (1922) 1 A. C. 68) as well as by at least two other decisions. In *The Karamea* (*sup.*), there were two vessels which were proceeding at right-angles to each other, and it was known that somewhere near a particular buoy each of them would make a right-angled turn. The *Karamea's* case was that she was not crossing, because she was going to turn and would not cross. This court and the House of Lords rejected that view, and, as I understand the authorities, while there may be cases in narrow channels where one does not prolong the course because one knows that the configuration of the land requires a change of course which will involve that the ships are not crossing, when the vessels are not in a narrow channel they must take their courses as prolonged, and if those two courses so prolonged, cross each other, art. 19 applies. That was decided by every judge in the House of Lords who heard the *Karamea*, and by the Court of Appeal. I will not repeat the passages in the *Karamea*; I remain of the opinion that what I said then, which I understand the House of Lords to have adopted, was correct. Accordingly the *Treherbert* was a crossing ship under art. 19.

Art. 22 (one of the group of four) is: "Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the cases admit, avoid crossing ahead of the other." The *Treherbert*, therefore, which is to keep out of the way of the *Archon*, is not to cross ahead of her. It follows that if she does not cross ahead of her, she will ultimately pass port to port, which in practice is what she does. But she need not necessarily go straight on to pass port to port because, if there is any difficulty about it, Art. 23 comes in: "Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse"; so that the give-way vessel is not obliged to go on and try to pass port to port by the buoy; if there is any difficulty about it, she has to slacken her speed or stop or reverse. The *Treherbert* was the vessel which had to act, and it appears to me that the so-called practice is merely what must happen under the rule. It does not in any way alter the application of Art. 19; it is what must follow under Art. 19 if Arts. 22 and 23 are observed; the practice merely represents what is desirable. Obviously,

in a case like this, it is desirable that the up-coming ship should lay a course well clear of the buoy so as to avoid the necessity of the give-way ship having to stop to enable her to pass port to port, as she must if she is not to break Art. 22. It appears to me to follow also that if, owing to the set of the tide, the up-coming ship has drifted nearer the buoy than was anticipated, the down-coming ship must still keep out of the way. She is not entitled to say that the up-coming ship is not giving her a clear berth, and that she (the give-way ship) will go on and run into her; she must, as the give-way ship, either stop her engines or reverse in order that the two vessels may not pass the buoy at the same time; or, if the circumstances are such that she cannot even by stopping her engines avoid running into the up-coming ship, she must consider whether she should not proceed inside the buoy. There is 40ft. of water at low water (spring tides) inside that buoy. A vessel coming down drawing 12ft. finds herself in difficulty by reason of the up-coming ship being near the buoy; if she does not think it right to stop her engines and wait till the up-coming ship is clear of the buoy, she can avoid the collision by going with her 12ft. draught into 40ft. of water to the west of the buoy; and that is what the *Batavier* did. The *Batavier* had a channel pilot on board and a very experienced master, who had a pilot's licence; and those two experienced men did go inside the buoy some 50ft. with a ship drawing 12ft. into 40ft. of water. The *Treherbert* drew 18ft., and if it was really impossible for her in her judgment to go outside the buoy, to the north and east of it, and she insisted on going on, she could have gone inside the buoy with her 18ft. draught and nothing whatever would have happened.

All the members of the court, however, being landsmen, have been quite unable to understand why, if there were 300yds. to the east of the buoy, a vessel with a beam of 50ft. should not have been able to go through that 300yds. in safety. We have had the same difficulty, if the place of collision is two cables at least north of the buoy—1200ft.—why the vessel should not have been able to go through that space in safety. We have, of course, felt that we are not navigators, and we also appreciate that the fixing of the place by the learned judge is very vague; but we have asked the assessors this question, and they have given a very intelligent answer.

(Q.) "Assuming the judge's finding of the place of collision at least two cables to the north of the buoy, and that the *Archon* passed, say, one-and-a-half cables off the buoy" (we put one-and-a-half cables because the judge found "not more than two cables" or something between a cable and two cables), "as a matter of good seamanship, could the *Treherbert* either (1) have passed safely between the *Archon* and the buoy, or (2) drawing 18ft. 3in. have passed safely to the west of the buoy where the soundings show 42ft. of water at low water (spring tides)?"

(A.) "Assuming the judge's finding of the place of collision at two cables to the north of the buoy, the *Archon*, on a course N.N.W. mag. (estimated made good steering N. by W. ½ W.) would have passed the N.E. Spit Buoy five-sixths of a cable or 500ft. off, when abeam. In our opinion, as a matter of good seamanship, with a distance of one-and-a-half cables between the *Archon* and the buoy, the *Treherbert* could have passed between, though it would have been very close navigation with the prevailing conditions of fresh wind and tide setting down on the buoy. Or the *Treherbert* could have passed with a draught of 18ft. 3in. to the westward of the buoy. It should be observed that steering inside a channel buoy can only be justified in order to avoid immediate danger."

Now dealing with the last answer first, I entirely agree that as a general rule a vessel ought not to pass inside a channel buoy. But if it be a question of either passing inside a channel buoy in ample water or having a collision, because if the vessel goes on she will run into another ship, I have no doubt whatever that she ought to pass inside the buoy if there is plenty of water, as there was in this case. I quite agree that it is dangerous to pass too near a buoy. We cannot have a better example of that than the next case in these appeals (*The Segundo*, unreported), where a vessel in the Tyne did pass too near a buoy and stripped all the blades off her propeller by catching the chain, and such a contingency must be taken into account. But in this particular case, if the alternative was running into the *Archon* because she was too near the buoy, or going inside the buoy with perfect safety just as the *Batavier* did, with an experienced pilot on board, I have no doubt that that course should be adopted.

As to the first part of the answer of the assessors, the five-sixths of a cable within which they say the *Treherbert* could have passed, though it was rather risky navigation, is arrived at by taking the place fixed by the judge at north of the buoy exactly two cables, and then drawing from that place of collision the course which the *Archon* was steering. But there is great indefiniteness in the judge's finding of the place of collision: "I am accordingly satisfied that this collision took place somewhere about two cables to the northward of the N.E. Spit Buoy. It may have been a little more, but I do not think it can have been anything less. Whether the buoy bore exactly due south from the place of collision, or a little west, or a little east of south, again I do not pretend to determine, but I am satisfied, after weighing all the credible evidence, that the collision took place to the northward of the buoy, and not less than two cables from the buoy." Obviously, with a position so vaguely described as that, it is quite impossible to draw a line from any named place and get the exact distance at which the *Archon* could pass the buoy at five-sixths of a cable, particularly as the learned judge finds "certainly more than one cable" as the distance the *Archon* passed the buoy. He finds this: "I think the probabilities are—and I am prepared to find as a fact—that he passed the N.E. Spit Buoy at some distance not more than two cables; I think he probably passed it at a distance somewhere between one and two cables." We have put in our question a cable and a half, *i.e.*, considerably more than the five-sixths of a cable which the assessors, by drawing a collision at a fixed point north of the buoy, have found to be the room in which the *Treherbert* could have passed, though it was a matter of some little difficulty of navigation.

Now if that be the true state of things, the *Treherbert* could have avoided this collision at a time up to the last moment—a time when the *Archon* was still keeping her course and speed, and we have had some difficulty with the cross-appeal, which condemns the *Archon* for not acting under the note to Art. 21. I have had that note before me many times, and it is very troublesome to construe and act upon in particular cases. "Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed"; and the note is this: "When, in consequence of thick weather or other causes,

such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision." One of the most instructive cases in which that note has been considered is *The Albano* (10 Asp. Mar. Law Cas. 365; 96 L. T. Rep. 335; (1907) A. C. 193, 207), where Lord Gorell in giving the decision of the Privy Council, said: "It must always be a matter of some difficulty for the master of a vessel which has to keep her course and speed with regard to another vessel which has to keep out of her way, to determine when the time has arrived for him to take action, for if he act too soon he may disconcert any action which the other vessel may be about to take to avoid his vessel, and might be blamed for so doing, and yet the time may come at which he must take action. Therefore he must keep his course and speed up to some point, and then act, but the precise point must necessarily be difficult to determine and some little latitude has to be allowed to the master in determining this." That is the way in which I always approach this note.

Now in this case I have formed the view, and the answer given us by the assessors confirms it, that with reasonable care the *Treherbert* could have avoided the collision by going either east or west of the buoy, and that consequently the moment had not arrived when it was necessary for the *Archon* to alter her course and speed until it was perfectly obvious that the *Treherbert* was in fact not doing anything that would help anybody, but was coming straight on. The learned judge, in rather an obscure passage, has found the *Archon* guilty of not acting soon enough. He has not expressly stated whether the action that she ought to have taken was to alter her speed or whether it was to alter her course, but he has found that she did not take some action, unspecified, as soon as she should have done. I think there is some corroboration in the note taken by Mr. Willmer that the point was taken by Mr. Digby in his reply, but I am bound to say that I should have expected the point to have been much more definitely put to the pilot of the *Archon* than it was in fact put in cross-examination. I think one reason why it was not definitely put was that the case for the *Treherbert* was quite different. Her case was that the *Archon* ported into her instead of keeping course and speed. That contention has hopelessly failed. Anything more unsatisfactory than the evidence of the pilot, master and look-out man on the *Treherbert* I find it difficult to conceive, and I entirely agree with the view which the learned judge has taken of that evidence. Putting that aside for the moment, and coming back to this point on the assumption that it was taken, though not very strenuously, I am unable to agree with the view taken by the learned judge that the *Archon* is to blame under the circumstances for not acting earlier. I think that the *Treherbert*, up to the time that the *Archon* acted, could have avoided the collision easily by her own action, and if that be so, there was no necessity on the part of the *Archon* to act earlier than she did. In my opinion, therefore, the cross-appeal must be allowed and the *Treherbert* held alone to blame for this collision.

Lawrence, L.J.—The case made by the *Treherbert* at the trial was not that the *Archon* had set a course too close to the N.E. Spit Buoy or had in fact come too close to that buoy, but that, having reached a position of safety in the accepted way, she suddenly ported towards the *Treherbert* and thereby brought about the collision. Langton, J. in his judgment says: "The case which the *Treherbert* puts forward is this. The pilot was quite explicit about it (he was given every possible opportunity), and he said that he saw the *Archon* coming on in such a position as would give him opportunity to pass in safety red to red, that is, to make his turn in the usual way. He did not see the *Archon* coming too close to the buoy in the first instance. He saw her, as he thought, leaving him ample room, and most explicitly, and testing him in every possible way as Mr. Raeburn did, and as I myself did at a later stage, he said that the cause of this collision was not that the *Archon* set an original course too close to the buoy, but that the *Archon*, at a late stage of the proceedings, ported her wheel and ported towards the *Treherbert*. In other words, that having reached a situation of safety by quite competent seamanship in the ordinary and accepted way, she quite suddenly determined to make a position of foolish danger by directing her course towards the ship which she should have been attempting to pass. I have had to determine upon his evidence, and upon the evidence of the ship's company which supported him, whether that is true."

The learned judge, after carefully reviewing the evidence, came to the definite conclusion that the *Archon* did not take any such port helm action as was imputed to her by the *Treherbert*, and he truly observes that, "to put the matter in a vivid phrase, that finding knocks a considerable hole in the story of the *Treherbert*, and she then comes before the court in sad case." I entirely agree with the learned jndge in taking that view of this part of the case. The *Treherbert*, however, in no way daunted, and ignoring the inconsistency involved, contended, I suppose as an alternative case, that the *Archon* passed too close to the buoy, having regard to the fact that she was in a place where the narrow channel rule (Art. 25) applied, or at all events, in a place where there was an accepted custom that an incoming vessel should give room to enable an outgoing vessel turning southward to pass between her and the buoy. I agree with the learned judge that Art. 25 has nothing to do with the case. The word "channel" denotes a depression between two banks or ridges having a definite boundary on each side, and a narrow channel is a channel in which the two boundaries are close to one another. The expression "narrow channel" in Art. 25 is, to my mind, wholly inappropriate to describe the place where this collision occurred. The N.E. Spit Buoy is placed where it is in order to mark the turning point for vessels inward and outward bound either from or towards the south, and it cannot in any sense be described as marking one side of a channel, regard being had to the fact that the other side is open to an indefinite extent. Equally, in my judgment, the contention that the buoy marks an approach to a narrow channel cannot hold good. The channels in the estuary of the Thames consist of three or four main channels, all of which converge and lead into a wide basin or expanse of sea in which the buoy in question is placed. In my judgment *The Harvest* (6 Asp. Mar. Law Cas. 5; 55 L. T. Rep. 202; 11 Prob. Div. 14), a case of collision on the Tyne, is quite inapplicable to such a place as that.

I agree entirely with the learned judge's conclusion that the governing rule in this case is the crossing rule (Art. 19). Under that rule the *Treherbert* was the give-way ship, and the *Archon* was the stand-on ship. It was, therefore, the duty of the *Treherbert* to keep out of the way of the *Archon*. It was contended, however, on the part of the *Treherbert* that at that place there was a local practice of pilots that the incoming vessel should

give room for any outward bound vessel bound southwards to pass between the incoming ship and the buoy, and that in this case the *Archon* did not comply with that practice and did not leave sufficient room for the *Treherbert*.

The first observation which occurs to me is that such a practice cannot override the crossing rule, but I agree with my Lord that the practice does not conflict with, nor was it intended to override, the crossing rule. In fact, as my Lord has pointed out, it assists the vessels inward and outward bound at this point to pass one another port to port. The learned judge held in the present case that without any negligence on the part of the pilot of the *Archon*, she did not, owing to the set of the tide and the wind, in fact leave sufficient room for the *Treherbert* to pass in safety between her and the buoy. In view of the advice that we have received from our assessors, I very much doubt whether that finding was correct. As a landsman I do not profess to have any acquaintance with seamanship, but to say that a space of 300 to 400yds. between a buoy (which, after all, is only one point and will be passed in a ship's length) and an incoming ship is insufficient for a vessel of the size of the *Treherbert* to pass through with safety, rather astonishes me. Our assessors say that with careful or close navigation there was sufficient room. But assuming that there was not, and bearing in mind that the crossing rule applies, how can it be said that the *Treherbert* was justified in going full speed up to a point when she could not see whether there was room enough for her to get through safely without attempting to reduce her speed, and then, finding that there was insufficient room, according to her story, between the vessel and the buoy, running into the on-coming vessel instead of either attempting to take such close navigation between the two points as was actually left to her, or going to the westward of the buoy, where there was plenty of water for her? We are advised by our assessors, and it seems reasonable, that to go the wrong side of the buoy is a course which should not be adopted unless there is imminent danger. The *Treherbert's* case was that there was imminent danger and, although there was ample water to go to the other side, for some reason which is wholly inexplicable to me, she chose the course of running into the *Archon* rather than infringing the direction that ships ought not to pass on the wrong side of the buoy.

Mr. Willmer raised a point which rather startles me. He said that as the pilot of the *Archon* had got out of his reckoning when he set his course two miles northward of the Elbow and found himself close to the buoy (I think he said within a mile of the buoy), he ought to have starboarded his helm to get back on the course which he had set all that distance away, and to have taken that helm action without even sounding any signal to the on-coming ship. It seems to me that such a doctrine would be dangerous and wholly contrary to the rules of navigation. The *Treherbert* could not tell what course had been set or how much the *Archon* was out of her reckoning; all she could see was the course on which the *Archon* was actually proceeding at the time when she had got near the buoy. The *Treherbert* could then judge the course and the speed sufficiently to enable her to keep out of the way. The rule that the stand-on ship must keep her course and speed is enacted in order that the give-way ship can take such measures as she thinks advisable to keep out of the way of that ship. The give-way ship has no knowledge of the course which has been set by the master of the stand-on ship or of what helm orders have been given, but she can see the course on which the vessel is actually proceeding at the time when she is approaching her, and, if helm action had been taken by the *Archon* such as suggested by Mr. Willmer and a collision had occurred, it is plain that she would have had no defence.

There remains only the cross-appeal. Mr. Digby with his usual frankness, admitted that at the trial that was one of the minor points of the case. I have already stated what was the real case made by the *Treherbert* at the trial, although it is true to say that it was suggested that the *Archon* did not act soon enough in stopping her engines, when she was in the agony of collision. No question, however, was put to the pilot of the *Archon* on this subject, and it seems to me that it would be unfair to condemn him for not having taken action soon enough, without giving him any opportunity of explaining why he did not take action sooner. There may have been many reasons why he did not do so, and it has to be borne in mind that this is a question of good seamanship in the particular circumstances. I need not dwell on the difficulty the master of a vessel, which is bound to keep her course and speed till the last moment, is under in determining when the moment has arrived to take action and what action ought to be taken. It is curious to note that Mr. Digby's case is that the *Archon* ought to have taken action before she heard the one blast from the *Treherbert*—and, according to the *Treherbert's* account that blast was sounded when the vessels were within a quarter of a mile of each other—and to compare the case so made with *The Ulrikka* (13 Ll. L. R. 367), where the stand-on ship was held negligent for having altered her course when she was three cables from the give-way ship, and was condemned for having acted too soon. That is only one instance; although there are many others in the reports, I do not think there is a single case in which the pilot or the master of the ship has not been given the opportunity to explain why he delayed the action he did eventually take, and yet has been held to have taken action too late. In my judgment there is no evidence in the present case on which the learned judge could properly have found that the action taken by the pilot of the *Archon* was taken too late. There is no question here that when he did take action he took the right action, that is to say, he starboarded, but the charge against him is that he did not give the order to starboard the helm soon enough. In my judgment there is no evidence to support that charge.

I agree, therefore, that the cross-appeal succeeds, and that the main appeal should be dismissed.

Greer, L.J.—I am of the same opinion, and having regard to the fact that the mind of the court goes 75 per cent. of the way the learned judge took, it is not treating him with disrespect if I deal quite shortly with the other 25 per cent.

With regard to the case made by the *Treherbert*, I am satisfied that the argument which has been presented to this court, to persuade us that the crossing rule did not apply, ought to be rejected. It is conceded that the crossing rule applies unless the collision took place in a narrow channel or in some space of water which has by custom of navigation become equivalent to a narrow channel.

Now it is quite clear, and beyond argument, that in the ordinary sense of the word this collision did not take place in a narrow channel. A channel with only one side of it indicated, and many—I might almost say hundreds—of miles, which can be used upon the other side, cannot by any stretch of language be described as a narrow channel. But it is said that there are authorities which show that a vessel which is approaching a narrow channel

may have to take the same kind of action, having regard to the need for skilful navigation, as she would take if she were actually in the channel. That I take to be the effect of cases like *The Kaiser Wilhelm der Grosse* (10 Asp. Mar. Law Cas. 504; 97 L. T. Rep. 366; (1907) P. 259), where the vessel was just approaching the place where she would have to go between two moles and into a narrow channel, and where it may very well be that good seamanship directs that the position is to be treated as if she were already in the channel and not treated as a case of crossing ships. But those decisions have no application whatever to the present case, where the vessels were a very long way from anything that could be described as the entrance to a channel. The object of art. 25, applying to narrow channels, is the same as the object of the crossing rule; it is in order to secure that the vessels shall pass port to port. It is secured in one way by the crossing rule: it is secured in another way by the provision in the narrow channel rule that each shall keep on her own starboard side.

Looking at the case broadly, I think the cause of this collision was the bad look-out kept on the *Treherbert*. The point which the *Treherbert's* witnesses made was that the ship was put into an impossible position by a vessel, which was coming towards them, porting towards the buoy in a way in which she ought not to have been coming—porting almost as much as to bring her over four or five points—and it was because of that situation that they were unable to avoid the collision. The learned judge has found, and I entirely agree with his finding, that no such porting ever took place. All that happened was that when the *Archon* was, I think, about two miles from the Elbow she altered her heading in order to counteract the set of the tide, which was on her starboard side. In my judgment, from the time that she altered her heading until the time immediately before the collision, she kept her course and speed. I agree with the view which has been expressed by Lawrence, L.J. that if after that time she had altered her heading, she would have failed to keep the course which was determined partly by her heading and partly by the set of the tide, a course which was obvious on a clear night to the approaching vessel if she had kept a good look-out.

In these circumstances it seems to me clear that the learned judge had no option but to put the principal blame for this collision upon the *Treherbert*; and the only other question on which I desire to say a word or two is as to whether he was right in his view that some blame must be attached to the *Archon*. Now I regard the general rules applying to negligence on land as applicable to negligence on the sea, and if a vessel knows that the other vessel is doing the wrong thing, and notwithstanding that, continues to be negligent in her own action towards the other vessel which she knows to be doing something wrong, then the action of the first vessel is the effective cause of the collision, and she ought to pay for the whole of the damage thereby caused. Applying that to this case, assuming that the *Archon* was doing something wrong, although the learned judge has found that she was not, in the course which she kept until she got opposite to the Spit Buoy, still if the *Treherbert* by careful navigation could have avoided the collision and did not do so, then she and she alone is responsible for the consequences. But in this case we have to deal with the note to art. 21, which puts an onus on the vessel at a time when it meets a wrong-doing vessel, to do its best to avoid a collision; that is to say, the vessel which is ordered by the rule to stand on, must not continue to stand on in such a way as to make the collision inevitable, if she has any reasonable opportunity and knows that the give-way ship is not going to give way so as to avoid the collision; a duty is then put upon the stand-on vessel to do her best in the circumstances. This is an extremely onerous duty and very difficult to perform, because the stand-on vessel is supposed to keep her course until the very last moment, until the moment when she can reasonably judge by some action that the give-way ship is not going to do the right thing to avoid the collision; then the stand-on ship must cease obstinately to stand on and must take some measures to avoid the collision.

I am satisfied in this case that there is nothing that would justify a conclusion that the stand-on ship failed at the right moment to come to a decision that it was necessary for her to act, but unfortunately, when she did act, that was not sufficient to prevent the negligence of the other vessel resulting in a collision between the two. I agree with Scrutton and Lawrence, L.JJ. that the cross-appeal must be allowed with costs.

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

Solicitors for the respondents, *Constant and Constant.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Oct. 9 *and* 23, 1933.

(Before Branson, J.)

Andrea Sanguineti fu Davide v. Ugleexport, Moscow. (*a*)

Charter-party—Construction of ice clause—Duty of charterers—Ship travelling in convoy.

A charter-party provided that on arrival of the ship at the ice edge the charterers would provide an icebreaker to enable the ship to reach her loading port.

Held, that this clause did not impose upon the charterers an obligation to provide an icebreaker which should give exclusive assistance to the ship. The contract was sufficiently performed if an icebreaker accompanied and assisted a convoy of ships, of which the chartered ship was one, provided that it was reasonable for the ships to proceed in convoy, having regard to the weather and ice conditions existing and to be expected at the time when the obligation to give icebreaker assistance arose.

Special case stated by an umpire.

The material parts of the special case were as follows:

"Whereas by a charter-party dated the 23rd Jan., 1931, and duly made at Genoa between Andrea Sanguineti fu Davide, owner of the Italian steamship *Entella* (hereinafter called 'the shipowner'), and Ufficio Noleggi dello Rappresentanza dell' U.S.S.R. as agents for Ugleexport, of Moscow.

(*a*) Reported by V. R. Aronson, Esq., Barrister-at-Law.

charterers (hereinafter called 'the charterers'), it was agreed that the said vessel should proceed to Mariupol, Nicolaieff or Theodosia at charterers' option, and there load a full and complete cargo of coal and (or) anthracite to be carried in the said vessel to one or two safe ports on the east coast or west coast of Italy, including Sicily, in the charterers' option in accordance with the terms and conditions in the said charter-party contained :

"And whereas the said steamship *Entella* proceeded under the said charter-party to Mariupol, at which port she arrived on the 13th March, 1931 :

"And whereas disputes and differences arose between the parties, the shipowner claiming demurrage and (or) damages for detention of the said steamship, and for damage alleged to have been sustained by her from ice on the said passage to Mariupol, and the charterers repudiating all liability for the said claims :

"And whereas the said parties duly referred the said disputes and differences to the determination and award of Charles Barry Cooper, of Leadenhall-street, in the City of London, average adjuster (duly appointed by the shipowner), and Alfred Morley Conybear, of 34, Lime-street, in the City of London, shipbroker (duly appointed by the charterers) :

"And whereas the said arbitrators, having entered upon the said reference and having failed to agree upon an award concerning the matters so submitted to them, duly appointed me, Alexander Thomas Miller, one of His Majesty's counsel, to be the umpire to enter upon the reference and to determine an award upon the matters so referred as aforesaid :

"And whereas both parties requested me in the first instance to deal by way of an interim award with questions arising as to the legal obligations of the charterers, leaving for subsequent determination (if necessary) all questions of the amount of demurrage and (or) damages (if any) recoverable :

"And whereas the claimants desire such interim award to be made in the form of a special case for the opinion of the court, and the respondents raise no objection thereto :

"Now I, the said Alexander Thomas Miller, having taken upon myself the burthen of the said reference and umpirage, and having heard and considered the evidence and arguments adduced before me on behalf of the parties concerning the premises, do hereby make and publish this my interim award in the form of a special case for the opinion of the court pursuant to sect. 7 (*b*) of the Arbitration Act, 1889.

"1. By the said charter-party of the 23rd Jan., 1931, it was provided (*inter alia*) as follows :

"*Ice Clause.*

"(1) In the event of the port of loading being inaccessible by reason of ice on vessel's arrival at Kertch, if loading at Mariupol or Berdjanska, or at the edge of ice if loading at Nicolaieff or Theodosia, or, in case frost sets in after vessel's arrival at loading port, the charterers undertake to provide icebreaker to enable steamer to reach, load at, and leave the said port, steamer being free of expenses for icebreaker.

"(2) Time lost by steamer waiting for icebreaker when entering loading port during forty-eight hours after her arrival at Kertch, if loading at Mariupol or Berdjanska, or at the edge of ice if loading at Nicolaieff or Theodosia, and when leaving port during forty-eight hours after giving notice of readiness, not to count in the first case as lay days and in the second case as time on demurrage or detention.

"(3) Any detention to the steamer waiting for icebreaker at the edge of ice, and also when leaving loading port (above the time mentioned—item 2), to count in the first case as time for loading, and in the second case as demurrage and detention, to be paid by the charterers at the rate of 25*l.* (twenty-five sterling), from which time days saved in loading shall be deducted.

"(4) In order not to miss her cancelling date steamer must arrive at Kertch, if loading Mariupol or Berdjanska, or at the edge of ice, if loading at Nicolaieff or Theodosia, not later than at noon the day previous to the cancelling date stipulated in clause 11, and in the case of any delay through ice whilst on passage, or entering loading port, or in giving notice of readiness, the cancelling date to be extended according.

"(5) Captains must follow official instructions issued by authorities for vessel convoy by icebreakers through the ice.

"2. The charterers duly nominated Mariupol as the port of loading, and the said steamship proceeded to Kertch, where she was ready waiting for icebreakers in order to proceed to Mariupol at 4 p.m. on the 4th Feb., 1931, having then received from the port authorities at Kertch a copy of the icebreaker regulations referred to in sub-par. (5) of the ice clause, and in pars. 5 and 6 of this case.

"3. At that time and thereafter at all material times in the absence of icebreaking assistance the port of Mariupol was inaccessible to all ordinary vessels, including the steamship *Entella*.

"4. All the icebreakers operating in the Kertch Straits and the Sea of Azov, as in all other waters of the U.S.S.R., are controlled by the port authority and belong to the Central State. The port authorities act under the jurisdiction and management of the Government Department known as 'the Commissariat of Ways and Communications,' and another Government Department known as 'Sovtorgflot' is specially constituted for the purpose of keeping open the ports which would otherwise be icebound.

"A number of icebreakers were at all relevant times allocated by the authorities to assist vessels in the transit between Kertch and Mariupol. Their help was given free of charge.

"5. The icebreakers operate under regulations which have the force of law. The regulation in force at all material times bear date the 12th Oct. 1930, are entitled 'Instructions for vessels convoyed by icebreakers through ice,' and are attached to and form part of this case. These regulations are a public document in Russia, were published in England in Lloyd's List in Dec., 1930, and copies could have been obtained at all relevant times in Genoa on application to the Freight Office of the U.S.S.R. at that port.

"6. The regulations prescribe (*inter alia*) :

"(4) The time and the order of proceeding through the ice, as well as the number of vessels to be convoyed simultaneously, shall be fixed, if in port by the harbour-master, and if at sea by the master of icebreaker.

"(5) The master of vessels following an icebreaker through the ice shall comply with the orders of the master of the icebreaker in regard to their movements in the ice and shall act in accordance therewith.

"The method of assisting a number of vessels at one time in a convoy as distinct from allocating the exclusive service of an icebreaker to one vessel only has been in force in the Sea of Azov for many years.

"7. The charterers Ugleexport are a Russian trade company and a separate legal entity. No legal means exist by which the charterers could influence in any way the manner in which the icebreakers

perform their duties or render assistance to vessels navigating in ice, nor could the charterers control the number or capacity of the icebreakers available for service at Kertch or in the Sea of Azov or elsewhere in the waters of the U.S.S.R. or exercise any authority or control as to the order in point of time in which vessels requiring help should be assisted.

"8. No evidence was adduced before me of any steps taken by the charterers to provide icebreakers to enable the steamship *Entella* to reach, load at, and leave the port of Mariupol, or of any notification (if any were given) by the charterers to any of the authorities concerned in the provision of icebreaking assistance.

"9. On the 7th Feb., 1931, until late afternoon the wind at Kertch was a moderate to gentle breeze from E.N.E., and there was nothing to suggest that the passage through ice from Kertch to Mariupol would be attended with any unusual difficulties. Accordingly, and as I find quite reasonably in the circumstances, it was decided by the harbour-master of Mariupol that the icebreaker *Makarov* should escort the steamship *Entella* and three other vessels, which were also awaiting icebreaking assistance in the vicinity of Kertch, in a convoy of four vessels through the ice to Mariupol. The other three vessels were the steamship *Anastassia*, the steamship *Anastassia Pateras*, and the steamship *Antonios Vrondisis*.

"10. The *Makarov* is a powerful and efficient icebreaker of modern type. The distance from Kertch to Mariupol is about 120 miles, and had conditions remained normal as anticipated the *Makarov* would have been able, apart from accidents, to escort the convoy of four vessels to Mariupol in from two to three days.

"11. Accordingly, at 0.15 p.m. on the 7th Feb., the steamship *Entella* (which up to that time had been awaiting icebreaker at Kertch), in pursuance of orders from the *Makarov*, weighed anchor and followed the *Makarov*. At 1.15 p.m. the *Entella* was taken in tow by the *Makarov*. At 3.30 p.m. they passed Enikale, and at 8 p.m. the *Entella*, in pursuance of orders from the icebreaker, let go the tow rope and came to an anchor, being then at or near the entrance from Kertch Strait into the Sea of Azov and near to the steamship *Anastassia*, also at anchor. The other two vessels of the convoy (the *Anastassia Pateras* and *Antonios Vrondisis*), having been taken through the straits earlier in the day, had made some further progress unattended and were then in ice in the Sea of Azov distant some eighteen miles.

"12. Unfortunately the wind which at 4 p.m. on the 7th Feb., 1931, had been force 3 from E.N.E., at 5.30 p.m., had increased to force 9 (a strong gale) from N.E., and at 6.30 p.m. is recorded by the *Makarov* as a storm from E.N.E., by the 8th Feb., 1931, at 8 a.m. the wind was E.N.E. force 10, a heavy gale, and thereafter continued blowing a gale from the E.N.E. until the 13th Feb.

"13. The effect of this increase in force of the wind and the consequent drifting and piling up of the ice was to make the conditions most difficult in the Sea of Azov and to block the entrance to the Gulf of Taganrog, south of Mariupol, with ice drifting from the easterly end of that gulf. The drifting and packing of the ice was such that on many occasions during the following days it was logged by those on the *Makarov* that the ice reached downwards to the ground, and at times attempts to make progress were made by exploding charges of ammonal.

"14. In these circumstances I find that those on the *Makarov*, having four vessels to assist, did all that was possible to assist the convoy (including *Entella*) to reach Mariupol, and on the 10th Feb. had got the *Entella* to a position marked A on the chart, about ten miles to the S.E. of Berdjanska Point. Thereafter, the *Makarov* herself, the *Entella*, and the other vessels in the convoy were carried by drifting ice, and the strong wind in a south-westerly direction, and by noon on the 25th Feb. the *Entella* was at a position near the letter B marked by me on the chart. At times the *Makarov* was herself stuck fast in the ice and unable to move.

"15. The *Makarov* with difficulty succeeded in getting through the ice to Mariupol for necessary coals, provisions and water, and returned forthwith on the 22nd Feb. accompanied by a second icebreaker—the *Toros*—which thereafter assisted. The *Anastassia* and *Anastassia* Pateras were got through to Mariupol by the *Makarov* on the 3rd March, 1931 ; and the *Makarov*, having taken in further necessary bunkers and water, was engaged on the 5th and 6th March (as I find reasonably and properly) in saving the lives of certain fishermen adrift in the ice off Mariupol. On the 7th March the *Makarov* again left Mariupol to bring in the *Entella* and the *Antonios Vrondisis*, which she succeeded in doing, the *Entella* reaching Mariupol on the 13th March, 1931, at 3.30 p.m.

"16. The delay which the *Entella* experienced in reaching Mariupol was in my view due to the conditions of weather and ice which supervened unexpectedly after the convoy started on the 7th Feb., 1931. Had these conditions existed or been anticipated before the convoy started, I am satisfied that all the vessels and icebreakers (including the *Entella*) would have been required to await an improvement at Kertch before attempting the transit to Mariupol. The conditions in the Sea of Azov after the 7th Feb., 1931, were for a considerable time unsuitable for the transit of the *Entella* to Mariupol, even if given the exclusive services of an icebreaker. The ice conditions in the Sea of Azov after the 7th Feb., 1931, were exceptional, but were such as are liable to occur from time to time under similar conditions of temperature and wind.

"17. During the said transit the *Makarov* rendered individual services to the *Entella*, but services of this nature by reason of the convoy system adopted and the weather and ice conditions were necessarily intermittent, as the other three vessels also required individual attention from time to time. The *Entella* was for short periods of time only in the tow of the *Makarov*. The vessels of the convoy became separated, and the *Makarov* had difficulty in getting from one to the other. It resulted, though those of the *Makarov* did the best they could in the circumstances, that for considerable periods the *Makarov* was not icebreaking for or in the vicinity of the *Entella*.

"18. On behalf of the shipowner it was contended before me :

"(*a*) That the ice clause imposed obligations upon the charterers to provide an icebreaker for the exclusive service of the *Entella*.

"(*b*) That this obligation became operative at 4 p.m. on the 4th Feb., 1931, and that the charterers were then in breach.

"(*c*) That the provision in the clause with reference to forty-eight hours after arrival at Kertch affects only the measure of damages for a breach—not the obligation itself.

"(*d*) That the *Entella* would have been taken safely and with no delay to Mariupol before the gale of the 7th Feb., 1931, came on had the charterers' obligation as contended for been complied with.

"(*e*) That, alternatively, an icebreaker giving exclusive services to the *Entella* as from 4 p.m. on the 6th Feb. would have enabled the *Entella* to reach Mariupol without delay.

"(*f*) That the charterers are responsible for delay of the *Entella* during the periods of time on the transit from Kertch to Mariupol, during which the *Makarov* was engaged in icebreaking for other vessels of the convoy and not for the *Entella*.

"19. As to (*a*) of par. 18, I hold that the ice clause imposed an obligation on the charterers to make arrangements for the services of an efficient icebreaker to be given to the *Entella* in such manner as in the circumstances of weather, the ice existing and reasonably to be anticipated, would enable that vessel apart from accidents to reach her loading port without undue delay.

"I find that the provision of the *Makarov* to assist the *Entella*, together with three other vessels in a convey, was in accordance with the obligation as I understand it.

"20. As to (*b*) of par. 18, I hold against this contention of the shipowner.

"21. As to (*c*) of par. 18 I hold that the ice clause allows the charterers a period of forty-eight hours within which to provide icebreaker, and that the charterers were in breach under this clause at 4 p.m. on the 6th Feb. 1931, and not before.

"22. As to (*d*) of par. 18 I find (though in my view this is immaterial) that had an icebreaker been provided at 4 p.m. on the 4th Feb., 1931, either exclusively for the *Entella* or for the *Entella* in a convoy with other vessels, the *Entella* would (apart from accidents) have reached Mariupol without undue delay.

"23. As to (*e*) of par. 18, I find that had an icebreaker been provided to give exclusive service to the *Entella* as from 4 p.m. on the 6th Feb., the *Entella* would (apart from accidents) have reached Mariupol without any undue delay.

"24. As to (*f*) of par. 18, so far as it is a question of fact I find that so far as it is a question of law I hold that the provisions of the *Makarov* by the Russian Government authorities (except as to the time at which her services to the *Entella* began) afforded to the *Entella* the assistance which by the ice clause the charterers had contracted to supply. I find that the assistance given by the *Makarov* to the *Entella* was as continuous as in the circumstances of the convoy was reasonably possible, and that to the extent to which other vessels of the convoy received a greater share of individual or prior attention, this was due wholly to the exigencies of the situation; and I hold against the shipowner's said contention.

"25. A document headed 'Submissions at law of the Respondents' has been submitted to me on behalf of the charterers, and is attached hereto and forms part of this case.

"26. I reserve all questions relating to the shipowner's claim for ice damage alleged to have been sustained by the *Entella* during the passage to Mariupol to be dealt with hereafter by my final Award.

"27. Subject to the opinion of the court I hold, award, and determine, that on the facts found by me the shipowner fails to make good in law any claim for demurrage and (or) damages for detention by reason of breach by the charterers of the ice clause, except in so far as such a claim can be substantiated (if at all) by reason of the delay of the *Entella* at Kertch waiting for icebreaker between 4 p.m. on the 6th Feb. 1931, and 0.15 p.m. on the 7th Feb., 1931.

"28. And subject to the opinion of the court I further award that the shipowner do pay the charterers' costs (if any) of the arbitration to be taxed if not agreed, and that the shipowner do bear and pay the costs and expenses of this my award and the arbitrators' fees amounting in all to the sum of Two hundred and sixty-five pounds, six shillings. And in case the charterers shall in the first instance pay the whole or any part of such last-mentioned sum I award and direct that the shipowner shall forthwith repay the charterers the amount so paid by them.

"29. The question for the opinion of the court is whether my interim award and determination contained in par. 27 hereof is right.

"If the court be of opinion in the affirmative, my said interim award and determination, and the award as to costs and expenses contained in par. 28, are to stand.

"If the court be of opinion in the negative the said awards and determination are to be set aside, and in that event I award and determine the question of the charterers' liability to the shipowner in respect of the shipowner's claim for demurrage and (or) damages for detention in accordance with the opinion of the court, but reserving for subsequent determination by me all questions as to the amount of such demurrage and (or) damages (if any) recoverable; and in that event I further award and determine as to costs as to the court shall seem fit.

S. L. Porter, K.C. and *C. T. Miller* for the appellants.

Sir *W. Jowitt*, K.C. and *H. Atkins* for the respondents.

Branson, J.—This is an appeal from an interim award made in the form of a special case by Mr. A. T. Miller, K.C. I take the following résumé of the facts from the case. The appellants are the owners of the steamship *Entella* and the respondents a body called Ugleexport of Moscow.

The *Entella* was chartered by the respondents under a charter-party, dated the 23rd Jan., 1931, to proceed to Mariupol in the Sea of Azov, and there load a cargo of coal. The charter contained an ice clause upon the true construction of which the result of this appeal depends. So far as material, the ice clause reads as follows: "In the event of the port of loading being inaccessible by reason of ice on vessel's arrival at Kertch . . . the charterers undertake to provide icebreaker to enable steamer to reach the said port, steamer being fre of expenses for icebreaker. (2) Time lost by steamer waiting for icebreaker when entering loading port during forty-eight hours after her arrival at Kertch . . . not to count as laydays. (3) Any detention to the steamer waiting for icebreaker . . . (above the time mentioned in item 2) to count . . . as time for loading . . . to be paid by charterers at the rate of £25 per day from which time days saved in loading shall be deducted. (4) in order not to miss her cancelling date steamer must arrive at Kertch . . . not later than at noon the day previous to the cancelling date stipulated in Clause 11, and in the case of any delay through ice whilst on passage, or entering loading port . . . the cancelling date to be extended accordingly. (5) Captains must follow official instructions issued by authorities for vessels convoyed by icebreakers through the ice."

The *Entella* reached Kertch and was ready to proceed at 4 p.m. on the 4th Feb., 1931, having received from the authorities at Kertch the icebreaker regulations referred to in par. 5 of the ice clause. Mariupol was then inaccessible to ships without icebreaker assistance.

The respondents are a Russian trade company having a separate legal entity. They did not and

could not do anything to provide icebreaker assistance for the appellants, but at 15 minutes past noon on the 7th Feb. the harbour-master, acting reasonably under clause 4 of the icebreaker regulations, decided that the *Entella* should proceed with three other vessels under the escort of the *Makarov.*, a powerful and efficient icebreaker.

The distance from Kertch to Mariupol is about 120 miles, and, had conditions remained normal, the *Makarov* could have enabled the convoy of four vessels to have reached Mariupol in from two to three days. Unfortunately, however, a heavy gale came up during the late afternoon of the 7th, which continued until the 13th Feb. Conditions became such that at times the icebreaker herself was stuck fast in the ice, and for considerable periods they were unsuitable for the transit of the *Entella*, even if given the exclusive services of an icebreaker. As a result of this storm, coupled with the fact that the icebreaker had four ships to look after, the *Entella* was left in the ice from the 10th Feb. till about the 10th March, and it was not until the 13th March that she was finally enabled to reach Mariupol. The learned umpire has found that the icebreaker acted reasonably in the circumstances, which were exceptional, and could not reasonably be foreseen when the convoy left Kertch.

The appellants claimed for demurrage and (or) damages for detention and for damage alleged to have been sustained by the *Entella* from ice on her passage to Mariupol. The respondents repudiate all liability. The learned umpire has found that except for the delay in the arrival of the icebreaker between 4 p.m. on the 6th Feb. (that is to say, forty-eight hours after 4 p.m. on the 4th Feb. when the ship was ready to proceed) the icebreaker assistance rendered by the port authorities to the appellants was all the icebreaker assistance to which their contract with the respondents entitled them. The question for me is whether in so finding he has misdirected himself in any point of law.

At the outset of my consideration of the law involved, there is one point which I must mention in order to dismiss it. The respondents contended before the learned umpire that their obligation was limited to the provision of an icebreaker at Kertch, and that their obligation was discharged if an icebreaker was there, notwithstanding that it might have rendered no assistance of any kind to the ship. It has already been held by Roche, J. and the Court of Appeal in *The Anastassia* (148 L. T. Rep. 139 ; 149 L. T. Rep. 342), and by me in *Akties. Steam* v. *Arcos Limited* (149 L. T. Rep. 428), that this contention is unsound and that the icebreaker assistance contemplated by the charterparty is assistance sufficient to enable the vessel to reach her port and that it must continue so long as is necessary to enable the vessel to reach her port. This point having been decided as above by the Court of Appeal was not open before me, either in the *Akties. Steam* v. *Arcos Limited* or in the present case, but was taken only to keep it alive in the event of an appeal to the House of Lords. I say no more about it.

The appellants, however, contend that those cases have at least decided that they are entitled to continuous assistance from an icebreaker from their entry into the ice till they reach the loading port, and they say that the assistance must be rendered to their ship exclusively.

With regard to the contention that they are entitled to the exclusive attentions of an icebreaker, the position is as follows: Roche, J., with whose judgment the majority of the Court of Appeal agreed, treated it as a question to be decided upon evidence as to the facts. He said, in *Dampskibs. Heimdal* v. *Russian Wood Agency* (*sup.* p.362; 148 L. T. Rep. 140, at p. 142): "I do not decide that it was wrong to assist this vessel in convoy with others. . . . That depends upon evidence." In the case of *Akties. Steam* v. *Arcos*, I used the following language (*sup.* p. 411 ; 149 L. T. Rep. 430), upon which much reliance was placed by the appellants ; "I think that the true construction of this clause means that this ship shall have the attention of an icebreaker which will enable her to enter and to leave the port. Like Roche, J. I do not decide that it is essential that every ship should have its icebreaker. I have to deal with this contract which is made between these plaintiffs and the defendants, and whilst I must not be understood as deciding that the contract has not been fulfilled if the icebreaker which is attending to the vessel does at the same time attend to another vessel, I do not think that this contract is fulfilled if by reason of the presence of another vessel the icebreaker leaves this one or delays the passage of this one through the ice in order to devote its attention to the needs of some other vessel."

It is said that these decisions involve an obligation upon the charterers, if not to provide exclusive icebreaker assistance to the chartered ship, at least to ensure that the chartered ship shall not be delayed by reason of the icebreaker, which is in attendance upon it, giving assistance also to other ships under its charge. The passages which I have quoted show that both Roche, J. and myself expressly disclaimed any intention to decide that the chartered ship was always entitled to the exclusive attentions of an icebreaker. It may well be that the conditions of ice and weather are such that one icebreaker could convoy a dozen ships as safely and speedily through the ice as she could convoy one. Whether, therefore, it is right or wrong to send more than one vessel into the ice in charge of one icebreaker must in each case be a question of fact to be decided by the tribunal of fact, unless there be anything in the charter-party which places that decision in other hands.

The respondents contend, and the learned umpire has held, that the provisions of par. 5 of the ice clause in the present charter, that captains must follow official instructions issued by authorities for vessels convoyed by icebreakers through the ice, coupled with clause 4 of the regulations, which reads : "The time and order of proceeding through the ice as well as the number of vessels to be convoyed simultaneously shall be fixed by the harbour-master," are sufficient, particularly in view of the finding in the award that the harbour-master quite reasonably in the circumstances decided that the icebreaker *Makarov* should escort the *Entella* in a convoy of four vessels through the ice to Mariupol, to dispose of any complaint by the appellants as to delay or damage to the *Entella* arising out of the fact that she was one of a convoy of four ships in charge of one icebreaker. In my opinion, this is correct. I am not aware that in so deciding I am in any way departing from what was said by Roche, J. and the Court of Appeal in the cases above referred to, or from what I decided in the case of *Akties. Steam* v. *Arcos Limited* (*sup.*), where no such clause was relied upon, if it existed, nor any evidence given of orders of any competent authority as to the number of ships to be convoyed simultaneously.

For these reasons I am of opinion that the learned umpire was right in rejecting the appellants' contention that they were entitled to the exclusive assistance of an icebreaker, and consequently cannot complain of any delay or damage arising by reason of the fact that the *Entella* sailed in a convoy of four ships.

A number of subsidiary contentions upon this part of the case were put forward on behalf of the appellants. One of these was that the icebreaker assistance to be provided must be such as to enable the ship to reach her port with the minimum of delay, so that if the conditions were such that one icebreaker could not get the ship through the ice, a second should have been summoned to assist. Another was that if there were a more powerful icebreaker available which could have got the ship through more quickly than the one in fact provided, the failure to provide the more powerful one would be a cause of complaint. I think the answer to these and similar contentions is that the charter-party is a commercial document and must be construed reasonably. The learned umpire has construed the clause as follows. He says in par. 19 of the award: "I hold that the ice clause imposed an obligation on the charterers to make arrangements for the services of an efficient icebreaker to be given to the *Entella* in such manner as in the circumstances of weather and ice existing and reasonably to be anticipated would enable that vessel apart from accidents to reach her loading port without undue delay." I can find no fault with that statement of the charterers' obligation under the ice clause.

The next question is as to the time when the obligation to provide icebreaker assistance arose. As to this, the appellants contended that the obligation arose at 4 p.m. on the 4th Feb., 1931, and that as no assistance had then been provided the charterers were in breach. On this point I agree with the learned umpire that the charter-party allowed the respondents forty-eight hours within which to provide icebreaker assistance, and that they were not in breach under this clause until 4 p.m. on the 6th Feb., 1931. After that date they were in breach by reason of the finding in the award, that they did nothing to implement the obligation undertaken by them to provide icebreaker assistance, and they are only relieved from the consequences of that breach to the extent to which their obligation was performed by the port authorities. The learned umpire has found, upon a construction of the charter-party, with which I agree, that except for the delay between 4 p.m. on the 6th, and fifteen minutes past noon on the 7th, the port authorities performed the respondents' obligation to the full. There is no finding of fact to the effect that the ship would have escaped the consequences of the gale had she started in convoy at 4 p.m. on the 6th, and, therefore, nothing remains for me but to dismiss this appeal. It may seem a curious result that, whereas the *Anastassia*, which was one of the convoy of four, and which actually suffered less delay than the *Entella*, should have recovered damages whilst the *Entella* fails, but the explanation is simple. In the case of the *Anastassia* as in the other cases which have been before the court, the charterers have relied on unsound constructions of the charter-parties and let the questions of fact go largely by default. The charterers in this instance have taken the trouble to present their case upon the facts.

Solicitors for the appellants, *Richards, Butler, Stokes*, and *Woodham Smith*.

Solicitors for the respondents, *Pettite* and *Kennedy*.

House of Lords.

Thursday, Dec. 14, 1933.

(Before Lords Atkin, Tomlin and Russell.)

Smith v. E. A. Casper, Edgar, and Co. Limited; The Zigurds. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Freight — Authority to collect freight given by master to ship's agent—Equitable assignment of freight—Notice—Letter to receivers of cargo informing them of authority to collect freight "against which we have made payments"—Sufficiency of notice—Priorities.

The master of the Latvian steamship Z. on arrival at the port of West Hartlepool, gave to the respondents, who were the ship's agents, an equitable assignment of the freight. Unless such an assignment had been given the ship's agents would have refused to make the necessary disbursements for the Z. Thereupon the ship's agents wrote the following letter to the receivers of the cargo, who were liable to pay the freight: "S.S. Zigurds. *We beg to give you notice that we hold the captain's authority to collect the freight for this steamer against which we have made payments."*

Held, that the respondents' letter to the receivers of the cargo was a good notice of their equitable charge and that as between them and the appellant who was an earlier equitable assignee of the freight and had given no notice of his assignment, the respondents were entitled to priority.

Decision of the Court of Appeal (reported sub nom. The Zigurds, *ante, p.* 332; 148 *L. T. Rep.* 381; (1933) *P.* 87) *affirmed.*

Appeal from a decision of the Court of Appeal (Scrutton, Lawrence, and Greer, L.JJ.), reported under the name of *The Zigurds* (*ante*, p. 332; 148 L. T. Rep. 381; (1933) P. 87), reversing a decision of Langton, J. The respondents had acted as agents for the Latvian steamship *Zigurds* at West Hartlepool in March, 1931, and in that capacity had made various disbursements on behalf of the vessel. Before making any such disbursements, and, as a condition of so doing, the respondents obtained from the master of the *Zigurds* a document in the following terms: "Please pay the freight for my vessel, the *Zigurds*, and all demurrage which may be payable under the charter to my agents, Messrs. E. A. Casper, Edgar, and Co. Limited, and oblige." Upon receiving this document the respondents wrote the following letter to Messrs. Churchill and Sim, who were the receivers of the cargo by whom freight was payable: "Dear Sirs,—S.S. *Zigurds*: We beg to give you notice that we hold captain's authority to collect the freight per this steamer's cargo, against which we have made payments.—Yours faithfully, for E. A. Casper, Edgar, and Co. Limited.—(Signed) D. Edgar, director." The freight was also claimed by Mr. Alfred Harris Smith, an earlier equitable

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

assignee. The Court of Appeal held, reversing the decision of Langton, J. (reported *ante*, p. 324; 148 L. T. Rep. 72; (1932) P. 113), that the respondents' letter was a good notice of their assignment, and that as between the respondents and an earlier equitable assignee of the freight, by whom no notice had been given, the respondents were entitled to priority. Alfred Harris Smith appealed.

Sir *Gerald Hurst*, K.C. and *Harry Atkins* for the appellant.

W. P. Spens, K.C. and *J. V. Naisby* for the respondents were not called upon to argue.

Lord Atkin.—In this case the question that arises before the House is a question as to the priority of equitable assignments. It arises in respect of a ship called the *Zigurds*, which in 1929 was sold to a Latvian firm, and in respect of the purchase of which the appellant made an advance of the purchase price, or towards the purchase price, for which he took a statutory mortgage on the ship. At the same time he took a supplementary agreement in writing which is alleged to be an equitable assignment of the freight of future voyages, and in respect of that matter, for the purposes of this case, it is to be assumed that that document did in fact give him an equitable assignment of the freight. In Feb., 1931, the ship was at West Hartlepool with a cargo of timber, and the respondents were appointed the ship's agents. They appear to have known of the financial position of the ship at that time, which certainly was not a very satisfactory one; there were defaults on the mortgage and there were claims in respect of other matters which it is unnecessary to deal with. The respondents were unwilling to undertake the duty of agents of the ship at West Hartlepool, in so far as it involved making disbursements on the ship's behalf, unless they got security over the freight. The ship's master, having authority, which is not disputed, to make such arrangement, did arrange with the respondents that they should have that security, and he gave the agents a document on the 2nd March, 1931, which is said to be in a printed form such as is taken by all ship's agents of foreign ships, and perhaps of British ships as well, entitling them to receive the freight. The document is on the ship's broker's paper, and says: "Dear Sir, Please pay the freight for my vessel, the *Zigurds*, and all demurrage which may be payable under the charter to my agents, Messrs. E. A. Casper, Edgar, and Co. Limited, and oblige, Yours faithfully, F. Krauklis, Master." It will be noticed that that is not in itself in terms an authority to the agents to receive the freight, but it purports to be a notice to the freight payers to pay to the agents, although no doubt it comes to the same thing. The question might have arisen possibly as to whether that document in ordinary form in ordinary circumstances would amount to an equitable assignment of the freight, and the authority of a judge having great weight in these matters—the late Bailhache, J.—was produced, which appears to be a decision that it would not. As far as that matter is concerned, I merely desire to say that it must be left open, because it is not necessary for the decision of this case.

On the facts of this particular case it is now not disputed that there was in fact an equitable assignment constituted by the intention of both parties that this authority should, in fact, represent an equitable assignment to the agents of the freight, giving them a charge over the freight, as against the disbursements they might make on the ship's behalf. Therefore, for the purposes of this case, there must be taken to be two equitable assignments—(1) that given in 1929 to the appellant, and (2) that given in 1931 to the respondents. The question then arises as to the priority of these two equitable assignments, and it is not disputed that that priority would depend upon the date at which notice of the equitable assignment was in fact given to the debtor. Now no notice was given of the appellant's equitable assignment at all, and, therefore, the question remains as to whether or not the respondents did in fact give notice of their equitable assignment. The notice that they gave was this: On the 5th March, 1931, they wrote to Messrs. Churchill and Sim, who are a very well-known firm who deal in timber at this port and many other ports, in these terms: "Messrs. Churchill and Sim, London. Dear Sirs,—S.S. *Zigurds*: We beg to give you notice that we hold captain's authority to collect the freight per this steamer's cargo, against which we have made payments.—Yours faithfully, for E. A. Casper, Edgar and Co. Limited.—(Signed) D. Edgar, Director." The question is whether that is a notice to Messrs. Churchill and Sim that the respondents did hold an equitable assignment or charge on the freight to which they would have to give effect.

It appears to me that there is only one possible construction of that document. I think it was given for the purpose of making it plain to Messrs. Churchill and Sim that the ship's agents did in fact hold a charge upon the freight and that they had made disbursements by virtue of that charge—"against which we have made payments." On the other hand, I think there can be no doubt at all that any reasonable firm of business people, used to this kind of business, would understand that that letter was given to them for the express purpose of letting it be made known to them that there was in fact held by the brokers an equitable charge over this freight and they, Messrs. Churchill and Sim, must not pay to anybody else. If that was the result of that communication, it appears to me to have been a perfectly effective notice of an equitable charge. It is suggested that it is not that at all, but that it was merely a notice of an ordinary authority to collect freight, in pursuance of which the brokers might, if so disposed, make advances for which they would have, if they did collect a freight, a lien.

I have already said I must not be supposed to assent to the proposition that that is the only effect of an authority given in ordinary circumstances by the master of a foreign ship, but, whether that be so or not, upon an ordinary notice, it appears to me quite plain that these words "against which we have made payments" convey to the recipients that here there was an equitable charge in respect of which they must govern their conduct accordingly.

For these reasons it seems to me that the decision given by the Court of Appeal is quite correct and cannot be challenged. I therefore move your Lordships that this appeal should be dismissed, with costs.

Lord Tomlin.—I agree.

Lord Russell.—I also agree.

Appeal dismissed.

Solicitors for the appellant, *Constant* and *Constant.*

Solicitors for the respondents, *Middleton, Lewis,* and *Clarke*, agents for *Middleton* and *Co.*, West Hartlepool.

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Nov. 9th, 10th, 13th, and Dec. 21st, 1933.

(Before LANGTON, J., assisted by TRINITY MASTERS.)

The Seapool. (a)

General average—" Extraordinary sacrifice . . . intentionally and reasonably made "—Vessel manœuvred against pier in order to avoid going aground—" Stranding "—York/Antwerp Rules, 1924, Rules A, E, and Rule 5.

In order to prevent his vessel from dragging ashore, the master of the plaintiffs' steamship allowed her to drift or fall alongside the pier at Bagnoli, in consequence of which very substantial damage was done both to the pier and to the steamship. The court held that in allowing his vessel to drift against the pier the master had acted reasonably in the circumstances, and that there was no other course open to him which appeared to ensure the safety of his vessel and her cargo.

Held, that the action of the master was a General Average act within the meaning of Rule A of the York/Antwerp Rules, 1924, which provides that there is a General Average act where " any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure."

Held, further, that there was not a " voluntary stranding " within the meaning of Rule 5, by the vessel striking the pier, notwithstanding that she was in fact bumping on the ground during part of the time when she was lying against the pier.

GENERAL AVERAGE.

The plaintiffs were the owners of the steamship *Seapool*, and claimed against the defendants, who were the insurers of a cargo of coal carried in the *Seapool* from the Tyne to Bagnoli, Italy, a general average contribution in respect of damage done to the *Seapool* and to the pier at Bagnoli, for which the plaintiffs had paid, by reason of the vessel having dragged her anchors and drifted against the pier, on the 1st Jan., 1932. By the terms of the charter-party under which the coals in question were being carried it was provided that average, if any, should be settled according to the York/Antwerp Rules, 1924.

The *Seapool* arrived at Bagnoli on the 31st Dec., 1932, and was anchored by a local pilot in a position of apparent safety off Nisida Island, about three-and-a-half to four ship's lengths to the southward and westward of Ilva pier. Early on the morning of the 1st Jan. the wind veered round and increased to gale force with squalls, causing the *Seapool* to drag her anchors, and ultimately to part her port anchor cable. The *Seapool* was then in close proximity to the Ilva pier, and in danger, unless some action was taken, of dragging ashore on to a sandy beach. It appeared to the master that if he attempted to steam away his vessel might strike the pier with her stern, damaging her counter and rudder, and that the safest course open to him was to allow the *Seapool* to fall with her side against the pier, as gently as he could manage it, with a view to subsequently getting clear. He accordingly took this course, and considerable damage was in consequence done, both to the vessel and to the pier.

The plaintiffs claimed a general average contribution in respect of the damage to the *Seapool* and the sum which they had to pay to the owners of the pier.

The York/Antwerp Rules, 1924, provide as follows :

Rule A : " There is a General Average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure."

Rule E : " The onus of proof is upon the party claiming in General Average to show that the loss or expense claimed is properly allowable as General Average."

Rule 5.—*Voluntary Stranding :* " When a ship is intentionally run on shore, and the circumstances are such that if that course were not adopted she would inevitably drive on shore or on rocks, no loss or damage caused to the ship, cargo and freight, or any of them, by such intentional running on shore shall be made good as General Average. But in all other cases where a ship is intentionally run on shore for the common safety, the consequent loss or damage shall be allowed as General Average."

Raeburn, K.C. and *Carpmael* for the plaintiffs.—The evidence shows that the master deliberately took the course of allowing his vessel to drift against the pier, and that if he had not done so the *Seapool* would probably have gone ashore, in which case both ship and cargo would have been totally lost. There was, therefore, a General Average sacrifice. The plaintiffs rely upon *Austin Friars Steamship Company* v. *Spillers and Bakers Limited* (13 Asp. Mar. Law Cas. 162 ; 113 L. T. Rep. 805 ; (1915) 3 K. B. 586).

Le Quesne, K.C. and *Naisby*, for the defendants, contended on the facts that the master did not exercise any election in taking the course that he did, and his action was not therefore intentional. They further contended that the pier ought to be treated as part of the shore, and that there was a voluntary stranding when the vessel struck the pier ; further, on the evidence, the *Seapool* was bumping on the ground when she lay against the pier, and there was therefore a stranding within the meaning of the rule.

Raeburn, K.C. replied. [Reference was also made to *Norwich, &c., Company* v. *Insurance Company of N. America* (1902, 118 Fed. Rep. 307) and *Barnard* v. *Adams* (1850, 10 How. 270).]

Cur. adv. vult.

Dec. 21.—**Langton, J.**—This is a claim to contribution for general average. The plaintiffs are the owners of the steamship *Seapool*, and the

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

defendants are insurers of a cargo of coals carried on board her. The *Seapool* is a single-screw steamship of 4549 tons gross, 392ft. long, 36ft. beam, and with a dead-weight carrying capacity of 8083 tons. She was laden with a full cargo, and on the voyage in question was proceeding from Dunstan, in the Tyne, to Ilva Pier at Bagnoli, which lies in the Bay or Gulf of Pozzuoli, on the West Coast of Italy.

The charter-party under which the coals were carried provided that average, if any, should be settled according to the York/Antwerp Rules, 1924.

Both the facts and law have given rise to acute controversy, and both have caused me some doubts and hesitation. The facts, as I find them, are these : The *Seapool* arrived off Bagnoli on the 31st Dec., 1931, at 11.30 p.m. On that night she was anchored in a position of apparent security by a local pilot under the shelter off Nisida Island. Both her bower anchors were laid out, with 60 fathoms of cable on the starboard anchor and 45 fathoms on the port anchor. The wind at that time was from the S.S.E., a fresh breeze, and the *Seapool* lay heading to the wind. She was anchored in a position about 400yds. to 500yds. north of the light on Nisida Island, and in that position she lay about three-and-a-half to four of her own ship's lengths to the southward and westward of Ilva Pier. Early in the morning of the 1st Jan., 1932, at about 3 a.m., the wind, which had veered from the S.W. and increased in force, began to blow with squalls of gale force. A certain amount of sea got up in the comparatively narrow waters of the bay, and at the same time a swell from a rather more westerly direction than the wind began to come in from outside the bay.

In these circumstances, the *Seapool* began to drag her anchors. Two shackles from a chain were let out on each anchor but, either because the scope of cable was unequal, or because the port cable was the weaker, the port cable carried away. At the time that the port cable carried away, the vessel had drifted about two lengths to the N.N.E. The engines had been kept with steam on and with a pressure of about 165lbs. on the main boilers, out of a possible 180lbs. When the cable carried away they were ordered full ahead, with the intention of steaming to sea. After the port cable parted, the vessel dragged still closer to the pier, but the engines eventually checked the drag at a time when the vessel was still distant from the pier about two-thirds of her length, and with the end of the pier somewhat forward of her port beam. In this position, it will be seen that she had but very scanty room in which to make the necessary manœuvre to get head to sea by porting her helm. I do not know whether it would be right to say that she was broadside to the wind, but she was in a position in which the wind was on her starboard bow, and it was therefore impossible for her, unless she could get the wind on her port bow, to steam up to her anchor, get her anchor, and get to sea. The master of the *Seapool* gave a careful, and, to my mind, a trustworthy, account of his subsequent manœuvres, and described, in great detail, the kind of dilemma in which he was placed. He said the alternatives before him were " (1) to let my vessel drag ashore, (2) to attempt to turn to sea, and (3) to let my vessel drift broadside on to the end of the pier. Of those three, the worst, in my view, was to let my vessel drift ashore. I should then possibly lose my propeller, almost certainly damage my rudder and, possibly, break my vessel's back by bumping on the shore. The one that was, at first sight, the most attractive, was to try and turn under port helm, get the wind on the port bow, and steam away. But I was already so close to the pier by the time I had considered this manœuvre that there was a danger of striking my stern with the somewhat vulnerable counter, and with the risk of damaging my propeller and my rudder, against the pier. The third alternative was the one which I adopted, which was to go ahead at first on the engines, then stop the engines, and let the weather drift her, as gently as I could manage it, with her broadside against the end of the pier." He did outline a further alternative of steaming past the pier and attempting to turn to sea to the southward of the pier, but I rather doubt whether that alternative was clear in his mind at the crucial moment.

The master of the *Seapool* was corroborated, in all essentials, in his description of the events by an exceptionally able and experienced chief officer, a Mr. Fenwick, who at the time of giving his evidence in this court, was, himself, the master of the *Seapool*. To my mind, he was an excellent witness, and, so far as one can see, he had nothing to gain by supporting an untrue story, and nothing to fear (since, in any case, he was not responsible for the misfortunes of the *Seapool* on this occasion) from telling the truth, if it happened to be other than what the master had described.

I think it is quite possible that in working the matter out the next day in comparative calm and safety on the other side of the bay, the story which they then put down (and it is material to note that they did put it down the same day) has acquired certain definite edges, and probably, perfections of detail, which were perhaps not present to their minds when faced with a sudden emergency in the early morning of the 1st Jan.

Both were subjected to a most careful and thorough cross-examination, and both these two witnesses—and subsequent witnesses—in their evidence revealed some divergencies of time and detail. Doubts were thrown by this cross-examination upon actual positions, upon the exact direction of the swell, upon how the seas were breaking over the ship, and how logs came to be written, erased, and re-written, and upon what was said, and what was omitted, in letters and protest, written and made concerning the events. I have weighed all that as carefully as I can ; I have weighed the demeanour of the witnesses whom I saw and heard ; and weighing them all up as carefully and conscientiously as I can, I do not think that those criticisms, reasonable and moderate as they were, shake the belief that I felt in these witnesses when they were giving their evidence. I am much strengthened in my view of their credibility by the fact that it is difficult to see why this story should have been invented—it is a daring and original story—for no particular purpose if it is untrue. A much simpler story would have been for the master and mate—who are both of them very intelligent people—to have made a case of overwhelming disaster. They would simply have said : " We were flung on the pier, we had not any chance, the gale got up very suddenly, and no precautions that seamen could have taken could have prevented disaster." There seems no reason for this elaboration, this instant elaboration the very next day, in very considerable and careful detail, and I have come to the unhesitating conclusion that the broad features of these stories are true. The leading feature of the story is that there was a consultation between the master and chief officer on the bridge of the *Seapool* as to what should be done in the circumstances, in what I have described as a triple dilemma.

which presented themselves. The fact that there was such a conversation is confirmed by one of the other officers who was on the bridge, but the broad feature of the conversation is this. The master proposed, and the chief officer agreed in the proposition, that the best thing to do was not to attempt to swing the ship and, thereby, jeopardise the propeller and rudder by striking the pier, but consciously to allow the ship to drift with her broadside against the pier. That is the conversation which has been spoken to in great detail, and confirmed by the chief officer, and which, I believe, actually took place, and it is, perhaps, noticeable in that, that I did not hear anything in the conversation of the suggestion of sliding past the pier and turning to the southward. That seems to me—without discrediting anything which the master and chief officer have said—may well have been one of the details which crept into their minds in the comparative calm of Baia on the other side of the bay. At the time that this decision was taken the master must have known—and indeed does not pretend not to have known—that very serious danger to the ship would quite possibly result and some probable damage to the pier, by the course which he was electing to take. To put a ship broadside against a pier which must have been for these purposes a grinding wall, is not a course which any shipmaster is at all anxious to follow, but the alternatives with which he was presented—drifting ashore or trying to swing, or doing damage to the vital portions of the ship—the propeller and the rudder—were even worse, and may have resulted in worse damage, not only to the ship but also to the cargo, and I think the master might quite reasonably weigh, at that moment, that the damage he was going to do by driving against the pier at least would not result in damage to the cargo, and might not damage the ship vitally. So that I feel that I am on reasonably sure ground when I say that the alternative present to the mind of the master at the time when he took this decision was an alternative of striking the pier or of going ashore, and of those two things he preferred and elected to take the evil of striking the pier. That it was no light evil is shown by the fact that the damage done to the ship was no less than 6719*l*., and the damage done to the pier has been assessed, as I understand, at 7898*l*. But having taken this alternative of allowing his ship to drift against the pier and to grind against the pier, he was enabled, by manœuvring his engines, I think astern, to get into position to the north side of the pier, and, by that means, to get his vessel with the wind on her port bow, and thus was able to steam ahead, pick up the ninety fathoms that still remained of his starboard cable, and get away to the other side of the bay. He steamed straight across the bay into the wind, and lay in perfect safety off Baia, on the other side of the bay.

Those are the facts on which the point arises as to whether there is in this case, a good claim for general average, and since the parties agreed to be bound by the York/Antwerp Rules of 1924, it is to that code that one must turn in order to solve this point. The important Rules for the purpose are Rule A, Rule E, and Rule 5. Taking first Rule E, the onus of proof is upon the party claiming in general average, to show that the loss or expense claimed, is properly allowable as general average. As to the effect of this Rule in the present case, there is no dispute. The plaintiffs agree that the burden is upon them. Taking next Rule 5, it bears the heading: "Voluntary Stranding," and is in these terms: "When a ship is intentionally run ashore, and the circumstances are such that if that course were not adopted she would inevitably drive on the shore or on rocks, no loss or damage caused to the ship, cargo, and freight by such intentional running on the shore shall be made good as general average. But in all other cases where a ship is intentionally run on shore for the common safety the consequent loss or damage shall be allowed as general average." Upon that Rule, Mr. Le Quesne, on behalf of the defendants, claimed that this was a voluntary stranding by the master, in that running the ship against the pier, or allowing the ship to drift against the pier was, within the terms of the rule, intentionally running on shore. His contention was that the pier, being attached to the shore, was part of the shore, and therefore if a ship were allowed to run against a pier it was the same as if she were running on shore. If that were a good argument I think it would follow, as Mr. Le Quesne contended, that this would not be a good claim in general average. On the other side, however, it was contended that "stranding" is a well-known term. It is a term that occurs in continental law, and in English law, and it has a well ascertained meaning. "Stranding" means going with the bottom on the shore, and for my part, I have always so understood it. I find it difficult to imagine that anybody could consciously have used language such as this if they had intended to include running a ship against the end of a pier, while the bottom of the ship was clear of the ground. It is true that some colour may be lent to the argument by the fact that, in this particular case, the ship appears to have bumped upon the ground whilst she was lying against the end of the pier; but apart from that—which seems to me an extraneous circumstance—I see very little colour in this argument at all. The York/Antwerp Rules, 1924, were, to my certain knowledge, debated for a very long period before being finally settled, and the language of the Rules was canvassed and chosen with quite unusual care. It was language chosen by people who were peculiarly conversant with, and peculiarly interested in, maritime matters and especially in maritime casualties, and I cannot think that they would have framed a rule and headed it "Voluntary Stranding" if they had not meant to use the word "stranding" in what I have called the ordinary sense.

Therefore I think there is nothing in this point, and I do not think that Rule 5 applies to the present circumstances.

One, therefore, is driven back to Rule A, which says: "There is a General Average Act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure."

Now the words of Rule A are, to my mind, not at all easy of interpretation, and I am sorry to say that no very great guidance from either the masters of the law or the prophets of the textbooks, can be obtained to enlighten one as to the exact meaning of the Rule. Where the masters of the law have spoken they have spoken with truly masterly caution upon this somewhat difficult subject, and where the prophets have spoken and written they have spoken with a wealth of disagreement that would do credit to doctors, so that I have been driven back very much upon my own resources in interpreting the meaning of Rule A. As showing the caution with which this subject has been approached by the masters of the law, I may take the decision of Lord Sterndale

in a case which was pressed upon me with almost equal vehemence by both sides—the case of the *Austin Friars Steamship Company* v. *Spillers and Bakers Limited* (13 Asp. Mar. Law Cas, 162 ; 113 L. T. Rep. 805 ; (1915) 3 K. B. 586).

Mr. Raeburn, on behalf of the plaintiffs, cited this case to me as providing excellent material for the construction of an *a fortiori* case—in the present instance a kind of fulcrum upon which he might turn his ship and get her head to sea. Mr. Le Quesne, on the other hand, seized upon it equally eagerly, as affording a wealth of material for distinction, and as showing that this particular act was not a general average act, although the act in the *Austin Friars Steamship Company* v. *Spillers and Bakers Limited* (*sup.*) was decided so to be. When I looked for guidance on the main point—that is to say, some enlightenemnt as to the meaning of rule A—I found only this somewhat cold and comfortless phrase from Pickford, L.J. (as he then was): "I do not think it is necessary to lay down any general principles of law as to what is a general average act in the case of voluntary stranding, but in the circumstances of this case it seems sufficient to say that in my opinion this was a general average act."

Turning from that rather comfortless dictum, I have studied the works of Mr. Carver and Mr. Lowndes, but again I am afraid without very much enlightenment. A statement in Mr. Carver's book, taken from the 7th edit., at p. 545, sect. 386, commended itself to me as being the clearest exposition that I could find. It is in these terms: "Where a common danger to the whole adventure has arisen not from the ordinary incidents of the voyage, but accidentally, and the master has intentionally sacrificed something to avoid that danger, we have the ingredients of a general average act, but there must be an extraordinary common danger, and a conscious giving away of something to meet it." That, when compared with Rule A, seems to me to be a fair expansion, although perhaps not much of an expansion, of the Rule itself—an expansion in the sense of making it a little clearer what the words of Rule A probably mean.

I think the best thing I can do in this case is to follow the caution of the masters of the law and confine myself to interpreting as closely as I can the meaning of Rule A, and frame my finding accordingly. Was there, then, in this case any extraordinary sacrifice? I think there was. I think, in this case, the master did "intentionally" —that is also one of the words of Rule A— "intentionally" sacrifice a portion of his ship. I think he made his conscious act of putting his ship against the pier, and I think he, by so doing, intended to, and did in effect, succeed in transferring what was a peril to the entire adventure, to a peril to the ship alone. If he did this, and did it with his eyes open to what he was doing, that seems to me to comply with the real underlying meaning of Rule A. He was confronted, as it seems to me, with the alternative of certain damage to his ship, and probable damage to the pier, as against a problematical worse damage to the whole adventure, and he elected to take the first of the two alternatives. He certainly did succeed in preserving his cargo from any loss or damage, and if it be necessary to decide—I am not sure that it is—whether his act was reasonably taken in the circumstances, I, for my part, think that it was a reasonable course to take. I say I am not certain whether it is necessary so to decide, because Mr. Raeburn put forward the argument that perhaps "reasonable" in Rule A only refers to expenditure, and that the Rule should be read: "When any extraordinary sacrifice is intentionally made, or when any extraordinary expenditure is reasonably made." I do not know whether that is, or whether it is not, the correct reading, and I do not know that it is necessary so to decide, because, as I have said, for my part I think that this was a reasonable thing for a man to do in the circumstances. I have put this point to the Elder Brethren for their consideration, and I think it is fair to say that they are not enthusiastic about the master's action in taking this alternative. They point out to me—and I have weighed it very carefully—that to put a vessel's side—more especially in the way of her engine-room—against the hard structure of a pier, in a swell, which necessitated that she would grind against the pier, is taking a very serious risk. But, against that, I am impressed with the unknown danger—always perhaps more terrible to a shipmaster—of letting his ship go on to the ground. The fate of vessels which take even a sandy beach is various and difficult to forecast. Sometimes a very little damage is done, sometimes the worst possible damage is incurred, and the vessel—as the chief officer, I think, in this case predicted would have been the case—the vessel breaks her back. But it is an unknown and, for that reason alone, a terrible danger to allow your vessel to go on sand, the nature and consistency of which you do not know. Therefore, the Elder Brethren are, to this extent, with me, that they do not think it was an unreasonable thing for the master to have taken this step. I go a little further than that, and I think that it was a reasonable thing to do, with the time at his disposal and the knowledge of the circumstances which were at his disposal. He had not been there on this occasion for more than a few hours of darkness and although the master had been there apparently as an able seaman some eighteen years before, it is unlikely that he made any special study of the sands which were, at that time, under his lee.

Therefore, in my view, this is a general average act and an extraordinary sacrifice was intentionally and reasonably made for the common safety and for the purpose of preserving from peril the whole property involved.

I, therefore, find that this was a general average act and the plaintiffs are entitled to succeed.

Solicitors for the plaintiffs, *Botterell* and *Roche*, for *Temperley*, *Tilly*, and *Hayward*, West Hartlepool.

Solicitors for the defendants, *Lightbounds*, *Jones*, and *Bryan*, for *Ingledew* and Co., Newcastle-on-Tyne.

Thursday, Feb. 1, 1934.

(Before BATESON, J., assisted by Trinity Master.)

The Gastelu. (*a*)

Collision—Fog—Action of vessel hearing another vessel sounding signal of two prolonged blasts—Regulations for Preventing Collisions at Sea, 1910, *arts.* 15 (b), 16.

In foggy weather a vessel upon hearing the signal of two prolonged blasts sounded by another vessel is not justified in altering her course or proceeding on until every precaution has been

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

taken to ascertain whether the blasts are getting nearer or the bearing is changing, since the signal of two prolonged blasts is frequently unreliable.

DAMAGE ACTION under the Short Cause Rules.

The plaintiffs, owners of the steamship *Halesius*, claimed damages from the defendants, owners of the steamship *Gastelu* in respect of a collision between the *Halesius* and the *Gastelu* which took place in foggy weather off the coast of Portugal at about 7.30 a.m. on the 7th Aug., 1933.

The plaintiffs' case was that the *Halesius*, whose engines were stopped upon running into the fog, heard two prolonged blasts from the *Gastelu*, from whom fog signals had been previously heard. The *Gastelu* thereafter was heard to sound signals of two long blasts as she gradually broadened on the port bow. After hearing several such blasts, and the whistle on the starboard bow having broadened to the beam, the *Halesius* altered course to 10 degrees to starboard and put her engines slow ahead to assist the helm. It was alleged that the *Gastelu* subsequently came into sight travelling at speed, and the collision took place.

The facts and findings of the learned judge fully appear from the judgment.

Hayward for the plaintiffs.

Pilcher for the defendants.

Bateson, J.—I have come to the conclusion, in which the Elder Brother agrees with me, that both these vessels are to blame, and I find also that they are equally to blame. In my view the real cause of this accident was that these two vessels were proceeding too fast in fog, and did not get their way off as they should have done before taking the manœuvres they did.

In dealing with the case from the point of view of the Regulations I find that both ships were going too fast in fog. Neither of them stopped when they heard the whistle of the other ship in front of them; each did something which I think in this case was wrong; the Spanish ship blew two long blasts when she had lost all her way, which is a very common thing. I cannot accept the excuse made by the master of the *Halesius* for altering his helm in fog, which is a very dangerous manœuvre and one which I think is generally condemned unless it turns out in the result that it could not have done any harm. If a vessel is going to alter her helm after another vessel has given her a signal of two long blasts, every precaution ought to be taken, before going ahead and using the helm, to make sure that the bearing of the blasts corresponds with what they are saying. It is only a matter of waiting a little longer when you cannot see what is in front of you, to make sure whether the sound is getting nearer, or whether it is altering its bearing, and if so in which direction, in order to be safe in putting the engines ahead, and using the helm. An invitation such as is conveyed by two long blasts is one which I think is well known to be seldom quite reliable. I think if proper precautions had been taken the master of the *Halesius* ought not to have gone on with his engines or used his helm. Good navigation required one to make sure, before putting the engines ahead and altering the helm that the other vessel is not changing her bearing or her distance. In my opinion it ought to have been clear in this case from the several long blasts that were blown that the *Gastelu* was getting nearer all the time, and therefore was not really stopped in the water. Further than that, the master of the *Halesius* put his engines on slow for some two minutes, he says, to help the helm. Even if the *Gastelu* was stopped it was quite unnecessary to increase the *Halesius'* way under those circumstances; she had as much as three knots way at the time of the collision according to her own account. If the *Gastelu* was stopped, the slowness of the *Halesius'* action on her helm would not matter, and on the whole I have had to come to the conclusion that she was wrong in altering her helm. The Elder Brother put it this way: If the navigation was cautious up to the time of taking action there might possibly be some excuse for that action. The vessel should have been brought to a standstill before taking such action as the starboarding involved. All the greater precaution was necessary, the blasts being more or less ahead, for it could not be assumed that the vessels were end on—there might be vessels coming from the north-westward making for Lisbon.

It seems to me, therefore, that these two vessels were negligent in different respects. It is true that the real fault was that they were going too fast in the fog initially, and I cannot see that one of them is any blacker than the other. The master of the *Halesius* seemed to me to be an honest man, but his estimates were, I think, too favourable for himself. He gave his evidence, I thought, quite fairly. On the other hand. I do not think that the master of the *Gastelu* was a bad witness. But I am going to decide in this case on what seem to me to be admitted facts.

The speeds on the ships when they were in collision I think were much about the same. They were not very fast. They had taken some steps to get their way off. The original way of the *Halesius* was ten knots or a little more, and the Spanish ship about eight-and-a-half, but both of them delayed getting off their way, and I am satisfied that the speeds were at all material times, too fast, especially in the neighbourhood of the Burlings, where there is a good deal of traffic and not all up and down the coast, as was suggested in argument.

The two vessels are much the same size. The *Gastelu* is 331ft. long by 48ft. beam; her draught was 20ft. 1in. forward and 19ft. 11in. aft. The *Halesius* is 385ft.long, 51ft. beam and drawing 20ft. aft and 16ft. 7in. forward. Both of them were loaded. The collision happened about half-past seven on the 7th Aug., 1933, in Lat. 38° 56′ N., Long. 9° 48′ W., about thirty miles W.N.W. of Lisbon. The wind was practically calm, and there was no tide. The original courses of the two vessels were, the *Halesius* N. true and the *Gastelu* about S. 5° E. true. It is noticeable, when we came to the evidence, that N. 10° E. true, the course pleaded "when the other vessel was first seen" was the *Halesius'* heading at the time of the actual accident, because she had gone off that much under her helm when she had heard two long blasts from the other ship, and I think she was actually on the swing of that 10 degrees alteration at the time of the accident, because, from the engineer's log, it is clear that at the time the engines were stopped for the manœuvre of using starboard helm the collision happened. I know the time is put later in the deck log, but the engineer says that he stopped the engines and there was the collision. The altering of this 10 degrees from N. to N. 10° E. took place, or was actually taking place, at the time of the accident. I do not think the master was right when he said that the ship was coming back under a port wheel at the last, although very soon after the collision she might well have done so. They saw each other at very close quarters—something like 200ft. I think, or probably even less.

It is noticeable that in the preliminary act of the *Halesius* she makes it very clear that she did not stop her engines until after the single long blast not only of the *Gastelu* but of another ship that she had heard on the other bow.

There is the further question of whether the *Gastelu* altered her helm or heading. I see no evidence of it, unless it can be said that the angle of the blow shows that she did so. That does not satisfy me that she must have done it. The *Gastelu* says she did not alter, and the people on the *Halesius* said that they only saw her for a very short time; that she came straight at them; and that they saw no alteration of her course at all. On the other hand the *Halesius* has to admit that just before the collision she had been under two minutes of slow ahead with her helm altering 10 degrees. The *Gastelu* denies altering, a denial which I accept; the other admits altering, and has to excuse herself for so doing by trying to put the blame on the other ship, which blew prolonged blasts to indicate that she was stopped in the water when she was not. The *Halesius* was going much too fast considering that she was in a fog bank; the *Gastelu* has that fine expression "reduced speed" in her log when, in fact, she was going full speed up to quite a late period. When I say "a late period" she was not going at reduced speed for the long time that she endeavours to make out, but only when she got into the neighbourhood of the other ship; just before that she was going at her full speed.

For these reasons both vessels are to blame, with no differentiation as to the degree.

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

Solicitors for the defendants, *Ince, Roscoe, Wilson,* and *Glover.*

House of Lords.

March 13, 15 *and April* 16, 1934.

(Before Lords Tomlin, Russell and Wright.)

Ugleexport Charkow v. Owners of Steamship Anastasia.

Russian Wood Agency Limited v. Dampskibsselskabet Heimdal. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Charter-party—Construction—Ice-bound ports—Icebreaker assistance—Obligation of charterers—Scope of the obligation.

Ugleexport Charkow *v.* Owners of Steamship Anastasia.

A charter-party provided that in the event of the loading port being inaccessible by reason of ice the charterers undertook on the vessel's arrival at the edge of the ice, to provide icebreaker assistance to enable her to reach the loading port.

Held, that the language of the clause was peremptory, that not merely an icebreaker, but icebreaker assistance was to be supplied, such assistance being to enable the vessel to enter or leave the port of loading, and the scope of the obligation extended to the supply of the icebreaker assistance until the vessel was enabled to enter or leave the port.

Decision of the Court of Appeal (ante, *p.* 404; 149 *L. T. Rep.* 342) *affirmed.*

Russian Wood Agency Limited *v.* Dampskibsselskabet Heimdal.

A charter-party provided that the charterers were to supply the ship with icebreaker assistance to enable her to enter or leave port of loading if required by the captain to do so. Such assistance was to be rendered within forty-eight hours after the steamer's arrival at the ice edge or readiness to leave the port of loading.

Held, that the express obligation to render icebreaker assistance to the chartered vessel—that is, assistance sufficient or satisfactory—for the specified purpose, involved a due regard both to her safety and her despatch, and was paramount; hence the convoy system could be justified only so far as it could be reconciled with this paramount obligation.

Decision of the Court of Appeal (ante, *p.* 404; 149 *L. T. Rep.* 342) *affirmed.*

Appeal from the decision of the Court of Appeal (Scrutton, Greer and Slesser, L.JJ.), reported *ante*, p. 404; 149 L. T. Rep. 342, affirming the decision of Roche, J. in two appeals which were heard together.

The facts in the first action were these: The steamship *Anastasia* was a Greek vessel trading at Russian ports. She was chartered to the appellants by a charter-party dated the 20th Nov., 1920, which contained a clause dealing with delay caused by ice. That clause was as follows:

"In the event of the loading port being inaccessible by reason of ice on vessel's arrival at the edge of ice, or in case frost sets in after vessel's arrival at port of loading, the charterers undertake to provide icebreaker assistance to enable steamer to reach, load at, and leave loading port, steamer being free of expense for icebreaker assistance."

The charter-party further provided for payments for demurrage.

The *Anastasia* arrived at the port of Berdiansk on the 30th Jan., 1931, and found that port inaccessible by reason of ice. She remained there waiting for assistance until the 7th Feb., when an icebreaker was provided, but it was subsequently withdrawn for a period of seventeen days, and in consequence the steamer was delayed.

The arbitrator decided that the delay was caused by a breach on the part of the charterers of their obligation to provide icebreakers, and he made an award in favour of the shipowners. The charterers submitted that they had discharged their obligation by providing an icebreaker on the arrival of the ship at the ice edge, and that the subsequent withdrawal for seventeen days was not a breach of contract. The owners contended that the obligation of the charterers was continuous and that their duty was to provide an icebreaker which would remain in attendance on the ship until she reached port.

The Court of Appeal held that the charterers had undertaken to provide icebreaker assistance to

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

enable the vessel from the edge of ice to reach its loading place and they did not provide such assistance if the icebreaker did not enable the steamer to reach its loading place.

The charterers appealed.

Sir *William Jowitt, K.C.* and *H. Atkins* for the appellants.

Le Quesne, K.C. and Sir *Robert Aske*, K.C. for the respondents.

In the second action the owners of the steamship *Asko* claimed from the charterers damages sustained through detention by ice at the port of Leningrad.

In Jan., 1930, the parties entered into a freight agreement by which the plaintiffs undertook to carry timber from Leningrad to certain named ports, a separate charter to be drawn up for each steamer employed. In pursuance of that agreement a charter-party for the employment of the *Asko* was entered into on the 26th Nov., 1930, under which that ship was to proceed to Leningrad, load a cargo of timber and carry it to Hull. Clause 35 of the charter-party provided as follows:

"Charterers to supply steamer with icebreaker assistance if required by the captain to enable her to enter or leave the port of loading free of all expenses to the owners. Captain or steamer's agents to notify the captain of the port in due time of steamer's readiness to enter or leave the port of loading. Icebreaker assistance to be rendered within 48 hours after steamer's arrival at the ice edge or readiness to leave the port of loading. Any time lost in waiting icebreaker beyond forty-eight hours after readiness to proceed, to be for charterers' account."

The *Asko* was ready to leave Leningrad on the 31st Dec., 1930, but owing to detention by ice she did not reach open water until the 12th Jan., 1931. It appeared that an icebreaker was ordered at 1.30 p.m. on the 31st Dec., and she came and towed the *Asko* until 9 p.m. on that day and then left her in the ice. She lay there until the 5th Jan., when she was towed as far as Kronstadt Roads. At that point she was outside the limits of the port of Leningrad, but she was still in the ice. On the 9th Jan., a convoy was formed of a number of vessels, including the *Asko*. The convoy reached the ice edge on the 12th Jan., and the *Asko* then proceeded on her voyage to Hull.

The plaintiffs argued that the defendants were under an absolute obligation to get the steamer away from the port. It was too narrow a construction of clause 35 to say that the words "to enable her to leave the port of loading," merely meant "to get beyond its geographical boundary." They claimed demurrage and also damages for the physical injury sustained by the ship whilst detained in the ice.

The defendants contended that their duty was ended when they had taken the ship beyond the limits of the port.

The Court of Appeal held, (1) That the charterers undertook to enable, by an icebreaker, the ship to enter and leave the port of loading; (2) that this being a fixed time charter, time lost outside the fixed lay-days was for charterers' account, which must include the time lost during which the icebreaker assistance was not provided to enable the steamer to enter or leave the port; and (3) that the Government regulation contemplated that the ship could require the icebreaker assistance outside the port limits.

The charterers appealed.

A. T. Miller, K.C. and *H. U. Willink* for the appellants.

Sir *Norman Raeburn*, K.C. and Sir *Robert Aske*, K.C. for the respondents.

The House took time for consideration.

Lord Wright (read by Lord Tomlin).—These two appeals, though not consolidated, were the subject of a single judgment in the Court of Appeal, and I shall in this opinion deal with both cases.

It is well known that ports of the Soviet Republic are with certain exceptions icebound in the winter months, so that normally navigation is suspended; the ports, however, can be kept open to some extent for the entry and departure of vessels by the use of icebreakers. The icebreakers are subject to the control of the particular Port Authority. These appeals arise out of two charter-parties, each of which contained a clause (described hereafter as the ice clause); that clause, similar in substance in both cases, though differing in each case in its precise terms, provided for the rendering to the chartered vessels of "icebreaker assistance" if that should be necessary to enable the vessel to enter or leave the port in pursuance of the chartered voyage. The questions here involved relate to the construction of the ice clause in view of the relevant facts.

I shall shortly summarise the terms of each charter-party and the circumstances of each case.

The first appeal arises under a charter-party of the Greek steamship *Anastasia*, dated the 20th Nov., 1930, made in a well-known English form at Piraeus between the shipowners and the Trade Delegation of U.S.S.R. (that is the Soviet Government) in Greece as agents for the charterers, Ugleexport Charkow; under the charter the vessel was to proceed to Mariupol and load a cargo of coal which was to be delivered at a port as specified in the charter-party. There were fixed lay-days for loading, and demurrage was to be at 25*l.* a day. The ice clause was in the following terms:

"(1) In the event of the loading port being inaccessible by reason of ice on vessel's arrival at edge of ice, or in case frost sets in after vessel's arrival at port of loading, the charterers undertake to provide icebreaker assistance to enable steamer to reach, load at, and leave loading port, steamer being free of expense for icebreaker assistance.

"(2) Time lost by steamer waiting for icebreaker assistance when entering loading port during 48 hours after her arrival at the edge of ice and when leaving port during 48 hours after giving notice of readiness not to count in the first case as lay-days and in the second case as time on demurrage or detention.

"(3) Any detention to the steamer waiting for icebreaker assistance at the edge of ice and also when leaving port (above the time mentioned in item 2) to count in the first case as time for loading and in the second case as demurrage or detention to be paid by charterers at 25*l.* per day or *pro rata* for any part of day, from which time days saved in loading shall be deducted.

"(4) In order not to miss her cancelling date, steamer must arrive at the edge of ice not later than at noon the day previous to the cancelling date, stipulated in clause 11, and in the case of any delay through ice while on passage or entering loading port, or in giving notice of readiness the cancelling date to be extended accordingly.

"(5) Captain must follow official instructions issued by authorities for vessels convoyed by icebreaker through ice."

The material facts as found by the learned arbitrator before whom the dispute came are shortly as follows: The *Anastasia* duly arrived on the 30th Jan., 1931, at the edge of the ice which then rendered the port of Mariupol inaccessible. She waited for icebreaker assistance until 2 a.m. on the 7th Feb., 1931; it is not disputed that this period of waiting counted as lay-days subject to the deduction of the 48 hours allowed under the clause. The vessel arrived at Mariupol at 6 a.m. on the 4th March, 1931; the intervening time is divisible into three periods; the first is the time ending at 6.5 p.m. on the 11th Feb., 1931, during which time, as the respondents (the shipowners) claimed and the appellants did not dispute, icebreaker assistance was given intermittently for not more than 21½ hours; the second period takes matters up to 7.30 p.m. on the 28th Feb., 1931, during which period no assistance was supplied to the vessel; the third period was up to her arrival at the port, during which time the icebreaker assistance was given during intermittent periods. The respondents claimed in the arbitration demurrage and damages for detention as for breach of the conditions of the ice clause to the extent of a total delay of 22½ days. A similar claim arose for delay after loading, but it is unnecessary to discuss that claim as it involves the same question.

The appellants did not contest these figures put forward by the respondents, nor did they offer any explanation why icebreaker assistance was either absent or intermittent; their contention was that on the true construction of the ice clause they had fulfilled their obligation when by their procurement the icebreakers arrived at the *Anastasia* at the edge of the ice; they were then, so they claimed, under no further obligation in the matter.

The learned arbitrator thus summarises their contentions:

(1) That the icebreaker assistance contracted for by the charter-party was that of icebreakers operated by the port authority.

(2) That the only duty of the respondents was to provide the icebreaker assistance ordinarily so provided.

(3) That the assistance given was controlled by an autocratic authority over whom the respondents had no influence or control.

(4) That the respondents' only obligation was to give icebreaker assistance at the edge of the ice and that therefore they had no further continuing obligation.

(5) That what happened subsequent to the arrival of the icebreakers at the edge of the ice was not a matter with which the respondents were concerned and was beyond their control.

(6) That the respondents had in accordance with the general practice requested the Port Authority to provide icebreaker assistance and that they were under no further obligation.

The arbitrator described the equipment of the port in regard to icebreakers and found that the duty of keeping the port open was imposed on the Port Authority; he said that he did not find it proved that the Port Authority was a department of the Soviet Government, but he found that the charterers (the appellants) were "the coal-exporting section of the Soviet Government."

He decided against the construction of the ice clause for which the charterers contended and held that they had broken their contract and were liable in damages.

The special case came before Roche, J., who by his judgment upheld the conclusion of the arbitrator. The Court of Appeal unanimously affirmed that judgment.

The second appeal arises out of a charter-party dated the 26th Nov., 1930, between the respondents, as owners of the Danish steamship *Asko*, and Exportles of Moscow. Under the charter the steamship was to load a cargo of timber at Leningrad and deliver it at Hull; the cargo was duly loaded and delivered. The respondents sued for a declaration that they were entitled to damages for detention and loss of time and also for damage to the steamship through being crushed in the ice, on the ground that there had been a breach of the terms of the ice clause in the charter-party, which was in the following terms:

> "Charterers to supply steamer with icebreaker assistance if required by the captain to enable her to enter or leave the port of loading free of all expenses to the owners. Captain or steamer's agents to notify the captain of the port in due time of steamer's readiness to enter or leave the port of loading. Icebreaker assistance to be rendered within 48 hours after steamer's arrival at the ice edge or readiness to leave the port of loading. Any time lost in waiting icebreaker beyond 48 hours after readiness to proceed, to be for charterers' account."

The appellants were treated for purposes of the action as representing the charterers.

The case was tried in the Commercial Court before Roche, J., before whom an agreement was reached, which in the words of the judge was as follows:

"So far as it is a question of fact or questions of fact are involved, the parties have quite naturally sought to avoid the expense of bringing oral evidence from abroad and have asked the court to decide the questions of fact on the basis of certain logs of the steamship in question and of certain icebreakers which assisted her and upon certain certificates and written material. The evidence, though contemporary, is in parts vague, and in other parts conflicting, and the parties have agreed, so far as questions of fact are concerned, that they are willing to take my decision on a question of fact as given upon the materials which have been made available to me and not to complain of it elsewhere."

The findings of fact of the judge, thus agreed to be binding, were that the *Asko* was ready to proceed, after loading, at 12.30 p.m. on the 31st Dec., and that the icebreaker *Oktober* came to her at 7.30 p.m. on that day, and time then began to count; that the steamer was assisted by an icebreaker between that time and the 6th Jan., for a period of nine or ten hours and no more; that she reached Kronstadt Roads on 6th Jan. and for some three days lay there unassisted by icebreakers with ice beyond her preventing her from reaching the open sea; that on the 9th Jan. she was formed into a convoy with some other vessels and was assisted slowly to sea, and reached open water on the 12th Jan., at 12.30 p.m.; that the steamer sustained detention for want of icebreaker assistance for a period of seven days between 7.30 p.m. on the 31st Dec. and 1 p.m. on the 9th Jan., and for a period of one day between the latter time and 12.30 p.m. on the 12th Jan., making eight days in all that the icebreakers were absent between the 9th and 12th Jan., for periods unexplained, and that it looked as if damage was done to the steamer during that time, which damage would have been at any rate minimised if an icebreaker had been present, even if it had occurred at all; and that the steamer sustained

damage in getting out of the port by reason of ice.

On these findings it was contended on behalf of the appellants that the icebreaker assistance which the charterers contracted for was that of icebreakers supplied and controlled by the People's Commissariat of Ways and Communications, a department of the Soviet Government, which embraced the Port Authority, and that the only duty of the charterers was to provide, as they did, the icebreaker *Oktober* to come to the vessel on the 31st Dec., 1930, so that they were accordingly not responsible for any subsequent delay or damage which the *Asko* sustained in her passage through the ice ; they also contended that if their obligation went beyond that it was merely to provide icebreakers which would do their best, and that the onus was on the respondents to prove that the icebreakers did not do so ; a third point which was taken on behalf of the charterers was that the obligation, whatever it was under the ice clause, ceased when the *Asko* reached the limits of the port of Leningrad, which was at Kronstadt Roads, about twelve miles from the loading berth, but did not continue till the vessel reached the edge of the ice where the open water began, which was about sixty or seventy miles further on. The judge decided against all these contentions, and made a declaration that the respondents were entitled to recover from the appellants :

(1) Damages for detention of the vessel for eight days.

(2) Damages in respect of any injury sustained by the vessel by reason of the prolongation of the voyage through the ice and absence of icebreaker assistance or by reason of either of such causes, including the 10th Jan.

The Court of Appeal unanimously affirmed this judgment.

In both these appeals I agree with the conclusions of the tribunals below. The two forms of ice clause differ somewhat in form, but are sufficiently identical in substance to enable me to state the opinion I have formed of their meaning as applicable *pro tanto* in each case and so far as material for these appeals.

In the first place the charterers' obligation is in express terms to supply the steamer with icebreaker assistance to enable her to enter or leave the port of loading. That stipulation does not mean that the obligation is merely to make arrangements with the Port Authority or any other person for that supply. It is, I think, immaterial whether or not the charterers and the Port Authority can be treated as parts of one and the same juridical entity, whether the Soviet Government or any other person ; as to this the evidence does not seem to me sufficient to justify my expressing any opinion ; in either case the charterers have contracted to supply the assistance, and that, in my opinion, means either by themselves or by others, so that they cannot justify a failure to do so on the pretext that they had not the icebreakers under their control and could not get them supplied by those who controlled them. In that sense the obligation is absolute. The charterers assumed the obligation and the risk. It follows equally that the charterers' obligation is not limited to an obligation to do their best to supply. The language of the clause is premptory.

Nor is the contract satisfied by the mere fact that an icebreaker does actually appear and proceed to render some assistance to the vessel ; the contract is not to supply an icebreaker, leaving it to the icebreaker, when supplied, to give or not to give the appropriate assistance ; the language is express that not merely an icebreaker but icebreaker assistance is to be supplied, such assistance being to enable the vessel to enter or leave the port of loading. This language clearly, as I think, defines the scope of the obligation, which extends to the supply of the icebreaker assistance until the vessel is enabled to enter or leave the port.

This construction is obviously fatal to the only contention advanced by the appellants in the first appeal, which accordingly should, as I think, fail. In the second appeal there are, in addition, some further points to be considered.

First of all, I may deal with the contention that the charterers' obligation is completely performed when the vessel is enabled to proceed through the ice to the limit of the port, though she is left with a stretch of ice many miles in width before she can reach the open sea and proceed on her voyage. It is obvious that such a construction would render the ice clause of no practical value to the shipowner ; the *Asko*, arrived at Kronstadt Roads, would have to wait there till the ice cleared in the spring. In my opinion, " leave the port " means leave it in such a way as to be able to proceed clear of the ice on her voyage. The vessel does not leave the port for purposes of this contract, if all that happens is that she crosses, as it were, the threshold, and is at once held up by an obstacle. I shall not further discuss this point, which seems to me devoid of substance.

The second appeal, however, also raises other questions. The obligation to render icebreaker assistance attaches at a specific time—that is, 48 hours after readiness ; from that time until the icebreaker assistance is rendered, delay is chargeable to the charterers and constitutes an ascertainable period of delay ; but once the assistance has been supplied there is no stipulation as to time. The exact character of what is meant by the icebreaker assistance is not particularised save that it is to enable the ship to enter or leave the port free of all expense to owners. The judge has found in this case that for a period of six days after the *Oktober* first came the steamer had only icebreaker assistance for nine or ten hours, and that she then lay unassisted in Kronstadt Roads for three days, and again was left for some periods without icebreaker assistance between the 9th and 12th Jan., 1931. The appellants did not explain why the assistance was so intermittent ; in effect they contended that their obligation could not in any case be put higher than an obligation to do their best or to do what was reasonable, and that the onus lay on the respondents to show that they had not done their best or had not done what was reasonable. I think this contention is erroneous ; there is in the clause a positive undertaking to render icebreaker assistance, which, I think, means *primâ facie* assistance which is not casual or intermittent ; and in order to justify a failure in that respect the charterers must show some excuse. The absence of icebreakers for such periods in the aggregate as the judge has here found is *primâ facie* a breach of the undertaking. I do not say that after the inception of the service, absence of icebreaker assistance at some period or periods may not be justified ; but I think the words of the clause are *primâ facie* not satisfied by intermittent assistance. I have already stated my opinion that it is immaterial whether or not the icebreakers are controlled by the charterers, because their responsibility is the same in either event. But it seems to me that there may be contingencies, such as perils of the seas, which, without anyone's fault, hinder or interrupt the

service, without any liability attaching to the charterers in those respects. In so hazardous and uncertain a service there can be no such thing as a normal time of getting from the loading berth to the ice edge, though *primâ facie* the service is, I think, contemplated as continuous; but in any case, I do not at present see how the withdrawal of icebreakers for the convenience of the appellants themselves or of any other charterers (whether or not they can be treated as all members of one entity), as, for instance, for the purpose of waiting to collect other ships to be convoyed, can be other than a breach. There is also discussed in this case the question whether the icebreaker assistance should be exclusive to the individual ship, or whether the clause allows the ship to be assisted, not separately by itself, but along with others in convoy or caravan. No doubt it is not unusual for a convoy to be formed, and it may be that this is familiar to those engaged in shipping business. But I think the express obligation to render icebreaker assistance to the chartered vessel—that is, assistance sufficient or satisfactory for the specified purpose—involves a due regard both to her safety and her dispatch, and is paramount; hence the convoy system can only be justified so far as it can be reconciled with this paramount obligation. The fact that the vessel proceeded with others in convoy cannot be relied on as a separate excuse in order to justify a failure in fulfilment, especially if the convoy was too large or the icebreakers too few. It seems to me irrelevant that ships are bound to proceed through the ice as ordered by the harbour master or the master of the icebreaker. These regulations are in no way inconsistent with the due performance of the appellants' obligations as I conceive them.

No doubt in particular cases difficult questions may arise as to whether or not the appropriate assistance has been rendered in accordance with the charter-party; such questions will be questions of fact and can only be dealt with on their respective merits as and when they come for decision. I have no desire to anticipate or prejudge them. It is enough to say in regard to the second appeal, as I said in regard to the first, that I think it should fail.

In my opinion, both appeals should be dismissed with costs.

The other noble and learned Lords concurred.

Appeals dismissed.

Solicitors for the appellants in the first appeal, *Pettite, Kennedy, Morgan,* and *Broad.*

Solicitors for the respondents in the first appeal, *Holman, Fenwick,* and *Willan.*

Solicitors for the appellants in the second appeal, *Wynne-Baxter* and *Keeble.*

Solicitors for the respondents in the second appeal, *Botterell* and *Roche*, agents for *Sanderson* and *Co.*, Hull.

Supreme Court of Judicature.

COURT OF APPEAL.

Monday, March 12, 1934.

(Before Scrutton, Greer and Maugham, L.JJ.)

The Edison (No. 2). (a)

ON APPEAL FROM THE ADMIRALTY DIVISION.

Practice—Costs—Reference—Items disallowed—Defendants' costs of resisting items disallowed—No order of court—Discretion of taxing officer to order payment of such costs by the plaintiffs—R.S.C., Order LXV., r. 27, sub-rr. 20, 29.

At a reference to assess the damages sustained by the plaintiffs by the loss of their dredger, certain items were claimed by the plaintiffs and allowed by the Admiralty registrar; but eventually, after an appeal to the House of Lords, these items were disallowed, and the matter was again referred to the registrar. The plaintiffs were given the costs of proving their claim, but no special order was made as to the costs incurred in respect of the items which were eventually disallowed.

In taxing the plaintiffs' bill of costs the assistant registrar disallowed the costs incurred at the reference in respect of the items disallowed as a result of the decision of the House of Lords, holding that such costs were not "necessary or proper for the attainment of justice" within Order LXV., r. 27, sub-r. 29, and his decision was, on objection, upheld by Langton, J. The defendants then claimed the costs incurred by them in resisting the items in the plaintiffs' claim, which were eventually disallowed. The assistant registrar held that he was entitled to order the plaintiffs to pay such costs under Order LXV., r. 27, sub-r. 20, and accordingly proceeded to taxation.

Order LXV., r. 27, provides that the court or a judge may at the hearing direct the costs of any proceeding or part thereof which is "improper, vexatious, or unnecessary, or contains vexatious or unnecessary matter, or is of unnecessary length, or caused by misconduct or negligence to be disallowed . . .; and, in any case, where such question shall not have been raised before and dealt with by the court or judge it shall be the duty of the taxing officer to look into the same . . . for the purpose aforesaid, and thereupon the same consequences shall ensue as if he had been specially directed to do so."

Langton, J. allowed the plaintiffs' objection to the bill on review, holding that the rule did not authorise the assistant registrar to order payment of the costs.

(a) Reported by Geoffrey Hutchinson, Esq., Barrister-at-Law.

Held, that the assistant registrar had no power without the order of the court to order the party whose costs he had disallowed under Order LXV., r. 27, sub-r. 29, to pay to the other party the costs incurred by the latter by matters in respect of which costs had been disallowed.

Decision of Langton, J. affirmed.

APPEAL from Langton, J.

The appellants, owners of the steamship *Edison*, were defendants in an action brought by the respondents, the owners of the dredger *Liesbosch*, in which damages were claimed for the loss of the *Liesbosch*. At the time of her loss the *Liesbosch* was being used by her owners for the purpose of carrying out certain contract works connected with the harbour at Patras, Greece. Liability was admitted in the action and the amount of damages was referred to the Admiralty registrar. At the reference the plaintiffs claimed a sum which far exceeded the value of the *Liesbosch*, but which they contended represented consequential losses which they had sustained by reason of the loss of the *Liesbosch*.

The registrar allowed items amounting in all to 19,820*l*., and his report was confirmed on appeal by Langton, J. In the Court of Appeal certain items were disallowed, and the amount of the claim substantially reduced (*ante*, p. 276; 147 L. T. Rep. 141; (1932) P. 52). On appeal to the House of Lords the order of the Court of Appeal was varied, and the assessment referred back to the Admiralty registrar, with directions that the damages should be assessed upon a certain basis which would, nevertheless, have given to the plaintiffs very much less than the amount of their original claim *ante*, p. 380; 149 L. T. Rep. 49; (1933) A. C. 449). The plaintiffs accordingly reassessed their claim on the basis laid down by the House of Lords, and at the reference the registrar allowed items amounting in all to 11,333*l*., and gave the plaintiffs the costs of proving their claim.

The plaintiffs then brought in a bill of costs which included all the costs of presenting the claim as originally framed, but the assistant registrar disallowed these costs, and allowed only the costs of proving the claim on the basis laid down by the House of Lords, holding that the costs incurred at the first reference were not necessary or proper for the attainment of justice and ought not, therefore, to be allowed under Order LXV., r. 27, sub-r. 29. Objections to the taxation were disallowed by Langton, J.

The defendants then brought in a bill of costs in respect of the costs incurred by them in resisting the items to which it had ultimately been held that the plaintiffs were not entitled. The assistant registrar allowed this bill and proceeded to taxation. The plaintiffs accordingly carried in objections to the taxation, and in answer to these objections the assistant registrar stated that the bill had been lodged under Order LXV., r. 27, sub-r. 20, and relied upon the power given by sub-rule 20 to the taxing officer to tax without an order of the court. Langton, J. allowed the objections, holding that sub-rule 20 did not apply to the present case, and the present appeal of the defendants was against this decision.

Order LXV., r. 27, provides as follows:

Sub-rule 20. "The court or judge may at the hearing of any cause or matter or upon any application or proceeding in any cause or matter in court or at chambers and whether the same is objected to or not, direct the costs of any indorsement on a writ of summons, pleading, summons, affidavit, evidence, notice requiring a statement of claim, notice to produce, admit or cross-examine witnesses, account statement, procuring discovery by interrogatories or order, applications for time, bills of costs, service of notice of motion or summons, or other proceeding, or any part thereof, which is improper, vexatious, unnecessary, or contains vexatious or unnecessary matter, or is of unnecessary length, or caused by misconduct or negligence, to be disallowed, or may direct the taxing officer to look into the same, and to disallow the costs thereof, or of such part thereof as he shall find to be improper, unnecessary, vexatious, or to contain unnecessary matter, or to be of unnecessary length, or caused by misconduct or negligence; and in such case the party whose costs are so disallowed shall pay the costs occasioned thereby to the other parties; and in any case where such question shall not have been raised before and dealt with by the court or judge, it shall be the duty of the taxing officer to look into the same (and, as to evidence, although the same may be entered as a decree or order) for the purpose aforesaid, and thereupon the same consequences shall ensue as if he had been specially directed to do so; and in the King's Bench Division the Master shall make such order as may be required to effect the object of this regulation."

Sub-rule 29: "On any taxation the taxing master shall allow all such costs, charges and expenses, as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred the same, no costs shall be allowed which appear to the Taxing Master to have been incurred or increased through over-caution, negligence, or mistake or by payment of special fees to counsel or special charges or expenses to witnesses or other persons, or by other unusual expenses."

Hayward for the appellants.

Hallett for the respondents.

Reference was made to the following authorities: *Mentors Limited* v. *Evans* (107 L. T. Rep. 82; (1912) 3 K. B. 174), *Shrapnel* v. *Laing* (1888, 58 L. T. Rep. 705; 20 Q. B. Div. 334), *Société Anonyme Pecheries Ostendaises* v. *Merchants Marine Insurance Company* (17 Asp. Mar. Law Cas. 404; 138 L. T. Rep. 532; (1928) 1 K. B. 750), *Geen* v. *Herring* (92 L. T. Rep. 37; (1905) 1 K. B. 152), *Ingram and Royle Limited* v. *Services Maritimes du Treport Limited* (12 Asp. Mar. Law Cas. 493; 110 L. T. Rep. 967; (1914) 3 K. B. 28), *Craedhall* v. *Janson* (1879, 40 L. T. Rep. 640; 11 Ch. Div. 1), *Garrard* v. *Edge* (60 L. T. Rep. 557; 44 Ch. Div. 224), *Reid Hewitt and Co.* v. *Joseph* (119 L. T. Rep. 688; (1918) A. C. 717), and *Cavendish* v. *Strutt* (90 L. T. Rep. 500; (1904) 1 Ch. 524).

Scrutton, L.J.—This is a troublesome case over a not very large sum; but the parties have been fighting this case very hard, and apparently they will fight to the end. It began with the sinking of a dredger, which the plaintiffs had bought to enable them to carry out part of the work in connection with a harbour contract which they had in progress, by a ship belonging to the defendants, in November, 1928. We are just finishing the history of the unfortunate dredger in March,

1934, so we have not been unduly expeditious in dealing with the matter. The plaintiffs, who had bought the dredger for 4000*l* and had taken her out to Patras for another 2000*l*, making 6000*l* in all, and insured her for 5500*l*., discovered that by her loss they had lost some 23,500*l*., which they proceeded to claim. The claim was made up on the basis: We are very poor, consequently we cannot do what a rich man would have done, and so we have had to make a series of elaborate and expensive arrangements of finance, in order to carry out our harbour contract. Langton J. gave judgment, confirming a reference on those lines for a sum of 19,000*l*. odd, and I can quite understand the defendants' anger, as it was rather provocative to claim for an old dredger more than twice its value on the plaintiffs' own computation. The matter then came to the Court of Appeal, which took the line that it is well established that the damages one can recover for the total loss of a ship are: her value to the owner at the time of the loss, taking into account her engagements, plus interest from the time of the loss; and we assessed the value at 9000*l*, being of opinion that that more than amply paid the plaintiffs for what they had lost. On appeal, the House of Lords laid down the same principle on which we thought we were acting, dismissed the appeal, and made the plaintiffs pay three-quarters of the costs, but sent the matter to the registrar to assess the damages on the principles they had laid down. The registrar gave 11,000*l*. odd; so that the plaintiffs got 2000*l*. more on the judgment of the House of Lords.

The question of taxing the costs of the reference then arose. The matter had not been mentioned to us in detail, but we had said: You, the defendants, did not tender any money, or pay any money into Court, and you must pay the costs of the reference. Nobody said to us expressly: "What do you mean by 'the costs of the reference,' the costs of the first reference on the basis of the improper claim, the wrong claim?" and we said nothing as to whether the defendants could have the costs of the reference on the wrong basis. What we should have said if we had been asked, I do not know. The bill of costs of the reference was then submitted for taxation. It was made up on the basis that the plaintiffs were entitled to the costs of the reference setting up their wrong claim, including all the matters which became quite unnecessary in view of the decision both of the Court of Appeal and of the House of Lords. That bill went to taxation, and we are told that, brought in at over 1900*l*., it was taxed down to 654*l*. It was taxed down for the reason that the defendants could not be called upon to pay the costs of proving a wrong claim. There was an appeal by the plaintiffs, and in the appeal the learned assistant registrar, who was taxing, said this: "It is true that there was no order dealing specifically with certain issues, but such an order is only necessary where the intention is to give the opposite party the costs of those issues. In the absence of any such order, it is still open to the taxing master to disallow the costs incurred in putting forward any items of a claim which have been disallowed." The assistant registrar was there taking the view that although there was no order giving the defendants costs, he could still tax the plaintiffs' bill, and he accordingly taxed off all the costs which had been incurred on the wrong claim.

The fact of that heavy disallowance of the plaintiffs' costs seems to have encouraged the defendants to try to get some costs; and so, not having got any order for the costs of any issue from the Court of Appeal or the House of Lords, they brought in the bill, the subject-matter of this appeal, for the expenses they had incurred in opposing the wrong claim originally put forward. The plaintiffs raise the objection that the assistant registrar has applied wrongly the principle laid down in Order LXV., r. 27, sub-r. 20. In allowing these costs, he stated that his reason for doing so was "that the plaintiffs costs, which were disallowed were unnecessary for the attainment of justice under regulation 20 of Order LXV., r. 27. The plaintiffs contend that as there has been no disallowance of their costs under sub-r. 20, the assistant registrar had no power to entertain and tax the present bill.

The matter turns upon two sub-rules, and I read them in this way: sub-rule 20 assumes that one party has been guilty—I am not using the word in an offensive sense—I will say: has in fact incurred unreasonable costs—using perhaps rather a slang phrase, has been piling up costs. That is the sort of thing which is aimed at. The sub-rule uses the words "vexatious," "improper" and "misconduct," and I think it is aimed at cases in which the costs have been piled up. It says that where that is found, whether by order of the Court, or by the taxing master, without the court having made any order, the costs will be disallowed; and secondly, that the party whose costs are so disallowed shall pay the costs occasioned thereby to the other party. It gives power in such a case, without the order of the court, for the taxing master to require the party who had been unreasonable in incurring costs, to pay to his opponent the costs which the other party has had to incur in order to meet the unreasonable claim. That is quite intelligible. It is quite a separate matter from that which is dealt with in sub-rule 29, which provides that the taxing master shall allow all those costs, charges and expenses as shall appear to him to have been necessary or proper for the attainment of justice, or for defending the rights of any party. That involves in itself that he may disallow any costs incurred which, in his view, are not necessary for the purpose of defending the rights of any party. It does not involve any allegation that the costs have been piled up. It may involve a finding that the party has put forward a claim in law quite intelligible and proper to put forward, but which failed, and accordingly a disallowance of the costs so incurred. The taxing master can allow all the costs which are necessary for defending the proper claim, but sub-rule 29 does not go on to say that he may order the party to pay the costs occasioned to the other party by reason of the costs disallowed. It leaves that out. In my view—and I do not wish to put it too positively, because I am always aware of the fact that when I have said anything too positively, facts may arise which show that I did not consider all the cases I ought to have considered—but in my view, the taxing master ought not to order the party whose costs he strikes out under sub-rule 29 to pay to the other party the costs occasioned to the latter by matters in respect of which costs have been disallowed, unless he has an order of the court to that effect. It is quite common in the common law, and I have no doubt it is in Chancery, to have a defendant successful on one issue who fails on the whole action, and unless there is an order of the court that the unsuccessful defendant is to have paid to him the costs of the issue on which he succeeds, I do not think the taxing master should proceed to make an order that, having failed on the issue, although the court has not made any order about it, the opponent is entitled to the costs of that issue.

That seems to me to draw a clear line between sub-rules 20 and 29, which otherwise would seem too difficult to work. On that view—which I think is the one put forward by the assistant registrar when he taxed the first bill and quite properly struck out a considerable amount of the plaintiffs' bill because it was incurred unnecessarily in respect of a wrong basis—he was not justified in going on and holding under sub-rule 29, under which he says he was acting, that the defendants were entitled to recover against the plaintiffs the costs occasioned to the defendants by the wrong claim. If there had been such an order he would have been entitled, of course, to tax this bill. The court was not asked to make any such order, and did not make any such order. Under those circumstances I think that the learned judge was right in the conclusion to which he came, and that this appeal must be dismissed with costs.

Greer, L.J.—I agree that this appeal should be dismissed with costs, and I also agree with the reasons that my Lord has given. I think there is another way of stating the reasons why the appeal should fail. There have been two taxations here: the first was a taxation of the plaintiffs' bill, with the result that some 1300*l.* was taxed off in respect of items which the assistant registrar thought the plaintiffs were not entitled to charge against the defendants under the order of the court. There was an appeal from that taxation and it was dismissed, and in my judgment, there was an end of the taxation of the plaintiffs' bill of costs. I read sub-rule 20 as making the disallowance of part of the bill on the ground mentioned, a condition precedent for the application of the latter part of the rule, under which something may be given to the other party for having to meet items of claim which never ought to have been in the bill at all. I do not think, after the bill of the successful party has been finally taxed, and there has been an appeal from that taxation and the appeal is dismissed, the taxation of the plaintiffs' bill should be reopened; and if the disallowance of part of that bill be a condition precedent to any allowance to the other party, then the taxing master was not in a position to make any allowance upon the second occasion. For these reasons I agree with my Lord that the appeal should be dismissed.

Maugham, L.J.—I agree with the judgment delivered by my brother Scrutton. The matter argued seems to me one of very great importance on the question of the taxation of costs arising from proceedings, and I therefore desire to add a few words.

Order LXV., r. 27, sub-r. 20, consists, I think, of three separate parts, which have to be considered separately if one wants to understand the true construction of that sub-rule. The first part provides that a court or a judge, on the hearing of any proceedings—I may point out that sub-rule 20 considers only taxation of costs arising out of proceedings, unlike sub-rule 29, which refers to any kind of taxation—may give a certain direction, a direction relating to the costs of a number of matters which arise in the course of proceedings, and in regard to which excessive costs may have been piled up by a litigant. Two different things may be done. The Court of a judge may direct that the costs in relation to the improper, vexatious and unnecessary matters be disallowed. It happens occasionally in the course of an action that a judge may see that some costs are hopelessly wasted costs, and at the trial he may make the direction himself—I have done it more than once—or he may do something different: he may direct the taxing master to look into those matters "and to disallow the costs thereof, or of such part thereof as he should find to be improper, unnecessary, vexatious, or to contain unnecessary matter, or to be of unnecessary length, or caused by misconduct or negligence." Whether the court acts, or whether the taxing master is directed to act, in each case, the action to be taken is of a discretionary character. Now comes in part 2 of this rule, which is not discretionary; it is something which follows automatically from the preceding part of the sub-rule. It is that "in such case the party whose costs are so disallowed, shall pay the costs occasioned thereby to the other parties." Then follows the third part of the rule, which was added seventy years ago, because originally the power could only be exercised by a direction obtained from the judge. The third part of the rule says: "in any case where such question shall not have been raised before and dealt with by the court or judge, it shall be the duty of the taxing officer to look into the same . . . . for the purpose aforesaid," and then the rule states quite briefly that "the same consequences shall ensue as if he had been specially directed to do so." That third part of the rule obviously means, without any doubt, that the taxing master is to exercise his discretion as to whether any of the sort of things referred to in the rule have occasioned costs in such a way that the matters in question may be described as improper, vexatious, unnecessary &c. Once having held or decided that the matters in question are improper, vexatious, unnecessary, &c., the consequence inevitably follows that the party who has so occasioned those costs is to pay the costs so occasioned to the other party. I may add that under sub-rule 21, having once acted under sub-rule 20 he may make a set-off.

What is the meaning of the phrase "improper, vexatious, unnecessary, or vexatious, or to contain unnecessary matter," &c.? It is true it contains the word "unnecessary," but does the word "unnecessary" there get no colour from the context? I think it is quite plain that it does, because if something is improper, it is obviously unnecessary as regards the other side, and so is vexatious. "Unnecessary" there does not mean, and cannot possibly mean, any matter without which the party whose costs are being taxed could not proceed to trial. It must be very much less wide than that. The contention on the part of the appellants is that if the taxing master has once disallowed certain costs, presumably under the general direction given him in Order LXV., including sub-rule 29 of rule 27, it follows that the same consequences are to result as if he had found the items in question were improper, vexatious and unnecessary, or contained vexatious and unnecessary matters under sub-rule 20. In my opinion it is quite impossible to hold that view if attention be paid to the form of the two rules, and if any regard be had to the history of the matter. Originally, this right of making a litigant entitled under an order to costs, pay costs which the other side had incurred, was a very special order, made, as I have said, by a court or a judge at the trial: and this addition of a portion to the rule, which makes it mandatory for the taxing master to look into the matter and exercise his discretion without any special direction, is not intended entirely to revolutionise the whole practice with regard to taxation, and to make it necessary, in every case where items are disallowed upon a taxation, for the taxing master to see whether, as a result of that,

he ought not to allow to the other side the costs occasioned by the matters which are disallowed. Sub-rule 21 and 22 are contrary to such a view; and as a matter of construction I am satisfied that the word "unnecessary" there must be read *ejusdem generis* with the other words in connection with which it is found in two places, namely, unnecessary in the sense of being improper, vexatious or unreasonable; and accordingly the taxing master, in order that he may be enabled to cause the opposite party to pay the costs occasioned by the unnecessary matters, must exercise his discretion and make a finding, under sub-rule 20, to the effect that the costs in question come within the description of the words I have read, in the sense of some impropriety or unreasonableness in connection with the incurring of those costs.

I will only add that, as I understand the decision of the Court of Appeal in *Garrard* v. *Edge* (60 L. T. Rep. 557; 44 Ch. Div. 224), Cotton L.J. took the same view, and I think the case *Geen* v. *Herring* (92 L. T. Rep. 37; 1905 1 K. B. 152), to which reference has also been made, is a case where again it was the existence of wholly unreasonable costs which justified the making of a special finding under sub-rule 20. In the present case, for the reasons given by Scrutton, L.J., I think it is quite clear that the taxing officer, the assistant registrar, was acting under sub-rule 29, and accordingly he has not exercised his discretion, or given himself any right under sub-rule 20. The result is that the objection by the plaintiffs must succeed, and the appeal must be dismissed.

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

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

March 26 *and* 27, 1934.

(Before SCRUTTON and GREER, L.JJ.)

The Stentor. (*a*)

ON APPEAL FROM THE ADMIRALTY DIVISION.

Costs — Taxation — Appeal and cross-appeal dismissed with costs—No apportionment in absence of special order.

The plaintiffs' steamship G. C. *was in collision with the defendants' steamship* S. *On the trial of the collision action the* G. C. *was held four-fifths and the* S. *one-fifth to blame. The defendants appealed and the plaintiffs cross-appealed. Both appeal and cross-appeal were dismissed with costs. On taxation the defendants' bill of costs which had been lodged at* 1935*l.* 10*s.* 3*d. was taxed down to* 91*l.* 4*s.* 11*d. upon the ground that the defendants' costs had only been increased to this extent by the cross-appeal. On defendants' summons to review the taxation, Bateson, J. held that the appellants' and the respondents' costs should be apportioned between the appeal and the cross-appeal with reference to the actual course taken and the time properly occupied on the hearing of the appeals. The plaintiffs appealed.*

Held (*reversing Bateson, J.*), *that in the absence of special order the principle of no apportionment applied, and that the defendants were only entitled to such extra costs as were incurred by reason of the cross-appeal.*

APPEAL by the plaintiffs from an order of Bateson, J. as to a review of taxation of costs. The plaintiffs were the Union Castle Mail Steamship Company Limited, the owners of the steamship *Guildford Castle*, and the defendants were the China Mutual Steam Navigation Company Limited, the owners of the motor vessel *Stentor*. The action was for damage by collision between the *Guildford Castle* and the *Stentor* in the River Elbe on the 31st May, 1933. Bateson, J. found that both vessels were to blame, and that the plaintiffs should bear four-fifths and the defendants one-fifth of the damages. The defendants appealed and the plaintiffs cross-appealed, both parties alleging by their notice of appeal that the other vessel was alone to blame. At the hearing of the appeals, however, the plaintiffs (cross-appellants) did not contend that the *Guildford Castle* was free from blame, but that she was to blame in less degree than the *Stentor*. The Court of Appeal (Scrutton, Lawrence, and Greer, L.JJ.) dismissed both appeal and cross-appeal with costs.

The costs of the plaintiffs (respondents and cross-appellants) were lodged for taxation at 802*l.* 14*s.* 6*d.* and those of the defendants (appellants and respondents to the cross-appeal) at 1935*l.* 10*s.* 1*d.* The assistant registrar, in the former case, allowed 755*l.* 17*s.* 9*d.*, but in the latter case the costs, a moiety of which was claimed against the plaintiffs, were taxed down to 91*l.* 4*s.* 11*d.* In reply to the defendants' objection to the taxation, the assistant registrar answered that the only question to be determined on this taxation was: "Were the appellants' costs increased by reason of the cross-appeal and, if so, by how much?" The cases upon which he founded this opinion were *The Lauretta* (4 Asp. Mar. Law Cas. 118; 40 L. T. Rep. 444; 4 Prob. Div. 25) and *Robinson* v. *Drakes* (48 L. T. Rep. 740; 23 Ch. Div. 98). There were other cases, but these were sufficient to show what he believed to be the recognised practice in cases where appeal and cross-appeal had been dismissed with costs, and the appellants' costs had not been increased by reason of the cross-appeal. Except in respect of the actual notice of cross-appeal and small items connected therewith, he had been unable to find any indication that the appellants' costs had been increased either in the brief or elsewhere, nor had the appellants' representative on the taxation been able to point out to anything suggesting such increase.

On the defendants' application for the taxation to be reviewed, Bateson, J. ordered "that the taxation of the appellants (respondents to the cross-appeal) and the respondents' costs herein be reviewed by apportioning the costs of each side between the appeal and the cross-appeal with reference to the actual course taken and the time properly occupied in the hearing of the appeals," and the bills were accordingly referred back to the assistant registrar. The plaintiffs appealed.

Digby, K.C. and *Main Thompson* for the appellants.—The assistant registrar followed the practice in allowing the plaintiffs the general costs of the defendants' appeal and the defendants such extra costs as were caused by the cross-appeal: (*The Lauretta*, 4 Asp. Mar. Law Cas. 118; 40 L. T. Rep. 444; 4 Prob. Div. 25). In *Jones* v. *Stott* (102 L. T.

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

Rep. 670; (1910) 1 K. B. 893) the appeal and cross-appeal dealt with different questions. In *Medway Oil and Storage Company* v. *Continental Contractors Limited* (140 L. T. Rep. 98; (1929) A. C. 88), the House of Lords disapproved of the principle of apportionment in the absence of a special order.

Kenneth Carpmael for the respondents.—Bateson, J. was right in following *Jones* v. *Stott* (*sup.*) which was not overruled in *Medway Oil and Storage Company* v. *Continental Contractors Limited* (*sup.*). In *The Lauretta* (*sup.*) and in *Robinson* v. *Drakes* (48 L. T. Rep. 740; 23 Ch. Div. 98) orders as to costs were made at the trial. In *The Bremen* (*ante*, p. 252; 145 L. T. Rep. 565; (1931) P. 166) the order was no costs on either side. On the facts the assistant registrar took too limited a view as to the costs allowed.

No reply was called for.

Scrutton, L.J.—This case deals with a matter which has arisen in a series of cases of the same sort since the original decision by Fry, J. in *Saner* v. *Bilton* (40 L. T. Rep. 125; 11 Ch. Div. 416). The *Guildford Castle* was coming down the River Elbe and the *Stentor* was bound up the river, and they ran into each other. This court made the order that the appeal and cross-appeal from the decision of Bateson, J. should be dismissed with costs, and the registrar was left to work out the taxation. Whether under the circumstances the Court of Appeal would have been wiser to do what they did in *The Bremen* (*ante*, p. 252; 145 L. T. Rep. 565; (1931) P. 166), namely, order no costs to either side, to avoid a serious quarrel about taxation, is a matter we shall have to consider the next time we come across this class of case, but that was the order which the Court of Appeal made: "appeal and cross-appeal dismissed with costs."

We are left to our memory and the assistance of counsel, also acting apparently on their memory, as to exactly what happened in the court below and in our court, because we have not a copy of the judgment. As I understand it, the *Guildford Castle* was found to be four-fifths to blame because (1) she had gone over to the wrong side of the river; (2) she was going too fast; and (3) although in the neighbourhood of fog, she had not been blowing her whistle properly. The *Stentor* was found one-fifth to blame because, having fog ahead, she did not stop her engines as soon as she heard the first whistle of the *Guildford Castle*. Perhaps the *Stentor* was a little lucky in getting off in that way, because our assessors advised us that, in view of the misty weather, she had been coming up too fast before she heard the other vessel.

On the order that we made, that each appeal should be dismissed with costs, the matter went to the assistant registrar, who took the view, I understand, not on the claim and counterclaim cases, but on *The Lauretta* (4 Asp. Mar. Law Cas. 118; 40 L. T. Rep. 444; 4 Prob. Div. 25), and what we find in *Jones* v. *Stott* (102 L. T. Rep. 670; (1910) 1 K. B. 893), that the right method of carrying out our order was on these lines: "The *Guildford Castle* appeals against all liability; I treat her cross-appeal as a separate appeal, and I order her to pay the costs which are occasioned by her falling on that separate appeal." The taxation was, of course, on two appeals, and the assistant registrar dealt in each case with an appellant who had a cross-appeal against him, and said that the amount to be determined was the amount that the appellants' costs were increased by the cross-appeal. He said: "The cases upon which I found this opinion are *The Lauretta* (*sup.*) and *Robinson* v. *Drakes* (48 L. T. Rep. 740; 23 Ch. Div. 98). I think there are other cases, but these are sufficient to show what I believe to be the recognised practice in cases where appeal and cross-appeal have been dismissed with costs and the appellants' costs have not been increased by reason of the cross-appeal."

The owners of the *Stentor* appealed to Bateson, J. and each appeal is dealt with in the same way. "The appellants as respondents to the cross-appeal object to the taxation of their costs and to the taxation of the respondents' costs as cross-appellants, on the ground that both the costs on behalf of the appellants as respondents to the cross-appeal and the respondents' costs have been taxed on a wrong basis, and that an apportionment should have been made of such items in each bill as refer to work done or payments made which have been available for the use of each party in resisting their opponents' and supporting their own appeal." The same thing was said about the other vessel. The learned judge being in chambers we have no note of his judgment, and it is doubtful what cases he looked at, but he set aside the taxation and made this order: "The judge ordered that the taxation of the appellants' (respondents to the cross-appeal) and the respondents' costs herein be reviewed by apportioning the costs of each side between the appeal and the cross-appeal with reference to the actual course taken and the time properly occupied on the hearing of the appeals, and he referred the said bills back to the assistant registrar."

In my view the decisions that have been given in claim and counterclaim cases, which raises almost exactly the same point, though under different circumstances, ought to be considered as the guide in this matter. The matter arose before Fry, J. in *Saner* v. *Bilton* (40 L. T. Rep. 125; 11 Ch. Div. 416), over fifty years ago. At that time there was a considerable doubt, and Fry, J. consulted with all the taxing masters of both Divisions to ascertain what was the practice, and all the taxing masters advised him that when there was no express authority they thought the right principle was on these lines: "The plaintiff commences litigation, and it seems to me his costs should depend upon his failure or success. The defendant, under the power given by the Act, superadds a claim of his own, and I think the additional costs occasioned thereby should abide the event. I consulted the common law masters, who agreed in this view, but it is only a matter of opinion, there having been no decisions." Claim and counterclaim cases went along on those lines until Atkin and Younger, L.JJ. had a case (*Christie* v. *Platt*, 124 L. T. Rep 649; (1921) 2 K. B. 17), which induced them to believe that the principle in *Saner* v. *Bilton* (*sup.*) was wrong. That was a case where the *Saner* v. *Bilton* (*sup.*) ruling resulted in the plaintiff getting 200*l.* and the defendant 3*l.*, which they said did not look right, and they laid down the principle of apportionment. Shortly after that Sargant, L.J. and I had the same sort of point raised in a running-down case (*Wilson* v. *Walters*, 134 L. T. Rep. 597; (1926) 1 K. B. 511), where each side was appealing, and we took the view that *Saner* v. *Bilton* (*sup.*) was applicable, and that apportionment should not be allowed. The matter then came up before the House of Lords in 1929, in the *Medway Oil and Storage Company* v. *Continental Contractors Limited* (140 L. T. Rep. 98; (1929) A. C. 88), a case which raises the point very neatly. I will not go into details, but the headnote in the House of

Lords is as follows : " Where a claim and counterclaim are both dismissed with costs, upon the taxation of the costs, the true rule is that the claim should be treated as if it stood alone and the counterclaim should bear only the amount by which the costs of the proceedings have been increased by it. No costs not incurred by reason of the counterclaim can be costs of the counterclaim. In the absence of special directions by the court there should be no apportionment. The same principle applies where both the claim and the counterclaim have succeeded. *Saner* v. *Bilton* (*sup.*), *Crean and Sons Limited* v. *M'Millan* (1922, 2 I. R. 105), and *Wilson* v. *Walters* (134 L. T. Rep. 597 ; (1926) 1 K. B. 511) approved and followed) *Christie* v. *Platt* (124 L. T. Rep. 649 ; (1921. 2 K. B. 17) explained and distinguished." Lord Blanesburgh, who, having been a party to *Christie* v. *Platt* (*sup.*), was a member of the court in *Medway Oil and Storage Company* v. *Continental Contractors Limited* (*sup.*), said that he agreed that *Christie* v. *Platt* had gone very much further than they intended, in view of the previous decisions. I think that is very nearly enough to be a decision against apportionment. It is a decision on this principle ; the plaintiff appeals, treat that as a separate matter ; if he fails, he is bound to pay all the costs occasioned by the defendant resisting his appeal. If there has been a cross-appeal, the matter is not to be dealt with by apportionment between the two, but only those extra costs which are occasioned by the cross-appeal are the subject-matter of the order for costs on the cross-appeal.

That seems to be the principle on which the assistant registrar has proceeded, and to be entirely justified on the decision of the House of Lords ; the learned judge's order appears to me to be a *Christie* and *Platt* (*sup.*) order—apportionment. I think the decision of the House of Lords shows that apportionment is not the proper principle to apply, and I therefore think that this appeal must succeed.

At the same time I desire to say, as I said in *The Young Sid* (*ante*, p. 22 ; 141 L. T. Rep. 234 ; (1929) P. 190), which is generally remembered as being the case of *The Ocean Swell*, that there is to be no binding of the courts as to the orders they make in this way. Each judge, under the present system now set up by Order LXV., r. 1, has discretion, and he can make such order as he likes. If he makes an order in common form, it is no doubt important that it should be known what the order in common form means ; but nothing is to bind the Division or any other Division to make any particular form of order. If the judge thinks a better result will be obtained as in *The Bremen* (*sup.*) by saying no costs, or by making an express order as to apportionment, he is perfectly at liberty to do it. It is only if he follows a common form order, which up to this time has had a meaning, that any rule of taxation, or any rule as to the order which should be made, applies. I say that because I do not want there to be too great a rigidity in any sort of orders as to costs ; the judge should make such an order as, knowing the practice, he thinks will give a proper result between the parties.

In this case the Court of Appeal did make an order which at the time, in my view, had a particular meaning, and I think it had the meaning which the taxing officer has followed. If we had meant that there was to be apportionment, we should have said so ; but we did not say anything about it. For this reason I think the appeal succeeds and the objections to the taxation fail.

Greer, L.J.—I agree. I think that the learned judge was not entitled to come to the conclusion that the taxation had been conducted upon a wrong principle ; and if he was not so entitled it was not for him to work out the result in pounds, shillings and pence.

It is true that the learned assistant registrar based himself upon two cases, *The Lauretta* (*sup.*), and *Robinson* v. *Drakes* (*sup.*), and Mr. Carpmael is right when he says that those are not decisions as to what is to happen in a case where the appeal is dismissed with costs, and the cross-appeal is dismissed with costs ; they are only an indication as to what the judges thought would be the appropriate result of that position. They did not leave the matter undecided in their judgments ; they made a special order in each case. We are told that the principle upon which the assistant registrar acted is the principle on which the taxing officers of the Admiralty Court have been acting for a considerable time when the order of the appellate court has been similar to that which was made in this case.

I agree with my Lord that, in looking for the right principle, we ought to be guided by what the House of Lords said in *Medway Oil and Storage Company* v. *Continental Contractors Limited* (*sup.*) in which Lord Haldane examined all the authorities, from *Saner* v. *Bilton* (*sup.*) downwards, dealing with the proper way to tax the costs on claim and counterclaim. I think the position of the appellant in appeal and cross-appeal is analogous to that of claim and counterclaim. My recollection of the present case is that the appellants, the owners of the *Stentor*, in order to prove that she was not to blame, went into the whole of the facts, including all the facts relating to the conduct of the other vessel ; and if there had been no cross-appeal the costs would have been very nearly identical with what they in fact turned out to be. Having regard to the fact that there was a cross-appeal, which in form challenged the blame attached to the *Guildford Castle*, but in substance, as presented to us, was only supported by an argument that the *Stentor* was more to blame, and inasmuch as some of the costs or some of the time may have been taken up in argument as to whether the proportions should be altered, no doubt the assistant registrar was entitled to say that the costs which were awarded to the respondents should be diminished by such costs as were due to their appeal. In my judgment this meets the justice of the case.

As a general rule it is desirable to look at the matter from the point of view of substance. Who really is the successful party in the litigation in the court below in the case of claim and counterclaim ; and who is really the successful party in appeal and cross-appeal ? I think in this case the respondents were successful and that they ought to have, in substance, all the costs which have been given to them by the assistant registrar.

I have observed in the various cases which have been cited that these questions have given rise to considerable differences of opinion, especially in cases on claim and counterclaim. When counterclaims were introduced they were a substitute for cross-actions, and in the early days they were treated as if they were cross-actions ; but latterly it was appreciated that in substance the counterclaim might really be a defence, and if it fails, all that happens in regard to costs is that the addition to the costs by reason of the counterclaim should be at the expense of the counterclaiming defendant. I think that a similar result should follow with regard to a cross-appeal—namely, that any costs attributable to the cross-appeal which have

increased the costs of the parties to the proceedings in the cross-appeal, ought to be given to the successful party in that cross-appeal. It might be in some cases that that would be a substantial figure; it might be in others that the experienced taxing officer would be able to come to the conclusion that the figure was not a substantial one, as he has done in this case.

I agree with my Lord, therefore, that this appeal should be allowed and the order of the assistant registrar restored.

Solicitors for the appellants, *Parker, Garrett and Co.*

Solicitors for the respondents, *Stokes* and *Stokes*, for *Alsop, Stevens* and *Collins Robinson*, Liverpool.

April, 17, 18, 19, 20, *and May* 17, 1934.

(Before SCRUTTON, GREER, and SLESSER, L.JJ.)

Tate and Lyle Limited v. Hain Steamship Company Limited. (*a*)

Contribution in general average—On part of cargo owners—Deviation—Stranding of vessel—Endorsees of bills of lading—General average bond—Contribution made under compulsion.

F. and Co., and C. D. S. C., both of New York, by separate special c.i.f. contracts, sold sugar to the plaintiffs. For the carriage of the sugar, F. and Co. chartered the defendants' steamer T., *and sub-chartered to C. D. S. C. the* T., *to proceed to a port in San Domingo. By the charter-party, the* T. *was to load sugar at two ports in Cuba and at one in San Domingo "as ordered." F. and Co. informed the defendants' agents in New York, S. S. and Y., of the names and order of call at these ports:* (1) *Casilda,* (2) *Santiago de Cuba, in Cuba, and* (3) *San Pedro de Macoris in San Domingo. The* T. *went to Casilda, and there loaded sugar, and was sent on by the local agents of F. and Co. to Santiago, where she loaded more sugar. S. S. and Y. had cabled to the steamer at Casilda directing her to proceed to Santiago and thence to San Pedro de Macoris. This cable never reached the master; it was said that a Cuban postmaster gave it to a coloured lorry driver to deliver but that he had forgotten all about it. S. S. and Y. had, however, dispatched to the master of the* T. *a copy of the charter, which stated that there was a third port of shipment in San Domingo, and this had reached him. The* T. *left Santiago for Queenstown with a claim for dead freight endorsed upon the bills of lading. Shortly afterwards the steamer was recalled by wireless to San Pedro de Macoris in San Domingo, where she completed her loading of sugar. On leaving this port on the eventual homeward voyage, the* T. *stranded and was damaged. All the sugar had to be discharged, and some of it was lost. The plaintiffs were endorsees of bills of lading of the sugar on board the* T. *The sugar under the plaintiffs' contracts was brought to the United Kingdom in another steamer, and to obtain the sugar the plaintiffs signed a general average bond agreeing with the owners of the ship to pay the proper proportion of salvage or general average or particular or other charges chargeable on their consignment to which the shippers or owners of such consignments might be liable to contribute and they made the deposit claimed in the action—* 9500*l. The plaintiffs admitted that they were liable to contribute in general average for the sugar from San Domingo, but denied that liability in respect of the Cuban sugar on the ground that there had been an unjustifiable deviation by the* T. *Roche, J. refused to order the return of the deposit.*

Held by Scrutton, L.J. and Slesser, L.J. (Greer, L.J. dissenting), that the appeal must be allowed. There had been an unjustified deviation, and the defendants, the shipowners, were not entitled to claim protection from the exceptions in the charter-party or its benefit in claiming a general average contribution. The plaintiffs' agreement under the general average bond had been obtained under compulsion. It had been stated to be made without prejudice and without admitting liability for such charges. It was not a question of lien, for the shipowners could not give information to enable the contribution to be calculated, and further all provisions in the charter-party or bills of lading had been destroyed by deviation. There would be a declaration that the T. *deviated, and for the return to the plaintiffs of the* 9500*l.*

APPEAL from a judgment of Roche, J. refusing to order the defendants, the owners of the steamship *Tregenna*, to return to the plaintiffs 9500*l.* deposited with them by the plaintiffs, endorsees of bills of lading for sugar on board the *Tregenna*, to cover a contribution in general average. The defendants counterclaimed for general average contribution and freight. The facts are set out shortly in the headnote and more fully in the judgment of Scrutton, L.J.

Sir *William Jowitt*, K.C. and *H. Stranger*, K.C., for the appellants (the plaintiffs).

Sir *Norman Raeburn*, K.C. and *Cyril Miller*, for the respondents (the defendants).

Cur. adv. vult.

Scrutton, L.J. — This appeal from Roche, J. raises troublesome questions of law and fact. The plaintiffs are Messrs. Tate and Lyle, Limited, well-known British dealers in sugar, and the nature of their claim is twofold. Firstly, they desire to be freed from any obligation to pay general average contribution in respect of a voyage of the steamship *Tregenna*, carrying to the United Kingdom sugar which they had purchased. Secondly, they desire to have settled the amount of their liability for freight in respect of that sugar. The foundation of their claim is an alleged deviation of the *Tregenna* from her contract voyage, as regards Tate and Lyle as endorsees of bills of lading for certain portions of the sugar on board the *Tregenna*. Roche, J. has found that there was no deviation, and Tate and Lyle appeal.

(*a*) Reported by C. G. MORAN, Esq., Barrister-at-Law.

Tate and Lyle were interested in the sugar on board the *Tregenna* under two contracts. (1) A contract dated the 1st March, 1930, for the sale by Messrs. Farr and Co., of New York, to them of 25,000 tons of Cuban sugar for shipment half in June and half in July, 1930, to Queenstown or Land's End for orders; terms—cost, freight, and full insurance, price 7*s.* 9*d.* per ton landing weight; payment in London on arrival of vessel in exchange for released bill of lading. Should sugar or part thereof not arrive from loss of vessel, or any other unavoidable cause, contract for such to be void, unless cargo be transhipped and arrive in another vessel for sellers' account. Messrs. Farr and Co. covered themselves on this contract by a purchase dated the 28th Feb., 1930, from a Cuban company known as the "Single Seller," which controlled all Cuban sugar. This company undertook to deliver 25,000 tons, half in June, half in July, f.o.b. in one or two safe ports of the south coast, at the option of the seller "Single Seller" for each shipment. The buyer was to supply vessels, informing the seller when they could begin loading. The seller was then to communicate to the buyer the port or ports of shipment. (2) Tate and Lyle had on the 28th Feb. bought 50,000 tons of Cuban or Dominican sugar, sellers' option, for shipment in equal monthly quantities during June, July, Aug. and Sept., 1930, cost, freight and full insurance to Queenstown or Land's End for orders. The sellers were the Cuban Dominican Sales Corporation, of New York, who have close connection with Messrs. Farr and Co., though they are a separate legal entity.

Messrs. Farr had to provide shipping for their own Cuban contract, and they accordingly, amongst other charters, chartered on the 16th July, 1930, from the Hain Shipping Company, the defendants in the action, the steamship *Tregenna*, then at Kingston, Jamaica, to load at one or two safe ports on the south side of Cuba "and at one safe port on the south side of San Domingo" as ordered a full and complete cargo of sugar not exceeding 7770 tons or less than 7030 tons. Why Messrs. Farr chartered to provide for a San Domingo shipment is not clear, but they did in fact on the 28th July sub-charter to the Cuban Dominican Sales Corporation the *Tregenna* to proceed to San Domingo, one safe port on the south side as ordered, and there load between 2780 and 2040 tons of sugar and proceed to Queenstown or Land's End for orders. In the Cuban charter the freight per ton was payable in New York, half on signing bills of lading, half on safe arrival, "charterers' nominee to do steamer's business at loading port."

The first step that Messrs. Farr had to take was to ascertain from their sellers the Cuban ports of shipment and inform the shipowners. They and the "Single Sellers" had apparently arranged on the 16th July that the *Tregenna* should be used to take 5000 tons of Cuban sugar at Casilda and Santiago de Cuba, and that she should be consigned at Casilda to Messrs. Iturralde, as ship's agents. Messrs. Simpson, Spence, and Young had acted as shipowners' agents in chartering, and are a well-known firm carrying on business in London and New York. Messrs. Farr's brokers accordingly on the 16th July informed the New York house that the first port of loading was Casilda, and the ship's agents were Messrs. Iturralde, and that the second port of loading was Santiago de Cuba, and the agents were Messrs. Wetmore and Bucher. Messrs. Simpson on the same day wired to the *Tregenna* at Kingston: "Casilda first loading," and the agents Iturralde. The shipowners arranged that Simpsons should finance the disbursements. On the 17th July Farr's brokers—Battie and Co.—informed Simpsons that the third port of loading was San Pedro de Macoris, San Domingo, and the agents were Tatem and Co., and on the same day Simpsons, New York, whose code name is "Arrow," sent a wire to the captain of the *Tregenna*, care of Iturralde, at Casilda, that the second port was Santiago, the agent Bucher, and the third port San Pedro de Macoris, agent Tatem. On the 18th July, Simpsons dispatched to the captain, care of his agents at Santiago, a copy of the charter, which would tell him if he read it that there was a third port for shipment in San Domingo; this letter was received by the captain at Santiago on the 26th July. Unfortunately, Simpsons did not in their letter of the 18th repeat and confirm their cable of the 17th informing the captain of these second and third ports of loading. This was unfortunate, because neither the captain nor his agent, Iturralde, at Casilda, ever received the cable of the 17th. There is no telegraph to Casilda; the nearest telegraph station is Trinidad, five miles off. The Western Telegraph Company forwarded the cable to Trinidad with instructions to forward it by mail or post to Casilda. The telegraphic or post office official gave it to a coloured chauffeur to take to Casilda, and it apparently stayed in the messenger's pocket. Simpsons assumed the cable had been received, though the captain did not acknowledge it, because the telegraph company did not inform them it had not been delivered, and the ship proceeded to Santiago, apparently in compliance with the telegram which was the only order for Santiago which Simpsons had sent, and also the captain had received the charter. The steamer did proceed to Santiago, because the "Single Seller" had given the information to Iturralde, "consigned to Wetmore and Bucher, Santiago, where she will complete her cargo." The steamer arrived at Casilda on the 19th July, took on board all the sugar intended for her, and sailed for Santiago on the 24th July. A bill of lading was signed by the master, as presented by Iturralde, in accordance with their instructions, acknowledging receipt on the *Tregenna*, "now lying in the port of Casilda and bound to Queenstown for orders," of a certain quantity of sugar. The bill contained a clause: "Freight and all conditions and exceptions to be in accordance with charter-party covering this cargo, and the said charter-party to take precedence of this bill of lading." There was a deviation clause: "The ship shall have the liberty to sail without pilots, to tow and assist vessels in all situations, to tranship goods by any other steamer or steamers and to touch at any port or ports for whatever purpose, and to deviate for the purpose of saving life or property or for coal or other necessary provisions."

The *Tregenna* arrived at Santiago on the 25th July, loaded cargo, making her total Cuban cargo 4990 tons, and sailed on the 29th July. But unfortunately she was cleared for and sailed for "Queenstown for orders," ignoring the Domingan port of San Pedro de Macoris, where the balance of her cargo was waiting. The captain had, in fact, received no notice as to San Pedro de Macoris, and had either not read his charter or misunderstood it as an option for San Domingo which had not been exercised. Simpsons thought the captain had received their telegram of the 17th. In fact, Wetmore and Bucher had received no instructions direct from the shipowners or their agents, apart from anything the captain said to them; they had received on the 26th July a copy of the charter from the "Single Seller," per Mendoza.

They had received no instructions from anybody about San Pedro de Macoris. Farr's contract with Tate and Lyle was completed at Santiago; the Macoris contract of sale was the affair of the Cuban Dominican Company; as to the charter, Farr's had given notice to the shipowner through Simpsons that San Pedro de Macoris was the third port, and both the captain and Wetmore and Bucher had the charter showing that the ship had to go to a third port in San Domingo, to be ordered. The cargo shipped at Casilda and Santiago, 4990 tons, left a shortage of over 2000 tons on the charter quantity, involving a heavy claim for dead freight. It is curious that under these circumstances neither the agents, Wetmore, nor the captain, asked for instructions as to the shortage or the third port, by cable either to Simpsons in New York, Farr and Co., or the "Single Seller." Bills of lading were presented and signed, acknowledging receipt of sugar on the *Tregenna* "lying in the port of Santiago de Cuba and bound to Queenstown for orders," with liberty to call at any ports in or out of the customary route in any order, to receive cargo or for any other purpose, to be delivered to order of the "Single Seller" or assigns, he or they paying freight as per charter. The captain required the bill of lading to be endorsed with a claim for dead freight on 2040 tons chartered quantity short shipped. No one at Santiago seems to have enquired "why there was a short shipment." On the 29th July, Wetmores wired Simpsons (Arrow) in New York and Mendoza for the "Single Seller," and the shipowners in England that the *Tregenna*, with a total cargo of 4090 tons, was sailing to Queenstown for orders (actually to Hampton Roads for bunkers). This information puzzled everybody. Wetmores, on discovering the mistake, at once acted on the 30th July and by wireless instructed the captain, then on the way to Hampton Roads, to proceed to Macoris; so did "Arrow," and the captain, saying he had no knowledge of the third port, did proceed to Macoris, where he arrived on the 1st Aug. A voluminous correspondence followed; Simpsons (Arrow) summarised their position in a long letter. Wetmores defend themselves on the ground that no one told them anything about San Pedro. One thing is clear, that the shipowners who had through their agents, Simpsons, New York, instructions for San Pedro de Macoris, and who through Simpsons attempted to give that order to the captain, did not, through the default of the telegraph company, in fact succeed in giving the captain the order. Neither did the shipowners give any order on the subject to Wetmore and Bucher, to whom the ship was consigned at Santiago. The *Tregenna*, in fact, made a diversion, to use a neutral term, involving 265 miles extra travelling in difficult waters to get to Macoris. Whether one considers the diversion from the point of view of the ordinary route from Santiago to Macoris, as per charter, or from the point of view of the ordinary route from Santiago to Queenstown for orders via Hampton Roads, as per bill of lading, it has all the appearance of a deviation. Probably nothing would have happened beyond mutual recrimination, and extra carefulness in future, but for the unfortunate event that after loading the rest of her cargo as purchased from the Cuban Dominican Company at Macoris, on leaving the port, the *Tregenna* stranded on the way out of the port, and sustained such damage that part of her sugar was lost, part damaged. The *Tregenna* had to go to Nobile for repairs, and the rest of the cargo had to be transhipped and forwarded to Great Britain by the steamship *Baron Dalmeny*. The question of the effect of the deviation or diversion was at once raised. Tate and Lyle had on payment of the price become endorsees of the bills of lading. They had no interest in goods which did not arrive, as payment was only due for arrived goods. Neither did the deviation, if any, before getting to Macoris affect the Macoris shipment. But Tate and Lyle, as endorsees of the Casilda and Santiago bills of lading, and their underwriters were concerned with any claim for general average contribution or for freight due in respect of those shipments. The shipowners required a general average bond before delivering the cargo under the bills of lading, and the endorsees signed the ordinary Lloyd's average bond which, in consideration of delivery by the ship, requires the owners taking delivery to deposit in joint names funds to cover the proper proportion of any salvage and (or) general average charges which may be chargeable on the goods delivered "provided always the deposit shall be treated as payments made without prejudice and without admitting liability in respect of the alleged charges." The endorsees now claim that they were not liable for any such charges because before the losses alleged to give rise to general average contribution were incurred there had been a deviation from the contract voyage, whether under charter or bill of lading, the result of which was to cancel any protection the shipowners claimed to have under any exceptions in the charter or bill of lading, and to leave the shipowners in the position of no longer having any enforceable contract with the endorsees. The plaintiffs, therefore, ask that the deposit under the average bond should be returned to them; the shipowners reply that they are still entitled to it in spite of the deviation or diversion, and they counterclaim for general average contribution and freight. As to freight, the endorsees have paid into court the freight on the arrived portion of the Macoris shipment, which is not affected by the deviation, and dispute liability for the freight on the arrived portion of the Casilda and Santiago shipments.

The learned judge has relieved the shipowners from liability for any deviation on a ground which I have great difficulty in following. He said: "Now the whole question, or the main question, in this case, as it seems to me, is that which has been debated, and very acutely debated, by the respective counsel; does that mean that the obligation of the shipowners as to the voyage is to perform such a voyage as they in London got orders to perform, or does it mean that they are to perform such a voyage as the ship, that is to say, those having control over the movements of the ship, got orders to perform? Counsel for the plaintiffs contends that the former is the proper construction, and counsel for the defendants contends that the latter is the proper construction. I have no doubt that the contention of the defendants is the right one." If I understand this, and I am not sure that I do, the learned judge means that Farr and Co., the charterers who had to give orders for the ports of loading, gave no effective orders if they only gave them to the chartering brokers as agents of the shipowners, or, indeed, if they only gave them to the shipowners in London. They, the charterers, must give orders which reach the ship. If the orders do not reach the ship, though sent by someone who purports to act on behalf of the shipowners, the loss is on the charterers; they have not given an order so that the shipowners are bound to execute it, and, therefore, what happens on the deviation is not a breach of any contract. The learned judge recognises that if the orders do not reach the ship

owing to the fault of the shipowners, or someone for whom they are responsible, it is not open to the shipowners to say that the ship (*i.e.*, the master) did not receive the order, and, therefore, "I am excused if the order I got from the charterer is not carried out." With respect to the learned judge, I do not agree with this, which is, in my experience, a quite novel point; I am not certain that I even understand it. Assume the charterer, a single person, contracts to provide a cargo at a port which he is to order and says to the shipowner within a reasonable time: "I order port A"; what more has the charterer to do? It is not his business to forward that order to the ship, or see that the ship executes it. The shipowner has to do what he is ordered to do, which he has contracted to do. If he employs an agent to pass on the order to the ship, and the agent fails to do so, the shipowner has no excuse for not doing what he has contracted to do, "proceed to a port as ordered." It appears to have been argued that in giving the order to proceed to the New York branch of the shipowners' chartering broker, the charterer did not effectively give any order. I do not understand this. "Arrow" accepted the order and purported to act on it, and the shipowners accepted "Arrow" as their agent. If I understand the learned judge, if Farrs had given the order for the third port to the shipowners in London in time for the shipowners to communicate by telegraph and by letter with the captain, and the wire and the letter had both gone astray in transmission, the risk, in the judge's opinion, would have been the charterer's.

It seems, however, to me there was in this case default or neglect on the part of the shipowners' agents. As to "Arrow," whom the shipowners accept as their agent, "Arrow" did not follow the usual course of repeating and confirming in his letter of the 18th July, his cable of the 17th July, ordering San Pedro de Macoris as the third port. If he had done so this deviation would never have taken place. But, and I regard this as vital, "Arrow" never sent any instructions as to the third port to the ship's agent at Santiago, who, it is true, had the charter, but not the nomination of the Domingan port which was to be the third port. As to the master, he had the charter at Santiago, but either did not read it or did not understand it, and took no steps to ascertain what was the third port. As to Wetmore and Bucher, who, though nominated by the charterers, were employed by the ship, and who had the charter, I cannot think they acted reasonably in dispatching the ship to England with an incomplete cargo, in the absence of instructions, and without inquiring what was the position as to the third port and the rest of the cargo. Some attempt was made to justify the action at Santiago by saying that the charterers must have known of the error when their agents, Wetmore and Bucher, ordered the ship to Macoris and they supplied cargo there, and this must be taken to be a waiver of the deviation, if any, which binds the endorsees of the bill of lading. This argument was, however, conclusively negatived in the well-known case of *Leduc* v. *Ward* (1888, 6 Asp. Mar. Law Cas. 290; 58 L. T. Rep. 908; 20 Q. B. Div. 475). The plaintiff was the endorsee of a bill of lading for goods shipped at Fiume in a vessel bound to Dunkirk with liberty to call at any ports in any order. The shipper knew that the vessel was going to Dunkirk *via* Glasgow, a quite unusual route. The vessel was lost off Glasgow. It was held that the endorsee was not affected by the knowledge of the shipper. The endorsement only passed the contract contained in the bill of lading, not the knowledge of the shipper as to any contrary intention of the shipowner.

As to any liberty obtained by the deviation clause, "to call at any ports in any order whether in or out of the route," it is now well settled by *Glynn* v. *Margetson and Co.* (7 Asp. Mar. Law Cas. 366; 69 L. T. Rep. 1; (1893) A. C. 351) and the cases following it up to *Stag Line Limited* v. *Foscolo Mango and Co.* (*ante*, p. 266; 146 L. T. Rep. 305; (1932) A. C. 328), that the general words must be limited by the purposes of the contract, and that when the *Tregenna* went off from Santiago to Queenstown instead of proceeding to a San Domingan port, her deviation was not protected by her turning off by an unusual route to Macoris. Similarly in regard to the effect of incorporating the clauses of the charter into the bill of lading, a series of well-known cases have established that this incorporation of "terms and conditions" is limited to terms and conditions to be performed by the consignee.

Unless it is possible to excuse the 265 mile deviation, it seems to me the shipowners cannot claim the protection of any exception in the contract or claim general average contribution for sacrifices incurred in carrying out the joint adventure, because the joint adventure has been abandoned by doing something which is inconsistent with the contract under which the adventure is carried on. I understood counsel for the ship to admit that if the loss had occurred while the *Tregenna* was on the deviation in the neighbourhood of Inagua Island, he would have had no answer, but to suggest that when he got back to his chartered route at San Pedro he was not liable for a loss incurred by some cause not connected with the deviation. In my opinion the decision of this court in *Thorley* v. *Orchis Steamship Company* (10 Asp. Mar Law Cas. 431; 96 L. T. Rep. 488; (1907) 1 K. B. 660) negatives this contention unless the shipowner can prove that if he had not deviated the same loss would have happened. I agree with Roche, J. that "of course, it is quite impossible for anyone to prove that it would have happened at that time and date" (or at any time) "if there had not been such change of voyage." The time of day or tide might have been different and the ship might never have struck as she did.

I have not thought it necessary to go through the numerous cases which have firmly established the law as to the effect of deviation unjustified, which is that it deprives the shipowner of the protection or benefit of the contract which he has departed from. There is nothing peculiarly nautical in such a law. If A. undertakes protection by exceptions by storage in warehouse X., but without justification warehouses the goods in warehouse Y., he is not entitled to the protection he would have had if he had warehoused them in X.: (*Lilley* v. *Doubleday*, 1881, 44 L. T. Rep. 814; 7 Q. B. Div. 510).

In this case I am of opinion that there was an unjustified deviation, and that the shipowners were not entitled to claim protection from the exceptions in the original contract, or its benefits in claiming a general average contribution. The plaintiffs, therefore, succeed in establishing that they are under no liability under the general average bond, and their deposit must be returned to them.

It is, however, argued that though there is a deviation from the voyage named in the bill of lading, the endorsee under the bill of lading to whom the property passes may be liable for general average contribution because under Lloyd's bond he has "agreed with the owner of the ship to pay

to the owner the proper proportion of salvage and general average or particular, or other charges chargeable upon his consignment, or to which the shippers or owners of such consignments may be liable to contribute." This agreement has been made under compulsion to obtain the release of their goods, and is stated to be "made without prejudice and without admitting liability for such charges and as though the deposit had been made for the purpose only of obtaining delivery of such goods." The legal and business position seems to be as follows: If there had been no deviation, and the depositor signing the Lloyd's bond had been owner of the goods at the time of the stranding which occasioned the general average sacrifices and expenditure in question the depositor would have sued his underwriter for a loss by perils of the sea. If he had made sacrifices he would have sued the underwriter for the whole of the sacrifice, not for his average contribution in respect of it: (*Dickenson* v. *Jardine*, 1868, 3 Mar. Law Cas. (O.S.) 126; 18 L. T. Rep. 717; L. Rep. 3 C. P. 639). If his loss was expenditure he would sue, not for the whole expenditure, but for his average contribution to it: (*The Mary Thomas*, 7 Asp. Mar. Law Cas, 495; 71 L. T. Rep. 104; (1894) P. 108). But in each case he would sue as for a loss by perils of the sea. The underwriter, having paid, would then sue in the name of the cargo owner the other cargo owners or the shipowner for their share of general average contribution, or might sue the shipowner in the name of the cargo owner for breach of the contract of affreightment, if the shipowner was not protected by exceptions. Now assume a deviation before or at the time of the loss by perils of the sea. One effect would be that the underwriter was relieved from his liability. He had not insured the deviated voyage. So also the cargo owner could sue the shipowner for the loss by perils of the sea, because the bill of lading contract had been destroyed by the deviation, and the shipowner had no exception of "perils of the sea" to protect him. It would also follow that neither the shipowner nor other cargo owners could sue that cargo owner, for they were not parties by agreement to the adventure after the deviation. The basis of general average contribution, the "common adventure," had been destroyed by the deviation. Each cargo owner could still sue the shipowner, because the exceptions protecting him had disappeared. The bill of lading endorsee would not be affected by any knowledge of his endorser of the deviation, for the Bills of Lading Act, 1855, only passed the contract contained in the bill of lading, not the knowledge of the shipper about the shipment: (*Leduc* v. *Ward*, *sup.*).

For these reasons I think the endorsees, who have only made a payment under compulsion to obtain their goods, without prejudice to disputing their liabilities, incur no liability. It is not a question of "lien," for the shipowner who cannot name an amount for which the lien is claimed, or give information to enable the contribution to be calculated, can have no lien. Further, all provisions in the bill of lading or charter about general average or lien have been destroyed by the deviation. I am not aware of any case where a cargo owner has been held liable for general average contribution after an unjustifiable deviation. Holding as I do with Greer, L.J. that there was here such a deviation, I am of opinion that there is no claim under the Lloyd's bond against the plaintiffs.

There remains the question of freight. Freight on the Macoris cargo is claimed by counterclaim, and admitted and paid into court, in the defence to the counterclaim. Freight on the Cuban cargo stands in this position. The freight on cargo arrived under the original bill of lading is 1834*l.*, but 1684*l.* had been paid in advance in New York; the balance, 155*l.* 1*s.* 8*d.*, is claimed by the shipowners, not under any contract with the *Baron Dalmeny*, in which it was transhipped, but under the original contract. There might be circumstances which would render the plaintiffs liable for the *Baron Dalmeny*, as if they had requested the cargo to be transhipped, but there is no evidence of that sort. The shipowners claimed to tranship the cargo as of right to earn their original contract freight. But they had abandoned the protection of that contract, and I do not see how they can claim freight as provided by it. They applied to amend by claiming under a *quantum meruit*, but I do not think that would help them: (1) We have no evidence as to the rate of the freight market, and (2) the fact that a volunteer without authority renders services to another man's property does not give him a right to remuneration, or to keep the property unless he gets remuneration. There is no authority on the question; but as a matter of logic, I think the claim for freight fails.

The judgment below must be set aside and judgment entered for the plaintiffs for a declaration that the *Tregenna* deviated and that the plaintiffs were never liable to contribute 9500*l.*, or any part thereof, and for the return of the 9500*l.* deposited with the trustees, and on the counterclaim, except as to the money paid into court.

Greer, L.J.—I have had the opportunity of reading the judgment of Scrutton, L.J., with the result that unfortunately, though I agree with a very large part of it, I do not agree with the result which he thinks necessarily follows from the facts he has stated, and I so disagree for the following reasons:

This is an appeal from the judgment of Roche, J. in favour of the defendants, the Hain Steamship Company Limited, in an action in which the plaintiffs were alleging that they were not liable to contribute to the sacrifices and general average expenses incurred by the defendants' steamship *Tregenna*, and the defendants alleged that the plaintiffs were liable to contribute the sum of 8269*l.* 14*s.* 9*d.* out of the security provided by them under a Lloyd's general average bond which they signed, and were also bound to pay the defendants the sum of 1955*l.* 4*s.* 5*d.* for freight in respect of goods of which they took delivery under bills of lading.

The facts are somewhat complicated, but the events which gave rise to the general average sacrifices and expenses and which determine whether the defendants are entitled to the freight that they claim have been fully stated in the judgment of Scrutton, L.J. I need not restate them, but in order to justify the view I take of the questions involved in the appeal, I think it necessary to refer in some detail to the documents and to some of the evidence. I may say at once that I agree with Scrutton, L.J. that Messrs. Simpson, Spence, and Young were agents of the steamship company to receive the orders as to the ports at which the steamship *Tregenna* was to load under her charter. Quite clearly they did not regard themselves as *functi officio* when they had fixed up the charter. The charter was ineffective until orders had been given by the charterers to the shipowners or their representatives, naming the ports of loading, and I think the chartering brokers representing the shipowners in New York were agents of the owners to complete the fixing of the

vessel by receiving notice of the ports of loading, and when they received such notice the shipowners were bound to go to the loading ports so named, and they were not excused from sending the ship to San Pedro de Macoris because the attempt of Messrs. Simpson, Spence, and Young to communicate the orders to the captain failed through the negligence of a casual messenger selected by the Cuban postmaster. I notice that in par. 3 of the affidavit of Mr. Readdie, who was looking after the business for his employers, Messrs. Simpson, Spence, and Young, it is stated that the authority of that firm was limited by the instructions contained in telegrams received from their London house. This means that they had the authority of the shipowners to carry out the instructions which they received from their own London house. On the 16th July, 1930, their London house cabled: "We confirm charter telegraph name of charterers please convey orders to captain care Lascelles Kingston and us." This, I think, is a clear admission that it was part of their employment to receive the orders of the charterers as to the ports of loading and to convey them to the captain. If there were any doubt about this, such doubt would be entirely removed by their reply to the defendants' letter of the 13th Sept., 1930, which is dated the 30th Sept., 1930. They did not dispute that it was their duty to receive the orders from the charterers and pass them on to the captain, their contention being that they were not responsible for the alleged deviation because they did not order it. I have accordingly no hesitation in agreeing with the view of Scrutton, L.J. that when the vessel sailed away from Santiago de Cuba with the intention of going direct to Queenstown she was deviating from the charter-party voyage; that when she turned back to go to San Pedro de Macoris she was also deviating from the charter-party voyage, and that in one or both of these cases she was deviating from the bill of lading voyage. There was, therefore, a deviation until the vessel arrived at San Pedro de Macoris. If she had there loaded and afterwards sailed away for Queenstown without the knowledge and consent of the charterers, who were at that time, I think, holders of the Casilda and Santiago bills of lading, there can be little doubt that the shipowners would not have been entitled to claim against the sugar shipped at Casilda and Santiago (which for convenience I shall hereafter refer to as the Cuban sugar), for contribution for general average sacrifices or expenses. But one question for decision in this case is whether, having regard to the conduct of the charterers in completing the loading of the vessel under the charter-party at San Pedro de Macoris, so as to fulfil their sub-charter, they were not thereby affirming the contract of carriage of the whole of the cargo from San Pedro de Macoris to the ultimate port of discharge.

The shipowners' claim depends upon the contract contained in the Lloyd's average bond, dated the 13th Oct., 1930. By that bond Messrs. Tate and Lyle agreed in consideration of the delivery of the goods to "pay to the owner of the said ship the proper and respective proportion of any . . . general average . . . charges . . . to which the shippers or owners of such consignments may be liable to contribute in respect of such damage loss sacrifice or expenditure." It will be observed that the promise to pay is a promise to pay what is chargeable upon the goods mentioned in the schedule, that is to say, 19,332 bags of Cuban sugar, and 18,541 bags of San Domingo sugar to which the shippers or owners of such consignments might be liable to contribute. This seems to me to mean that if the shipowners were entitled to claim contribution from the shippers or from the owners of the goods at the time the sacrifices were made and the expenses incurred, and had a lien upon the goods for the payment of the amount due for such sacrifices and expenses, they were entitled to withhold delivery until they were paid, and there was, therefore, a good consideration for the receiver's promise to pay even though the receiver was not the owner at the date when the lien on the goods attached. I have come to the conclusion that the Cuban sugar was being carried by the steamship *Tregenna* with the consent and for the benefit of the owner at the time when she was stranded and the general average sacrifices and expenses were made and incurred, and that accordingly, under the Common Law rule relating to general average contributions the ship had a lien on the goods for the proper proportion due from the owner of the goods. To make this contention good, I regret that it is necessary for me to refer in some detail to the contracts of sale, to the charter-party, and to the bills of lading.

The charter-party describes the ports of loading as one or two safe ports on the north side or one or two safe ports on the south side in Cuba, and one safe port on the south side of San Domingo as ordered. The charter-party contains a cesser clause which is in the following words: "Charterers' liability to cease when cargo is shipped and bills of lading signed and total freight, dead freight also demurrage at loading port (if any) have been paid." Messrs. Farr and Co. bought their 25,000 tons of Cuban sugar from a firm called for convenience in the case the "Single Sellers." Delivery was to be alongside steamer, and the buyer had to pay 95 per cent. of the invoice amount against delivery of shipping documents. As this was not a c.i.f. sale, the shipping documents could only mean either the mate's receipt or the bills of lading. On the 1st March, Messrs. Farr and Co. agreed to sell the same quantity of Cuban sugar to the plaintiffs on special c.i.f. terms, which contained these clauses: "(4) To be delivered free of freight and insurance to the buyers from over the ship's side at a usual place of discharge at port of destination as customary, buyers paying all charges incurred in landing and weighing. . . . (8) Payment of the approximate amount named in rule 155 to be made in London on arrival of vessel at port of discharge in exchange for released bill of lading or freight release, and (or) ship's delivery order, charter-party (if any) and approved policy of insurance, and the balance as soon as the net weights and polarisation are ascertained. . . . (9) Should the sugar, or any portion thereof, not arrive from loss of vessel, or any other unavoidable cause, contract for such to be void; but should the sugar or any portion thereof be transhipped and arrive in any other vessel or vessels for seller's account, contract for such to hold good." It seems clear that the plaintiffs under their contract would not obtain any property in the sugar until the bills of lading and other documents referred to in clause (8) were transferred or released to them. Messrs. Farr and Co. were the agents for the Cuban Dominican Sales Corporation, and the terms on which the plaintiffs agreed to buy the sugar shipped at San Pedro de Macoris were the same as those relating to the Cuban sugar. There seem to have been three bills of lading at Casilda in respect of bags of sugar separately marked: 6997 bags marked "Sta Isabel," 3000 bags marked "Agabama," and 2696 bags marked "Trinidad." The bills of lading were, I understand, in the same form. The one supplied to me was the bill with regard to the bags marked "Agabama." That bill incorporated some of the terms of the

charter-party in these words: "Freight and all other conditions and exceptions as per charter-party. Freight and all conditions and exceptions to be in accordance with charter-party covering this cargo, and said charter-party to take precedence of this bill of lading." It is well settled that words such as these only refer to conditions and exceptions to be performed by the charterer. The vessel was described in the bill of lading as bound for Queenstown. Inasmuch as it was a condition of the charter-party that part of the vessel's load should be shipped by the charterer at the two other ports, I think the words "Bound for Queenstown for orders" must in the circumstances be interpreted "Bound for Queenstown for orders after giving the charterer an opportunity of complying with his obligation to load at the two other ports." It could not be, and indeed it was not contended, that the ship deviated by not going direct from Casilda or from Santiago de Cuba to Queenstown. The undertaking in the bill of lading with regard to delivery was "unto notify Frame and Co. Limited or to assigns he or they paying freight for the said goods." Farr & Co. were the London agents for the charterers. The Casilda bill of lading was not a bill of lading to the order of the "Single Seller," but it was endorsed by the "Single Seller" and must have been sent by the "Single Seller" to the charterers, Messrs. Farr and Co., as it bears the stamp of their bank. The bank of the "Single Seller" seems to have been the Royal Bank of Canada. The "Trinidad" bills of lading were sent on the 25th July, 1930, to Messrs. Farr and Co., and copies of all bills of lading were sent to them on the 26th July. On the 30th July, 1930, Messrs. Farr and Co. seem to have received the Santiago bills of lading. It appears from a letter of the 1st Aug., 1930, that Messrs. Farr and Co. are pledging to their bank the 6997 bags shipped at Casilda and marked "Santa Isabella," and there can be no doubt that at that time they were the owners of those bags, who had the property either because the "Single Seller" took the bills of lading merely as their agent, or because they were assignees to whom the property had passed. The bank did not become such assignees, but only pledgees, and the property remained in Messrs. Farr and Co. I think it is clear that with regard to the goods covered by these bills of lading Messrs. Farr and Co. were the owners at the time the vessel was stranded. I cannot trace in the documents what happened to the other bills of lading at Casilda, but have no doubt, having regard to the fact that the name of the bank on them is the name of Messrs. Farr and Co.'s bank, that they were dealt with in the same way as the "Santa Isabella" parcel. The Santiago bills of lading are not in the same form. The sugar covered by them is made deliverable to the order of the "Single Seller" or his or their assigns, and the term as to incorporation in the charter-party is in the margin "all conditions as per charter-party." The bills of lading were endorsed by the "Single Seller," and bore the stamp of Messrs. Farr and Co.'s bank. I think it is not unreasonable to draw from the documents the inference that when the *Tregenna* sailed from its third port, San Pedro de Macoris, all the sugar on board, except that which had been shipped by the Cuban Dominican Sales Corporation at San Pedro de Macoris, and at the time when she stranded, was the property of Messrs. Farr and Co.

On the 31st July Messrs Battie and Co., the brokers who had acted on behalf of the charterers in fixing the charter, advised Messrs. Farr and Co. by telephone and letter that Messrs. Wetmore and Bucher, who had been agents for the charterers and the ship at Santiago, had ordered the vessel back to San Pedro de Macoris. The charterers had appointed Messrs. Tatem and Co. as their agents in San Pedro de Macoris, and, knowing all about the deviation, they allowed their agents to put the balance of the cargo they had undertaken to provide on board the steamship, thereby fulfilling their obligations to the sub-charterer. They did not protest or tell the shipowners that they were in possession of the Cuban sugar without their consent and without any terms upon which it was to be carried. They cannot be allowed to approbate by loading under the charter-party, and reprobate by saying that the charter-party no longer applied owing to the deviation. I think they must be taken to have assented to their Cuban sugar being carried from San Pedro de Macoris on the terms of the charter-party. The general average sacrifices and expenses were being made and incurred for their benefit, and for the benefit of the Cuban and Dominican Sales Corporation who were then the owners of the sugar shipped at San Pedro de Macoris, as well as for the benefit of the ship.

The somewhat unusual circumstances under which the general average sacrifices and general average expenses were incurred by the ship raise some difficult questions of law. (1) Does contribution become due from the merchant who is the owner of the cargo at the time the sacrifice has been made, or the expenses incurred, subject to the condition that the goods shall afterwards arrive at the port of discharge, or is the only obligation imposed by law an obligation on the merchant who is the owner of the goods under the bills of lading at the time the vessel reaches its port of discharge? (2) Has the ship a lien on the cargo to secure the due contribution of the owner of the goods which attaches to the goods at the time of the general average sacrifices or the incurring of the general average expenses, or is the lien only one which becomes available at the port of discharge as against the then holder of the bill of lading, whose contract under the decisions such as *Leduc* v. *Ward* (1888), 5 Asp. Mar. Law Cas. 571; 58 L. T. Rep. 908; 20 Q. B. Div. 475) is entirely governed by the terms of the bill of lading?

I cannot find that these questions have ever been definitely settled in any of the decided cases, but the law has been frequently stated by judges and jurists of authority in commercial matters in words which lead me to conclude that both the liability and the lien come into existence as soon as the sacrifice has been made or the expenses have been incurred, but that the liability and the lien are subject to be defeated by the non-arrival of the cargo at the port of destination. In *Fletcher* v. *Alexander* (1868, 3 Mar. Law Cas. (O.S.) 69; 18 L. T. Rep. at p. 434; L. Rep. 3 C. P. at p. 381), Bovill, C.J. states the principle in these words: "The general principle, as to which there is no serious doubt or difficulty, is that, where the goods of one are sacrificed for the general safety of the whole, all are to contribute according to the benefit they severally derive therefrom." On the same page he quotes with approval the following words from Marshall on Insurance, 4th edit., by Mr. Justice Shee, at p. 424: "In the case of jettison, which is where the goods of a particular merchant are thrown overboard in a storm, which may be lawfully done to save the ship from sinking; or where the masts, cables, anchors, or other furniture of the ship are cut away or destroyed for the preservation of the whole; or where salvage is paid to re-captors, or money or goods are given as a composition to pirates to save the rest; or where a ransom (when

that was legal) was agreed to be paid to an enemy or pirate for liberating the ship; or an expense is incurred in reclaiming her, or defending a suit in a foreign court of Admiralty, and obtaining her discharge from an unjust capture or detention; in these, and the like cases, where any sacrifice is deliberately and voluntarily made, or any expense fairly and *bona fide* incurred, to prevent a total loss or some great disaster, such sacrifice or expense is the proper subject of a general contribution, and ought to be rateably borne by the owners of the ship, freight, and cargo, so that the loss may fall equally on all, according to the equitable maxim of the civil law: "Nemo debet locupletari alienâ jactura." The application of this principle was understood by the Rhodians, whose regulations on this subject were adopted into the Roman law, and make an important head in the Digest, under the title "De Lege Rhodia de Jactu" (Dig. lib. 14, tit. 2); the leading principle of which is, "Omnium contributione sarciatur, quod pro omnibus datum est . . . Aequissimum enim est commune detrimentum fieri eorum qui, propter amissas res aliorum, consecuti sunt ut merces suas salvas habuerunt" (Dig. lib. 14, tit. 2, ss. 1 and 2) Lord Esher (then Sir William Brett, M.R.) states the law as follows in *Ocean Steamship Company* v. *Anderson* (1883, 5 Asp. Mar. Law Cas. 202, 401; 50 L. T. Rep. at p. 172; 13 Q. B. Div. at p. 662): "The proposition as to general average is, that wherever under extraordinary circumstances of danger to both ship and cargo a voluntary sacrifice of money is made, in order to save both ship and cargo, by the expenditure of which both ship and cargo are saved, the person who has made the voluntary sacrifice is entitled to call upon the others, whose property has been saved by the voluntary sacrifice made on their behalf, as well as on his own, for general average contribution." See also *Burton and Co.* v. *English and Co.* (1883, 5 Asp. Mar. Law Cas. 84, 187; 49 L. T Rep. at p. 769; 12 Q. B. Div. at p. 220), where the same learned judge said that the right of contribution "does not arise from any contract at all, but from the old Rhodian laws, and has become incorporated into the law of England as the law of the ocean. It is not a matter of contract, but in consequence of a common danger, where natural justice requires that all should contribute to indemnify for the loss of property which is sacrificed by one in order that the whole adventure may be saved." In *Birkley* v. *Presgrave* (1801, 1 East 220) it was held that the shipowner's right to recover from the owner of the cargo could be enforced by a common law action by the ship against the owner of the cargo. In *Strang Steel and Co.* v. *A. Scott and Co.* Lord Watson said (1889, 6 Asp. Mar. Law. Cas. 419; 61 L. T. Rep. at p. 599; 14 App. Cas. at p. 608): "In jettison, the rights of those entitled to contribution, and the corresponding obligations of the contributors, have their origin in the fact of a common danger which threatens to destroy the property of them all; and these rights and obligations are mutually perfected whenever the goods of some of the shippers have been advisedly sacrificed, and the property of the others has been thereby preserved." In my view, the Cuban sugar belonging to Messrs. Farr and Co. when the sacrifices were made and the expenses incurred being upon the vessel with the knowledge and assent of the owner, and threatened by a danger common to them, to the owner of the San Domingo sugar, and to the ship, the owners of the cargo at the time were liable to make the appropriate general average contributions *inter se*, provided the goods arrived at the port of discharge. It was the property of Messrs. Farr and Co. and the Cuban and Dominican Sales Corporation, as well as the ship, that were saved by the sacrifices and expenses. This inevitably follows from the terms of the contract of sale to the plaintiffs, which provides that if the sugar did not arrive from loss of vessel or any unavoidable cause, the contract was to be void. If the ship had not made the sacrifices or incurred the expenses, neither the San Domingo sugar nor the Cuban sugar would have arrived, and the plaintiffs' sellers would have suffered a complete loss of what would have been the arrived value of their goods. They have been saved from that loss by the general average sacrifices made and the expenses incurred by the shipowners, and both owners were, in my judgment, liable to contribute their due proportion of general average. When they heard of the vessel's safe arrival at San Pedro de Macoris with the intention of loading the balance of the charter-party cargo, the charterers were in a position analogous to that of a lessor who knows that his tenant has committed a breach that entitles the landlord to re-enter, or the position of an employer who knows that his employee has done an act which justifies instant dismissal. In the one case a landlord who continues to treat his tenant as tenant, affirms the tenancy, and cannot treat the lease as at an end. In the other case, the employer who continues, after knowledge of acts which entitle him to dismiss a servant, to accept his services, cannot afterwards dismiss him unless for some new misconduct. In this case, in my judgment, the charterers, by loading the vessel by their agents at San Pedro de Macoris after they knew of the deviation, affirmed the charter-party as the governing contract between them and the ship in respect of the carriage of the complete cargo carried from San Pedro de Macoris.

With regard to the question of lien, the law is stated in Carver on Carriage by Sea, 7th edit., p. 605, s. 442: "The shipowner has a lien upon the goods for general average contributions due in respect of them, whether the claim be on his own behalf or on behalf of other cargo owners." The matter is dealt with in art. 117 of Scrutton on Charterparties and Bills of Lading (13th edit.), at p. 334, in these terms: "Where a general average loss has occurred on a voyage, the shipowner or master has the right to retain the cargo until he is paid or tendered the amount due on it for general average; he is under a duty to persons entitled to a general average contribution from the cargo to take all reasonable precautions to protect their interests either by obtaining deposits in cash or suitable bonds and guarantees, and is liable to an action if he omits to do so." Lord Esher in *Huth and Co.* v. *Lamport* (1886, 5 Asp. Mar. Law Cas. 543, 593; 54 L. T. Rep. at p. 663; 16 Q. B. Div., at p. 736) said: "The defendants as shipowners had a lien on all the goods on board to secure payment by each owner of his proportion of this general average, and were entitled to refuse to deliver goods to any consignee of the cargo, until they were paid the amount of the general average to which he was liable." Having regard to the earlier part of the passage, I understand the words "to which he was liable" to mean to which the owner was liable.

In *Scaife* v. *Tobin* (1832, 3 Barn. & Adol. 523; 1 L. J. K. B. 183) it was held that a consignee who was not the owner of the goods when he received them in pursuance of a bill of lading, and not the owner of the goods when a general average sacrifice was made, was not liable to contribute, but in the course of the argument it was pointed out by Lord Wensleydale, then Parke, J., that the liability was the liability of the owner at the time the general

average accrued (see 3 Barn. & Adol. at p. 527). It seems to me a reasonable inference from the origin of the rules of law relating to general average that the owner of any cargo who has benefited by the general average sacrifices and expenses, must be the person on whom the liability falls, and that if a liability to contribute does fall on such owner the ship is given a lien which entitles the ship to refuse delivery until payment is made. The ship's charge on the goods and the ship's lien would be of little value to the ship if it could be made unavailable by assignment of the property in the goods after the liability of the owner and the lien on the goods had attached. No doubt both the liability and the lien would be destroyed by the non-arrival of the cargo, as it would then become impossible to estimate the arrived value: (see *Chellew* v. *Royal Commission on the Sugar Supply*, 15 Asp. Mar. Law Cas. 393; 126 L. T. Rep. 103; (1921) 2 K. B. 627), but that is immaterial in the present case, as the plaintiffs' undertakings in the general average bond were made in respect of goods which did arrive, and which were, in my opinion, subject to a lien. If the goods, instead of being withheld under the lien, had been delivered to the plaintiffs without requiring any undertaking from them, I think they would probably have been entitled to say, on the principle of *Leduc* v. *Ward* (1888, 5 Asp. Mar. Law Cas. 571; 58 L. T. Rep. 908; 20 Q. B. Div. 475): "Our contract is entirely contained in the bill of lading, and, in deviating, the ship did so without our consent, and was in possession of our goods without any contract relating to them, and we refuse to make contribution to the general average sacrifices and expenses, as they were incurred by a wrongdoer who has no claim against us." But I do not think the decision in *Leduc* v. *Ward* (*sup.*) prevents the shipowner from saying, "I had a right to contribution from Messrs. Farr and Co., in whose interest, and for whose benefit, the sacrifices were made and the expenses incurred, and their liability was secured in my hands by the lien given by the law, and there was, therefore, a charge on the goods within the meaning of the bond, and a good consideration on the part of the plaintiffs contained in the bond."

I have still to consider whether the view I have taken of the case is open to this court on the pleadings. The relevant pleading in the defence and counterclaim is contained in par. 9, which is in these words: "In pursuance of the said charter-party and bills of lading, and of the said orders set out in par. 8 hereof, the said steamship on or about the 29th July duly sailed from Santiago with the said cargo on board for Queenstown. But on or about the 30th July, while the said steamship was duly proceeding as aforesaid, the said captain received orders by wireless from the said Wetmore and Bucher to proceed forthwith to San Pedro de Macoris in San Domingo, which he accordingly did, and arrived there on or about the 2nd Aug. Having there loaded about 2750 tons of sugar in bags under a bill of lading dated the 6th Aug., 1930, the said steamship duly sailed from San Pedro de Macoris at about 5.34 p.m. on the 6th Aug., but very shortly thereafter stranded in a position bearing N. 58 degrees E. (by compass) from the East Point lighthouse, and N. 37 degrees W. (by compass) from the South Point Signal Station. After salvage operations involving the discharge of all the said cargo, the said steamship was refloated on or about the 14th Aug. and proceeded on or about the 23rd Aug. to repair. Such part of the said cargo loaded as aforesaid at Casilda and Santiago de Cuba (as well as that loaded as aforesaid at San Pedro de Macoris) as was not destroyed as a consequence of the said stranding, was, on or about the 25th Sept., loaded in the M.V. *Baron Dalmeny* at San Pedro de Macoris, and carried therein to Greenock, and there duly delivered to the plaintiffs or their agents or assigns in the circumstances set out in par. 4 hereof." I agree that none of the agents there referred to had any implied authority to waive the deviation, or to enter into a new contract for the charterers to complete the loading of the ship on the terms of the charter-party at San Pedro de Macoris. However, though not without some doubt, I am disposed to read par. 9 as meaning that the ship sailed after loading from the charterers the balance of the chartered cargo under the charter-party recited in par. 5 of the defence and counterclaim. If this be permissible, the point on which I think the case turns is sufficiently pleaded. Facts, not law or evidence, have to be pleaded (R.S.C., Order XIX., r. 4). However this may be, I think the court has power to, and ought to, amend the defence so as to raise the question of liability on the basis of the facts proved at the trial. No application to amend was made either in the court below, or in this court, but the point on which I think the decision turns was fully argued before us, and I think we have power to amend the pleadings of our own motion without any application by either party. This can be done under the wide powers given to the Court of Appeal by R. S. C., Order LVIII., r. 4: (see *Ecklin* v. *Little*, 1890, 6 Times L. Rep. 366; and *Nottage* v. *Jackson*, 1883, 49 L. T. Rep. 339; 11 Q. B. Div. 627). The court may decide the appeal on the case made by the amendment, or decide that the trial judge was wrong on the pleadings as they stand, and order a new trial after amendment: (see *Copthall Stores Limited* v. *Willoughby's Consolidated Company*, 113 L. T. Rep. 1169; (1916) 1 A. C. 167).

I think, however, in the present case we should decide the appeal on the basis of the amended pleading instead of ordering a new trial, as it is quite beyond dispute that the charterers knew that the ship had gone to San Pedro de Macoris to load the balance of the chartered cargo, and that they allowed their agents so to load her.

The question relating to the defendants' claim for freight remains to be determined. To arrive at a decision on this part of the case it is necessary to consider what in law is the true effect of a deviation. Is deviation, like unseaworthiness, merely a breach of an essential term of the contract, or is it a fact which shows that the goods are being carried unlawfully, without any contract of carriage, and without the assent of the owner of the goods? I think the latter is the true view. If deviation were merely a breach of a condition of the contract after the goods were put on board it would only have the same effect as a breach of the condition as to seaworthiness. If the contract be displaced by breach of some condition or term going to the root of the contract, then the court ought to have held in *The Europa* (11 Asp. Mar. Law Cas. 19; 98 L. T. Rep. 246; (1908) P. 84) that the breach of the condition of seaworthiness displaced the contract, but the Divisional Court held otherwise, and the decision in *The Europa* (*sup.*) was approved by the House of Lords in *Kish* v. *Taylor* (12 Asp. Mar. Law Cas. 217; 106 L. T. Rep. 900; (1912) A. C. 604). I think the true view of the deviation cases is that where there has been a deviation the ship is throughout not carrying under the only contract that has been made with the shipper, but is throughout in unauthorised possession of the goods of whoever may turn out to be the owner, and must deliver them up to the owner on demand without payment for a service which neither the shipper nor the

owner ever asked him to perform. This, I think, would appear plain if a ship, chartered to take goods to Liverpool, took them to Capetown. This would be an extreme case of deviation, but the law has drawn no distinction between large deviations and small deviations, only between deviations not excused by law, and such as are so excused, like a deviation to save life, or such as are expressly excused by statute. I think, in law, the position of the shipowner is accurately stated in the argument of Mr. Hamilton (as Lord Sumner then was) in *Thorley* v. *Orchis Steamship Company* (10 Asp. Mar. Law Cas. 431; 96 L. T. Rep. at p. 489; (1907) 1 K. B. at p. 664), where he states the effect of deviation as being to substitute a different voyage for that contracted for in the bills of lading and therefore the shipowner who has not performed that contract (*i.e.*, the bill of lading contract) cannot set up the exception clauses which formed part of it, and were only applicable to the voyage as therein contracted for by the parties. The Master of the Rolls, Lord Collins, appears to treat deviation as a mere breach of a condition of a contract, like a breach of condition of seaworthiness. Fletcher Moulton, L.J. seems to accept the argument of Mr. Hamilton when he said (10 Asp. Mar. Law Cas. at p. 434; 96 L. T. Rep. at p. 490; (1907) 1 K. B. at p. 669): "The cases show that, for a long series of years the courts have held that a deviation is such a serious matter, and changes the character of the contemplated voyage so essentially, that a shipowner who has been guilty of a deviation cannot be considered as having performed his part of the bill of lading contract, but something fundamentally different, and therefore he cannot claim the benefit of stipulations in his favour contained in the bill of lading." He then expresses an opinion which seems to me, with respect, to be a *non sequitur*, that the shipowner is entitled to remuneration for the services of which the owner has received the benefit. In my judgment, on a bill of lading contract if there be a deviation the shipowner is not entitled to any freight unless there are circumstances from which some contract can be implied from his delivering the goods on presentation of the bill of lading.

It follows that on the bill of lading contract with which on the question of freight we are alone concerned (see *Leduc* v. *Ward* (*sup.*)), the ship had no right to claim freight from Messrs. Tate and Lyle to whom the goods pass by endorsement of the bill of lading, nor had they any lien therefore which they were entitled to assert against Messrs. Tate and Lyle.

Accordingly, in my view, the judgment below must be varied by affirming the judgment so far as it is concerned with general average contributions and dismissing the claim for freight. As regards costs, I think that as the point on which the respondents succeed, if my judgment prevailed, was not made in the court below, and at best is only imperfectly pleaded, the appellants should have no costs of the appeal. If my judgment had turned out to be the judgment of the majority, I would have thought it right to draft an amendment of the pleading if I considered it desirable that the court should have it, but inasmuch as this is the minority judgment, I have not thought it worth while to do so.

Slesser, L.J. — In my opinion, the casualty which occurred to the s.s. *Tregenna* on leaving the port of San Pedro de Macoris in respect of which the defendants required a general average deposit from the plaintiffs as a condition of delivery of their cargo was a misadventure during an unjustifiable deviation from the contract voyage. The charter-party, the terms of which were incorporated in the bills of lading covering the plaintiffs' goods, provided that the ship should proceed to Cuba and there load at one or two safe ports on the north side or at one or two safe ports on the south side and at one safe port on the south side of San Domingo, and after receiving her cargo proceed as ordered by the charterers or their agents to discharge at one safe port in the United Kingdom or in the Bordeaux-Hamburg range, one port only at charterers' option.

The charterers duly designated their ports through a communication from them to Simpson, Spence, and Young, the agents for the steamship company. The first port they named was Casilda —a port on the south side of Cuba. This information was sent on by Simpson, Spence, and Young to the captain at Jamaica and later in the same day Farr and Co., the charterers, designated to Messrs. Simpson, Spence, and Young in New York their two further ports in the charter-party, namely, Santiago de Cuba, the second Cuban port, and San Pedro de Macoris, the San Domingan port. Scrutton, L.J. has described in his judgment why the orders of Messrs. Simpson, Spence, and Young with regard to these two second ports never reached the captain. It appears that Messrs. Farr and Co.'s agents at Casilda informed the captain that Santiago was the second Cuban port. Had it not been for this information he would have been without orders from the owners' agents both as to Santiago and as to the San Domingan port.

I agree with Scrutton, L.J. that the power and duty to give orders to the master was in the owners and their agents, and that once the charterer had communicated the names of his ports to the owners or their agents, he had done all that was required of him under the charter, and I do not think that, as regards the charterers or their successors in title to the goods, the question propounded by the learned judge, namely: "Did Messrs. Simpson, Spence, and Young act diligently or negligently in the transmission of those orders?" is material in determining whether there was an unjustifiable deviation.

The names of the ports having been properly designated, if the captain, through failure of those names to reach him from the owners or their agents, did not proceed upon the contract voyage, that is sufficient to justify the charterers *prima facie* in claiming that responsibliity for an unjustifiable deviation thereby ensuing was on the shipowners. Counsel for the plaintiffs has rightly argued that here, in the circumstances, the whole voyage after leaving Santiago was a deviation, because the ship, instead of proceeding directly from Santiago to San Pedro de Macoris, proceeded for over a day away from San Pedro de Macoris and increased her voyage from the direct route from Santiago to San Pedro de Macoris by over 250 miles. From the moment that the ship left Santiago it was deviating and the mere fact that ultimately it returned to the port to which it ought to have gone directly does not make that deviation any less a deviation.

In the absence of express stipulation to the contrary, the owner impliedly undertakes to proceed in the usual and customary manner without unnecessary deviation, and delay in performing the charter voyage may constitute a deviation: See the observations of Cockburn, C.J. in *Scaramanga and Co.* v. *Stamp* (1880, 4 Asp. Mar. Law Cas. 161 at. p. 297; 42 L. T. Rep. at p. 842; L. R. 5 C. P. D. at p. 299). In the present case I think that it is clear that at the time of

the misadventure the owners of the goods were not the plaintiffs, Messrs. Tate and Lyle, but Messrs. Farr and Co., the charterers. Greer, L.J., in his judgment, has given the reasons why he has come to this conclusion—reasons with which I agree and do not repeat. On this assumption my Lord propounds the following questions: Firstly, whether contribution becomes due from the owners of the cargo at the time the sacrifice has been made, or is an obligation imposed only on the owners of the goods under the bills of lading at the time the vessel reaches the port of discharge; and secondly, has the ship a lien on the cargo to secure contribution of the owner of the goods at the time of the general sacrifice, or is the lien only one which becomes available at the port of discharge as against the then holder of the bill of lading?

The most useful authority which I have been able to find on this point is the case of *Scaife* v. *Tobin*, (1832, 3 Barn. and Adol. 523, 1 L. J. K. B. 183). In that case a consignee received goods in pursuance of a bill of lading which expressed that the goods were to be delivered to him "paying average accustomed." The ship encountered a storm and the masts were cut away for the preservation of the ship and cargo, which gave rise to the claim for average. Lord Tenterden said (3 Barn. and Adol. at p. 529; 1 L. J. K. B. at p. 185): "A consignee who is the absolute owner of the goods is liable to pay general average because the law throws upon him that liability. There is no other person to pay it. But a mere consignee who is not the owner is not liable unless before he receives them he is informed by the shipowner or the master that if he takes them he must pay it"; and Lord Wensleydale (Parke, J.) said (3 Barn. and Adol. at p. 531; 1 L. J. K. B. at p. 185) that a mere consignee is not liable but the shipowner may insist on his right of lien and refuse to deliver unless the consignee pays or agrees to pay it.

Thus in the present case the person who would be primarily liable to general average would be Messrs. Farr and Co., the owners of the goods at the time of the sacrifices, though in the present case their liability would have been destroyed by reason of the deviation from the chartered voyage and the liability of the plaintiffs to pay, and so to afford an answer to the defendants in retaining their money which has been paid under the average bond; the plaintiffs' case must depend upon whether or not, in the circumstances of the deviation, the shipowners can properly claim a lien upon the goods. This appears to me in the present case to be the decisive question.

Greer, L.J. takes the view that if the goods instead of being withheld under the lien had been delivered to the plaintiffs without requiring any undertaking from them, they would probably have been entitled to say on the principle of *Leduc* v. *Ward* that the ship in deviating without their consent was in possession of their goods without any contract relating to them as the contract is entirely contained in the bill of lading, but the Lord Justice says that he does not think that the decision in *Leduc* v. *Ward* (1888, 6 Asp. Mar. Law Cas. 290; 58 L. T. Rep. 908; 20 Q. B. Div. 475) prevents the shipowner from saying: "I had a right to contribution from Messrs. Farr and Co., in whose interest, and for whose benefit, the sacrifices were made and the expenses incurred, and their liability was secured in my hands by the lien given by the law, and there was, therefore, a charge on the goods within the meaning of the bond, and a good consideration on the part of the plaintiffs contained in the bond."

I have come to the conclusion, however, that the deviation would have prevented the shipowners from having any right to contribution from Messrs. Farr and Co., and I am impressed by the observation in the judgment of Scrutton, L.J., that he is not aware of any case where the cargo-owner has been held liable for general average after an unjustifiable deviation, and so no lien on the goods arises enforceable against the plaintiffs, who have paid and signed the bond to obtain their goods wrongly detained.

In my view, therefore, whether the matter be looked upon from the point of view of the cargo-owner at the time of the sacrifice or from the point of view of the plaintiffs, the ultimate consignees of the goods, the deviation is in either case a sufficient defence to a contribution for general average. For these reasons I am of opinion that the finding of unjustifiable deviation concludes this matter, and consequently that the retention of the goods by the shipowners and the payment by the plaintiffs under compulsion cannot be justified.

The question whether deviation destroys the contractual right to freight raised on the counterclaim is a difficult one, both as to the right to freight under the contract and also as regards an implied fresh agreement to pay freight on a *quantum meruit*. In the present case, the goods were ultimately shipped in another vessel, the *Baron Dalmeny*, but no claim is made in respect of that transhipment, but rather a claim for the original contract freight and, in any event, there is no evidence that any arrangement was made that the freight should be paid for the service of the *Baron Dalmeny* in respect of the original contract, and the same view applies to the claim for *quantum meruit*. The defendants have an obligation to hand over the plaintiffs' goods and make no profit out of their wrongful detention on another and uncontracted voyage.

As to the claim for freight, if it were otherwise maintainable on any basis, I agree with Scrutton, L.J. that while there is no authority on the question, as a matter of logic the claim for freight would fail with the disablement of the contract of carriage. As to an implied contract on *quantum meruit*, in an appropriate case where the carriage was performed under an implied fresh agreement, I do not feel it necessary in the present case to express an opinion. I do not deal with the defence which relies upon the action of the agents, Messrs. Wetmore and Bucher, at San Domingo, because in my view if the captain acted on their instructions, they were instructions given without any authority from the charterers, and I do not accept their view that they were their agents in any manner to give orders to the master of the ship. If they had any such authority, which I doubt, it was rather as agents of the owners than of the charterers.

The appeal therefore succeeds, and judgment should be entered as stated by Scrutton, L.J.

Appeal allowed.

Solicitors for the appellants, *Middleton, Lewis, and Clarke*.

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

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

April 30 *and May* 1, 1934.

(Before MacKinnon, J.)

Hain Steamship Company Limited v. Sociedad Anonima Comercial de Exportacion e Importacion. (*a*)

Charter-party—Construction—Duration of lay days—"Sundays and holidays excepted"—Local law forbidding loading of ships after 1 p.m. on Saturday—Saturday afternoon not a "holiday."

A charter-party provided that the ship should be loaded at the rate of a fixed number of tons per running day, "Sundays and holidays excepted." No loading took place on Saturday afternoons, in compliance with the law of the Argentine Republic (in which the loading port was situated), which prohibits the loading of ships on Saturdays after 1 p.m.

Held, that the period from 1 p.m. to midnight on Saturday was not a "holiday" within the meaning of the charter-party, and therefore that that period could not be excluded in computing the date at which the lay days expired.

Love and Stewart Limited *v.* Rowtor Steamship Company Limited (13 Asp. Mar. Law Cas. 500; 115 *L. T. Rep.* 415 (1916) 2 *A. C.* 527) *applied.*

Special case stated by an umpire.

By a charter-party dated the 8th Nov., 1932, the ship *Trevarrack* was chartered to proceed to ports in the Argentine, and there receive a cargo of grain for carriage to Antwerp or Rotterdam.

The material clauses of the charter-party were as follows:

"13. The steamer shall be loaded at the rate of 225 tons per running day up to the first 3000 tons and at the rate of 400 tons per running day for any quantity above 3000 tons, Sundays and holidays excepted, otherwise demurrage shall be paid by the charterers at the rate of twopence sterling per gross register ton per running day for steamers of up to 4000 tons deadweight cargo capacity and threepence sterling per gross register ton per running day for steamers of over 4000 tons deadweight cargo capacity. Time for loading shall commence to count twelve hours after written notice has been given by the master or agents on any day (Sundays and holidays excepted) between 9 a.m. and 6 p.m. to the charterers or their agents that the steamer is ready to receive cargo, but the said notice shall be given at the first port of loading only.

"16. Dispatch money (which is to be paid to charterers before steamer sails) shall be payable for all time saved in loading (including Sundays and holidays saved) at the rate of 10*l.* sterling per day for steamers up to 4000 tons bill of lading weight, and 15*l.* sterling per day for steamers of over 4000 tons bills of lading weight. . . .

"17. The cargo to be brought to and alongside at charterers' risk and expense."

(*a*) Reported by V. R. Aronson, Esq., Barrister-at-Law.

The ship arrived at San Lorenzo, and gave notice of readiness to load at 9 a.m. on the 14th Nov., and the lay days, therefore, began at 9 p.m. on that day. She proceeded to Rosario on the 22nd Nov., and to La Plata on the 28th Nov., and the loading was completed at the latter port at 11 a.m. on the 1st Dec. The total cargo was 7607 tons, the lay days under the charter-party being, therefore, twenty-four days twenty hours.

The shipowners said that the lay days expired at 6.30 p.m. on the 16th Dec., making the time saved in loading fifteen days seven-and-a-half hours. The charterers said that the lay days expired at 2.30 p.m. on the 19th Dec., making the saving eighteen days three-and-a-half hours. The difference in the two computations was due to the shipowners including the whole of the Saturdays between the 14th Nov. and the 16th Dec., whereas the charterers said that time only ran on Saturdays until 1 p.m., and that Saturday afternoons must be excluded.

The umpire found as a fact that by Argentine law the work of loading vessels was prohibited after 1 p.m. on Saturdays. He held, nevertheless, that Saturdays were to be computed as full days under the charter-party, and he made an award based on that construction.

The question for the court was whether the umpire's construction of the charter-party was correct in law.

Willink for the charterers.

Sir *Robert Aske*, K.C., and *F. M. Vaughan* for the shipowners.

MacKinnon, J.—This is a special case stated by an arbitrator. A dispute arose between shipowners and charterers on a charter-party dated the 8th Nov., 1932, on a printed form known as "Centrocon," in regard to the carriage of a cargo of grain from the Argentine by the steamship *Trevarrack*. By that charter-party, as by any charter-party, the shipowner engages to carry the cargo from one port to another at a certain rate of freight per ton. The services which the shipowner provides for that payment in addition to the carriage of the goods across the sea from port to port, include the service of the steamship lying in the port of loading and the port of discharge for the loading and discharge of the cargo. In calculating the freight he includes a certain estimated time of stay in the port of loading and the port of discharge, and usually if that time exceeds the basis on which the freight per ton is calculated, he is to receive further remuneration by way of demurrage. In this, as in many forms of charter-party, there is an added provision that if the charterers do the work of loading or discharge in less than this agreed standard time, the shipowners shall make payment to them for the saving in delay of the ship in the form of dispatch money.

Accordingly, rather an elaborate provision is inserted in this charter-party to ascertain what is the standard time that the ship is to stay in the port of loading. If that standard is exceeded the ship is to receive demurrage; if the standard time is not all occupied the charterer is to receive dispatch money. They provide for the ascertainment of that standard time, not by saying so many days or so many hours, but with reference to the size of the steamer in the form of saying that the steamer shall be loaded at the rate of a certain number of tons, namely, 225 tons, per "running day" up to 3000 tons and at the rate of 400 tons per "running day" for any quantity above 3000

tons. As the cargo in this case amounted to 7670 tons an arithmetical application of that figure at the rate I have mentioned shows that the standard time for loading was twenty-four days twenty hours. The ship in fact was loaded in some six "running days," or six periods of twenty-four hours. It is obvious therefore that so far from the ship having earned demurrage dispatch money was payable by the shipowner to the charterer.

This dispute arises as to the amount of the dispatch money. That is because the shipowner says the time saved was fifteen days seven-and-a-half hours, and the charterers say that it was eighteen days three-and-a-half hours. That difference arises in this way. The clause runs: "The steamer shall be loaded at the rate of" (so many tons per running day) "Sundays and holidays excepted. . . . Time for loading shall commence to count twelve hours after written notice has been given by the master or agents."

Now a "running day" *primâ facie*, as was pointed out by Lord Esher in the case of *Nielsen* v. *Wait* (5 Asp. Mar. Law Cas. 553; 54 L. T. Rep. 344, at p. 347; 16 Q. B. Div. 67, at p. 72) means a consecutive day, and, as he points out, a "running day" is a nautical phrase. "Running days" in those days were days on which the ship in the ordinary course was running. It therefore means the whole of every day when a ship is running and *primâ facie* means every calendar day, including Sundays. In this case they are clearly not calendar days. They are periods of twenty-four hours, because time is to begin twelve hours after a certain notice, and from that moment when time begins you take your consecutive periods of twenty-four hours as "running days." But the contract provides that you shall not take all consecutive periods of twenty-four hours, because Sundays and holidays are to be excepted. Therefore, when you have started at any particular hour, counting your consecutive twenty-four hours, if a Sunday or a holiday intervenes, you cut that out and omit from the calculation the twenty-four hours of the Sunday or the holiday.

The charterers say that in addition to that express exception of Sundays and holidays a further period is to be cut out from the computation of the consecutive twenty-four hours, namely, from 1 p.m. on Saturday until midnight, or rather, as Saturday precedes Sunday, you add the period from 1 p.m. onwards to the hours of the ensuing Sunday. They say that arises because in the Argentine not only is Saturday afternoon after 1 p.m. a non-working time, or a holiday, but it is a compulsory holiday in the sense that by the Argentine law it is illegal to work after 1 p.m. on the Saturday. Therefore, the charterers argue that as it was illegal to work after that time, that period when it was so illegal to work must be cut out of the period of twenty-four hours which is to constitute a "running day."

I think that this contention is erroneous. In the first place, there is not any undertaking by the ship, or by the charterers, that they will work on Saturday afternoon contrary to Argentine law. This provision in this clause is simply an artificial arbitrary method of calculating the mean period, standard time, for loading at this port. If they had chosen to do it they might have fixed a period of so many consecutive hours. They do it by calculating that amount of time with reference to the size of the steamer and "running days." They provide that out of that calculation of consecutive periods of time, Sundays and holidays shall be excepted. It would have been perfectly easy to say "Sundays and holidays and Saturday after one o'clock shall be excepted." They have not done so, and it was settled in the case of *Love and Stewart Limited* v. *Rowtor Steamship Company Limited* (13 Asp. Mar. Law Cas. 400; 115 L. T. Rep. 415; (1916) 2 A. C. 527) that Saturday afternoon is not included in the term "holiday." Lord Sumner in that case says (115 L. T. Rep., at p. 417; (1916) 2 A. C., at p. 536): "I think that time during which the weather is wet, which is time that may be measured by minutes or by hours, and the half of each Saturday, which though half of a calendar day, may not be the same as a variety of the number of working hours on an ordinary day, cannot be brought within the exception of 'Sundays, general or local holidays.' They are not days within the exception in the clause. A wet day, even if it rains all day, is not a day in the sense in which Sunday or Monday or Bank Holiday is a day. Consecutive days are running even though rain may prevent the receiver from getting any benefit from them. Saturday afternoons are the more plausible case of the two, but the exception in the charter is clearly based on days, not on parts of days. I do not think the term extends to the latter part of a weekday, on which it is usual not to work, although we all call it and enjoy it under the name of a Saturday half-holiday."

I think, similarly, in ascertaining what is the meaning of the language used by the parties here, that quite clearly the period on Saturdays from 1 p.m. onwards is not included in the Sundays and holidays and must not be taken to be impliedly included merely because in the Argentine a holiday is sanctioned by something more stringent than custom or usage, namely, by a local law which says that it is illegal to work. It is, I think, purely a question of what is the meaning of this clause and the language used by the parties, and having regard to the decision in the *Rowtor* case (*sup.*) I think clearly the proper meaning of this is to exclude from the consecutive periods of twenty-four hours only Sundays and full general holidays and not to exclude the period from 1 p.m. on Saturdays.

In the result I think that the learned umpire was right when he held that the time saved in loading was only fifteen days seven-and-a-half hours, and not, as the charterers contend, eighteen days three-and-a-half hours, and therefore that the award should be upheld.

Solicitors for the charterers, *Richards, Butler, Stokes*, and *Woodham Smith*.

Solicitors for the shipowners, *Sinclair, Roche*, and *Temperley*.

Supreme Court of Judicature.

COURT OF APPEAL.

June 6 and 7, 1934.

(Before SCRUTTON, GREER, and MAUGHAM, L.JJ.)

The Baarn (No. 2). (*a*)

ON APPEAL FROM THE ADMIRALTY DIVISION.

Collision — Chilean vessel — Repairs carried out in Chile — Action in rem *— Admission of liability subject to reference to assess damages—Tender in Chile of sum in Chilean pesos exceeding amount of plaintiffs' claim in pesos—Depreciation of Chilean peso—Tender rejected—Deposit of sum tendered in Chile in satisfaction of debt in accordance with Chilean law—No satisfaction of claim in action.*

The plaintiffs, a Chilean company, owners of the Chilean steamship B. B., *claimed damages in an action* in rem *in which the owners of the Dutch vessel* B. *were defendants, for loss arising out of a collision between the* B. B. *and the* B. *An undertaking for bail was given by the defendants' solicitors, and bail in the sum of 3750l. was subsequently completed. The defendants admitted liability subject to a reference to the registrar and merchants to assess the amount of the damages, but before the reference was held they tendered in Chile a sum in Chilean pesos which was sufficient to discharge payments actually made in Chile by the plaintiffs in Chilean pesos for repairs to the* B. B., *which had in fact been repaired in Chile. The Chilean peso having in the meanwhile depreciated, the plaintiffs accordingly rejected this tender. By Chilean law it is not essential for the validity of a payment that it should be made with the consent of the creditor, but it may be made against his will by the process known as "consignation," i.e., formal payment or deposit of the amount of the debt in accordance with the direction of the court. The defendants accordingly had recourse to this procedure, and a sum in pesos, exceeding the amount of the plaintiffs' claim at the rate of exchange prevailing at the date of the loss was, by direction of the Court of Chile, and in opposition to the wishes of the plaintiffs, deposited with a bank in Chile.*

Langton, J. held that the deposit of the sum in Chilean pesos by the process of "consignation" was a sufficient discharge of that part of the plaintiffs' claim, and that the reference dealing therewith should be stayed. On appeal (reversing Langton, J.), Scrutton and Romer, L.JJ. held that the deposit in Chilean pesos had no effect upon the claim and that the reference should proceed. Greer, L.J. was of opinion that the deposit should be treated as payment on account of the claim to be assessed in sterling.

At the reference the registrar held that the plaintiff was entitled to the agreed damages of 1581l., together with interest, on the ground that a foreign defendant sued in this country could not tender payment in foreign currency in satisfaction of the claim. Bateson, J. upheld the finding of the registrar, and the defendants appealed.

Held, that the defendants were bound by the previous decision of the Court of Appeal and could not therefore contend that payment in Chile was a payment on account of damages in England; per Scrutton and Maugham, L.JJ., that a payment in foreign currency which could not be converted into sterling did not satisfy a claim payable in sterling; per Maugham, L.J., that an action brought in England must be subject to English law and, accordingly, a deposit in pesos was not a valid payment.

The Baarn (150 *L. T. Rep.* 50; (1933) *P.* 251) *considered and explained.*

APPEAL by the defendants from a decision of Bateson, J. confirming a report of the Admiralty registrar on a reference to assess damages. The facts and contentions of the parties are fully set out in the judgments.

In his report the registrar said: "The only question before me on the reference was whether the sum of 80,761·02 pesos deposited in the bank in Chile was to be treated as a sum paid on account of the damage. The defendants submitted that the proper rate of exchange was 57·31 pesos to the £, that the deposit made was equivalent to the payment of 1409*l.* 3*s.* 11*d.*, and that all the plaintiffs were entitled to was a judgment for the difference between that sum and 1581*l.*, the agreed damage, namely, 172*l.* 16*s.* 1*d.* No evidence was called. but it was agreed by counsel that there was in Chile an Exchange Control Commission, that from a date before the 27th June, 1932, until the present time it was impossible to purchase foreign currencies in Chile with pesos unless the permission of the Commission was obtained, that that permission was unobtainable, and that the only use to which the pesos could be put was to purchase commodities in Chile. If the owners of the *Baarn* had not entered an appearance the plaintiffs could have had the vessel sold . . . and when, as a result of the undertaking to appear and put in bail, bail was given in the sum of 3750*l.*, the plaintiffs were assured of having their damages paid in sterling. Instead of tendering a sum in sterling the defendants offered the plaintiffs a sum in pesos in Chile to satisfy the claim. Such a deposit is not equivalent to a payment into court, and in my view cannot affect the proceedings properly instituted against the defendants in this country. No injustice will be done to the defendants in refusing to give them credit for the pesos offered to the plaintiffs in Chile, and the defendants admittedly can at any time obtain possession of them from the bank in Chile and the plaintiffs do not claim them. The result is that the plaintiffs are entitled to be paid the sum of 1581*l.* with interest." The defendants appealed.

Bateson, J., in confirming the report of the registrar, held that the defendants were bound by

(*a*) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

the decision of the Court of Appeal in *The Baarn* (150 L. T. Rep. 50; (1933) P. 251).

The defendants appealed.

Willink for the appellants.—The registrar made his report on the supposition that no question had arisen as to the validity of the payment in Chile. The Court of Appeal had not held that the sum tendered could not be taken into account. Greer, L.J. had been of opinion that the payment in Chile should be treated as payment on account. According to Chilean law the sum tendered was at least part, if not full, discharge of the debt. The claim should, therefore, be reduced by the corresponding amount in sterling. [He referred to *Société des Hôtels Le Touquet Paris-Plage* v. *Cummings* (126 L. T. Rep. 513; (1922) 1 K. B. 451), *The Volturno* (126 L. T. Rep. 1; (1921) 2 A. C. 544), and *de Beeche* v. *South American Stores (Gath and Chaves) Limited* (1933), unreported C. A., Nov. 29).]

Hayward for the respondents was not called on.

Scrutton, L.J. — In my opinion this appeal fails. Certain Chilean shipowners have obtained a judgment in the English courts for damages caused to their ship by a collision with a Dutch ship, the defendants being the Dutch owners. That has resulted in a judgment against the defendants expressed in sterling. The point in dispute is whether the defendants can reduce the amount they have to pay by bringing into account a sum that, under Chilean law, they have deposited in a bank in Chile, it being alleged that by Chilean law that amounts to payment of the claim for repairs by the Chilean shipowner—expenses incurred in Chilean pesos. That contention has been rejected by the registrar and by Bateson, J., and I agree with the result of their decisions and with the reasons that they have given. I might stop there; but in view of the very earnest and able argument addressed to us by Mr. Willink, I think it right to shortly state the reasons why I agree with the two decisions under appeal.

This appeal is—I hope—the last chapter, but I am not sure that it is, of a history which began with the collision between the Chilean ship, the *Bio Bio*, and the Dutch ship, the *Baarn*, in the waters of Ecuador. For centuries the English Court of Admiralty has had a jurisdiction over the high seas, which include, in the view of the English Admiralty, a number of territorial waters, including the waters of Ecuador. The plaintiffs had to repair their ship, which they did in their own country. They also incurred some expenses in Ecuador, some payments to the American Consul in American dollars, and some payments to someone in English pounds. They might have sued the Dutch shipowners in Holland. They might, on the other hand, under the English Admiralty procedure, arrest the *Baarn* wherever they could find her. They did find her in England, arrested her *in rem*, and compelled the defendants to give bail; and the defendants then admitted liability for the damages occasioned by the collision. The question then would proceed to trial in the registry to ascertain what was the amount of damage. But the defendants then made an attempt to say there should be no proceedings in the registry, because "as to the Ecuadorian currency and the United States currency and the English currency I pay you, and as to the Chilean currency I have taken certain proceedings in Chile which amount to paying you your Chilean expenditure in the currency in which it was incurred"; and the defendants endeavoured to put that contention before the English courts by an application to stay proceedings in the registry, on the ground that there had been payment of the only claim left in dispute. They succeeded in persuading Langton, J. that there had been payment of the Chilean expenditure; but the learned judge made an order that the items which were not Chilean expenditure should go to the registry. Those items have passed out of the case, because they have been settled.

The plaintiffs appealed from the order of Langton, J. disallowing the assessment of the items of Chilean expenditure, and this court reversed the judgment of the learned judge. The order of the court as drawn up is: "The Court of Appeal, having heard counsel, . . . pronounced in favour of the plaintiffs' appeal . . . and pronounced the payment by deposit made by the defendants to the plaintiffs in Chile on the 24th June, 1932, in satisfaction of items 7 to 14 of plaintiffs' claim not to be a good payment, and ordered payment of such items to be made in this country." That order was made eleven months ago, and the parties have made no attempt to vary it. But Mr. Willink has argued that it was a bad order and that it does not express the judgment which had been given by the court eleven months ago. I think he is right to this extent: that the court did not say anything in its judgment about ordering payment of such items to be made in this country. It seems to follow, however, when payment to the extent of 3500*l.* has been guaranteed and payment has to be obtained in respect of a judgment given in sterling, that it probably would be made in this country, the guarantor being in this country. I think, however, that the statement in the order which pronounced the payment by deposit not to be a good payment, does express the views of the majority of the Court of Appeal, and the Court of Appeal was unanimous in setting aside Langton, J.'s order and ordering that the items in question should go to a reference: all three of the Lords Justices agreed in that order.

There is, however, some controversy as to what the Lords Justices meant, or as to what one of them meant. There is no doubt, I think, of what my brother Romer meant. He took this view: "This is a claim for damages. A sum purporting to be paid in Chile in respect of a claim of damages being considered in England is quite irrelevant; when damages are being claimed in sterling in England it is no good saying that by the law of a foreign country some payment not in sterling but in a foreign currency is a good payment of the claim in sterling." I think that is the view taken by Romer, L.J. I think also there is no doubt about the view taken by my brother Greer. He said: "I think it was established by the affidavits that under the law of Chile a payment by 'consignation' is the equivalent of payment to the creditor. In my judgment the result of the evidence as to the effect of the payment according to the Chilean law is that it is a payment to the Chilean company of the number of pesos paid into the Chilean bank, but the decision of the Chilean court does not affect the question whether the payment is sufficient to extinguish or satisfy the debt, and it has no bearing on the question as to what value in sterling the English court in which the action *in rem* is pending should attribute to the payment." He points out that "the claim is not a claim for each item as a debt, but one for damages measured by the expenses and losses incurred by the owners of the ship by reason of the collision." "In my judgment, treating what has happened in Chile as a payment on account, it will be the duty

of the registrar to credit that payment by its equivalent value in sterling at the rate of exchange prevailing on the date when the payment was finally approved by the Chilean judge" : (150 L. T. Rep. 50 ; (1933) P. 251). On that view my brother agreed that the order of Langton, J. must be set aside, because he had stayed any proceedings before the registrar ; whereas my brother Greer was of opinion that the registrar ought to go into the question, What was the value and extent of the payment in pesos—what he found to be a payment in pesos—as compared with the judgment to be given in sterling.

Unfortunately there has been some controversy as to what the third judge meant. The third judge set out in considerable detail the proceedings in the Chilean court. The Chilean law apparently allows a debtor to say to his creditor : "I offer you money, Chilean payment. If you will not take it I will deposit it in a bank" ; and it is quite clear also on the Chilean law that having deposited the money in a bank he can take it out again at any time before the creditor has accepted the money ; and that mere clause makes it odd that this procedure should be considered as payment when the debtor paying can at any moment take it back from the place where it is deposited. What had happened in the Chilean proceeding was that the defendants having deposited in the Chilean bank rather more pesos than the pesos stated to have been expended in Chile by the plaintiffs—and the plaintiffs having refused to accept the money for the reason that they were claiming sterling in London, where they had arrested the ship and where the proceedings were going on—the Chilean shipowners went to the Chilean courts and asked them to decline jurisdiction in the matter of this "consignation" because the owners of the *Baarn* "desire to take advantage of the depreciation which has occurred in our currency, so as to settle for a miserable sum losses which we suffered a year ago, and which for the most part we had to pay them in the gold currency which was then current." Thus the Chilean shipowners "asked the judge to accept their opposition to the aforesaid payment by deposit and to declare his incompetence to settle the question at issue as to whether the amount offered by the other side is or is not sufficient to discharge its debt, because this case is being ventilated by the parties before the British courts." The judge took the view : "holding that it is not for these proceedings to deal with the request made, it is declared there is no ground for the same without prejudice to any other rights of the plaintiffs"—these Chilean shipowners. Mr. Willink's clients on this said : "If the plaintiffs still wished to discuss the sufficiency of the payment made they had a suitable means of doing so by bringing the necessary action in the ordinary courts . . . which is the only legal method for discussing this question." How the Dutch shipowners, having taken the line of there being another course open to the plaintiffs, can now say the payment was conclusive in the absence of a decision by the other court, I am quite unable to understand.

However, the third judge, having set out the whole of the Chilean records on the subject, expressed his opinion in this way : "I am of opinion, having considered the evidence, that there is no final decision by the Chilean courts that the payment in depreciated pesos is sufficient, while proceedings are pending in London." Now I should like to say for the credit of the third judge that that was all that was necessary for him to decide to set aside Langton, J.'s order, because, if there was no final decision binding and affecting the position, then the learned judge had made the wrong order in staying the proceedings in the registry. The third judge went on to say : "As I have held there was here no payment by Chilean law"—and knowing the third judge I am of the impression he meant what he said when he said that. If so, we are in the position that all the Lords Justices agreed that the order of Langton, J. was wrong and that the reference in the registry must go on, but that two of the Lords Justices were of opinion that what had happened was no payment ; and that is I think correctly expressed in the order and judgment of the court. The result is that on the first point which Mr. Willink argued this court is bound by its previous decision to say that what has happened does not amount to payment.

The second and third points as to what would be the position if the judgment already given did not bind this court is I think disposed of by what I have already said about the bringing of proceedings which did take place in the Chilean court ; but I am content to say that I agree with the reasons given both by the registrar and by Bateson, J. which show that the argument of Mr. Willink is not well founded.

There is one other matter which was not before the Court of Appeal in the previous case, and that is this. Under Chilean law a tribunal has been established and there is a law by which no exports of currency can be made without the consent of a certain Commission ; and we had brought before us very prominently in *de Beeche* v. *South American Stores* (*Gath and Chaves*) *Limited* (unreported, C. A. Nov. 29, 1933), that that is not a mere letter, but is acted on. In that particular case there was an obligation to pay rent in sterling or sterling bills for houses in Chile ; for seventeen months running the tenants of the houses applied to that Commission for leave to get sterling bills and so export pesos, and they were refused on every occasion by the Commission ; and it seems clear that in this particular case, if the Chilean shipowners had taken out these pesos they could not have turned them into sterling by any process of exchange. If that be the fact, it seems extraordinary that a judgment given in England for payment of damages in sterling should be satisfied by payment of pesos in Chile against the wish of the creditors, which pesos, if they took them, they could not turn into sterling by any method.

For these reasons, agreeing as I do with the reasons stated in detail by the registrar and by Bateson, J., I agree that this appeal must fail and be dismissed, with the usual consequences.

Greer, L.J. — I agree that this appeal should be dismissed. I cannot say that I agree with everything that has been said by Scrutton, L.J. as to the reasons for dismissing the appeal ; but that is immaterial, because if there is one good reason it is unnecessary to inquire whether the other reasons relied on are well founded or not.

Langton, J. had before him an application to stay the reference on the ground that a large proportion of the damages which were claimed in the action in England had been paid by reason of certain transactions that took place in Chile. That involved a decision by him as to whether the deposit which was made in Chile was a payment at all, and secondly, if it was a payment, whether it could be treated as a payment in full in respect of the various items which it was alleged ought not to be considered by the registrar. If it was not a payment at all, then the order which was made by Langton, J. was wrong. He need not have considered whether

it was a sufficient payment if it was not a payment at all. There was an appeal from that decision, and the decision of this court, though it happened to be the decision of a majority of this court, is still the decision of the Court of Appeal; and in so far as it is recorded in the formal document, it creates an estoppel between the parties. They cannot even allege, while that judgment stands, anything that is contrary to the import of that judgment. [His Lordship read the formal judgment as drawn up.] I read that as meaning that between these parties it has been decided in the Court of Appeal that the payment by deposit in Chile was not a good payment; that is to say, was not a payment that could be treated in the action which was going on in this country as a payment by the defendants to the plaintiffs of part of the damages. If that be so, this appeal cannot succeed.

It is said that that order does not comply with what was orally stated by the Lords Justices at the hearing of the appeal. I disagree with that view. I think that both Scrutton and Romer, L.JJ. held that the deposit was not to be treated as a payment in respect of the claim that was being made in the English court; Scrutton, L.J. expressly says that he came to that conclusion because he held that there was no payment by Chilean law, and therefore the English proceedings could not be stayed. I am not sure that Romer, L.J. did not also hold that there was no payment by Chilean law, because in the course of his judgment he constantly refers to the alleged payment as being merely a deposit; but the main ground of his decision is that whether it was a payment in Chilean law or not, it certainly was not a payment of the claim which was being litigated in the Admiralty Division. Two of the Lords Justices having decided that there was in fact no payment, it is quite impossible for this court now to decide that there was a payment.

For these reasons, though with some regret, because all the arguments that convinced me on the former occasion that there was a payment and that some value ought to be attached to it still weigh in my mind, I think there is an estoppel here which prevents this appeal from succeeding. I do not think it necessary to enter into the other questions which would arise for decision. But I should say that my mind rather went with the argument which has been put forward by Mr. Willink on those other questions if they had been open.

Maugham, L.J. — I am of the same opinion, and I agree with the judgment of Bateson, J. and Scrutton, L.J.

There are two matters on which I should like to say a word. First with regard to the decision of the Court of Appeal in *The Baarn* (150 L. T. Rep. 50; (1933) P. 251). Reading that case I have come to the conclusion that the majority of the court intended, and the recorded judgment on appeal must be taken to show that they intended, to decide that the deposit of pesos in the circumstances which have been stated was not a payment in English law which would diminish the amount of the damages payable to the plaintiffs. I will add that, having had an opportunity in the course of the able and ingenious argument presented to us of carefully considering the matter, for my part I agree with the judgment of Romer, L.J. and with his conclusion that for the reasons given the deposit, in his words, "has not . . . any effect at all upon the plaintiffs' claim in this action": (*The Baarn* (*sup.*)).

I will add a few sentences with reference to the so-called payment in Chile. That, as Scrutton, L.J. has pointed out, is the deposit of pesos made pursuant to some articles of the Chilean Code, and authorised to be made by decree of the Chilean Court at Valparaiso on the 25th June, 1932. In considering what its effect may be, it is, I think, vital to remember that it is a payment alleged to have been made in satisfaction of a liability in this country, or at any rate in reduction of the damages which might be awarded in this country; and it is made after a judgment or order in this country, leaving to be determined in the ordinary way by the registrar the amount of the damages payable to the plaintiffs. The payment is one which according to the Chilean law need not be one accepted by the plaintiff or other person who is alleged to be entitled to a sum of money or other property; and in fact in this case the plaintiffs declined to accept it. Under art. 1606 of the Chilean Code: "While the creditor has not accepted the deposit or where the payment has not been declared enough by the judgment of the court, the debtor can withdraw the deposit, which consequently ceases to exist." It is not an unimportant consideration that if the creditors did accept the deposit in this case they would be unable under the existing law without the consent of a body of commissioners to utilise the pesos which they received by changing them into English sterling or any other currency for the purposes of discharging their liabilities in other parts of the world or acquiring property in other parts of the world. In other words, we are dealing with what is popularly described as a "frozen currency."

For my part, I am unable to see that the Chilean law has anything to do with the matter before the court. It is true that the plaintiff company has a Chilean domicile; but I am at present unable to see how that fact is relevant with regard to such an action as we are concerned with here. The vessel owned by the plaintiffs having received damage while in the territorial waters of Ecuador through being run into by a Dutch vessel, that vessel was arrested in this country; her owners were put to bail, and have admitted liability; and the action is a perfectly ordinary action in this country for the purpose of determining the amount of the damages due to the plaintiffs. The cause of action might have been assigned, but whether assigned or no, I do not know any principle of law under which an action properly brought in this country is affected in any way by the domicile that the plaintiffs happen to possess; and if it were so, it would lead to the result that the better course would be to assign the cause of action to some other person domiciled in this country. But whether in some remote way the domicile of the plaintiffs is material does not seem to me to affect the question as to what amounts to a payment after judgment by consent or otherwise determining the liability of the defendants. In this country that is a most technical matter, and is not one which can be easily explained. Some of the cases which deal with that question are to be found in the decision of this court in *Société des Hôtels le Touquet Paris-Plage* v. *Cummings* (126 L. T. Rep. 513; (1922) 1 K. B. 451). There one sees the curious position that a debtor occupies who pays his creditor a debt *post diem*, which is the first thing to be considered, and then the case of a defendant paying or seeking to pay the plaintiff after action brought, and *a fortiori* after a judgment determining liability, that being a case where there can be no accord and satisfaction according to English law. It is well settled that the procedure in any action brought in this court must be governed by the *lex fori*, and it is settled, as a reference to Dicey's Conflict of Laws, 5th edit., p. 857, will

show, that if the defendant tries to set up a set-off which is not allowed by English law, the set-off is not permitted. It is obvious that if the defendant is defending on the ground of accord and satisfaction he must prove accord and satisfaction according to our procedure. The same thing must be true as regards an alleged tender; and I would add with regard to a tender that it is settled in this country that a tender after judgment determining a liability, and while a reference for assessment of damages is being held, is too late. It seems to be reasonably plain that an allegation as to a payment that has been made according to Chilean law by means of a deposit of pesos under the circumstances which I have mentioned, with the suggested result of precluding the English court from giving judgment for a sum in sterling or reducing the amount of the judgment, is a payment which we cannot look at in any sense at all. The whole suggestion I think is wrong; because the amount in the circumstances I have mentioned can only be diminished by some payment which is a valid payment according to English law, and it is plain that this deposit of pesos is not such a payment.

For those reasons, in addition to those mentioned in the judgments of Bateson, J. and my brother Scrutton, I am clear that this appeal should be dismissed.

Solicitors for the appellants, *Middleton, Lewis*, and *Clarke*.

Solicitors for the respondents, *Ince, Roscoe, Wilson*, and *Glover*.

June 1, 5, 6 *and* 29, 1934.

(Before SCRUTTON, GREER, and MAUGHAM, L.JJ.)

The Arpad. (*a*)

Damage to cargo—Measure of damage—Cargo of wheat—Non-delivery—Breach of contract—Tort—Conversion—No market price—Payment before delivery.

The plaintiffs were consignees of a parcel of wheat shipped to Hull in the defendants' steamship A. The wheat had been bought by the plaintiffs in Aug., 1930, for Sept.-Oct. shipment per the A., and was described "as per sample 727." The plaintiffs had paid for the wheat and had resold it at a profit before the time for delivery. The wheat was not in fact all shipped until November, when the plaintiffs paid for it. The A. discharged her cargo at Hull in January, and it was held in the action that there was then a short delivery of the plaintiff's cargo of 47 tons, the amount of damages being referred to the Admiralty registrar. The registrar reported that there was no market in which wheat of the contract quality could be bought, although a market existed in which wheat of that quality could be sold. He accordingly awarded damages based on the price actually paid for the wheat by the plaintiffs. The report was confirmed by Bateson, J.

Held (Scrutton, L.J. dissenting), reversing Bateson, J., that the proper measure of damage was the value of the wheat at the time of the defendant's failure to deliver, and that such value should be estimated without having regard to the contracts made by the plaintiffs before the breach: that the market value of the wheat at the date of delivery, which was the price at which it was then capable of being sold, fixed the measure of damage; and that the measure of damage was the same whether the claim was framed in contract or in tort (Maugham, L.J. doubting whether any right of action existed in tort).

Decision of Bateson, J. reversed.

France *v.* Gaudet (1871, *L. Rep.* 6 *Q. B.* 199) *considered and distinguished.*

APPEAL from a decision of Bateson, J. affirming a report of the Admiralty registrar.

The plaintiffs (respondents), Messrs. Spear and Thorp, were the consignees of a parcel of Rumanian wheat, shipped on the defendants' (appellants) steamship *Arpad* for delivery at Hull, and claimed against the defendants damages for short delivery or conversion. Langton, J. held that there had been short delivery of 47 tons, and referred the assessment of damage to the Admiralty registrar. Bateson, J. confirmed his report, and the defendants appealed.

The facts and contentions of both sides fully appear from the following judgment:

Bateson, J.—The plaintiffs were the consignees of a parcel of Rumanian wheat shipped by the steamship *Arpad* at Galatz, and destined for Hull. On the 11th Aug., 1930, the plaintiffs bought the wheat from a Mr. Kampffmeyer at 36*s.*, September–October shipment, per the *Arpad*, as per sample 727. The ship's name was declared later than the actual time of the purchase. Part of the wheat—some 30 tons—was not shipped September–October, and Mr. Kampffmeyer had to take 24*s.* 6*d.* for it. The wheat was a very fine sample, and the sample of wheat was a very fine sample. The plaintiffs paid for the wheat on the 27th Nov., 1930, and resold the whole of it at 38*s.* 6*d.* The resale was effected on the 11th and 12th Aug., and the resale was by the sample. The vessel arrived at Hull and failed to deliver 47 tons as on the 10th Jan, 1932—that is the date to be taken as the date of the breach. There was no market for this wheat from which the plaintiffs could supply themselves—that is with similar wheat to sample 727, Danubian or Rumanian wheat, September–October. The plaintiffs could not buy against the shipowners who had failed to deliver. Wheat, generally, had gone down some considerable number of shillings, variously stated, I think, as high as 16*s.* and as low as 12*s.* But there was none like this wheat to be had, and no doubt if the plaintiffs could have got 47 tons of wheat from the ship to sell they no doubt could have disposed of it at some figure. I do not think that that makes a market for that class of wheat at all—the fact that if you had it you could sell it. There are very few things you cannot sell. I think a market means where there are buyers and sellers, and that it is possible for a person to go into that market and buy what he wants or sell what he wants. If there had been any wheat of this sample to buy, the plaintiffs would have

(*a*) Reported by GEOFFREY HUTCHINSON Esq., Barrister-at-Law.

bought it, and made a big profit on it, as they had a ready purchaser.

The question which has arisen in this case is, What is the true measure of damages in these circumstances? The learned registrar says it is the price paid for the goods less certain allowances. He finds there was no market price for this wheat, and after reading the evidence I agree that the plaintiffs have proved that there was no market price for this wheat. I think there was ample evidence for the learned registrar's finding in Mr. Thomas's, Mr. Cartwright's, and Mr. Wood's evidence, and there was no evidence to contradict them. If any market price is available for arriving at the value of the goods, the best evidence of their value is what they were sold for or what they were purchased for, as, for instance, the invoice price and, incidentally, what similar goods brought to their owners. Although I think the learned registrar has been a little mean in his figures, Mr. Pilcher is content with them, and it is, therefore, not necessary to alter them for anything more.

The argument before me was that all the plaintiffs could recover was 47 tons of wheat, which the plaintiffs could go into the market and sell. He says, "There is a wheat market and you can sell any wheat on it." Perhaps you can force a sale, but I do not think that that is a fair criterion, nor do I think it is a legal one. I think you must be able to buy as well as to sell in a market. He says, "You cannot consider any extraneous matter like a sub-sale, or the price paid for the article." I agree that extraneous contracts cannot be looked at, but I do not think that is a question in this case. I think the question in this case is, What is the value of the goods to the man who has lost them. If in fact he has sold the goods, I think that may be some evidence what their real value is. The shipowner cannot say here that the plaintiffs could go into the market and buy so as to replace themselves as if the goods had been delivered.

Mr. Pilcher, on the other hand, says in tort he could recover the actual value of the goods to him. "They were worth 36*s.* 6*d.* to him," he says, and he says that the shipowner has converted them, and he cites as his principal case *France* v. *Gaudet* (1871, L. Rep. 6, Q. B. 199). He says that that case has been approved in all the textbooks such as Mayne and Clarke and Lindsell and other writers. He says that this is damage which naturally flows from the injury, namely, the conversion. To some extent I think Mr. Pilcher is right in regard to the way the damages are to be assessed in tort, but I do not think that it is really any different to the way damages have to be assessed in contract, and in *France* v. *Gaudet* the result seems to me to be the same whether the loss is caused by tort or by conversion. In contract Mr. Pilcher says he is entitled to be put in the same position as if the contract were fulfilled; he is entitled to *restitutio in integrum.* Quite true if there is a market the market price will do; as he says, he can go into the market, and get the goods at a low price and recoup himself for all he has lost. That is to say, here if he could have got the goods at a low market rate in the market, he could have fulfilled his contract and got his 36*s.* 6*d.* His trouble here is that he could not get them. Further, he says that he paid for these goods before the breach. Technically, he says, "I paid away my money; I had no money to go into the market with which to buy goods against those which you failed to deliver." I think it is good law that in a case of prepayment market price is no criterion. There is a passage which I will refer to later on in Halsbury's Laws of England, vol. 25, at p. 271, to that effect.

In my opinion the plaintiffs are entitled to the value of the wheat short delivered. Is that the value to them? I think it is common ground that it is. Then comes the question: What is the market value, if there is a market? I think there is no doubt about that. Unless it is proved that there was a market for such goods this criterion cannot be applied. Then if there is no market value it can only be the actual value to the plaintiffs. That is easily ascertained in this case, because, in fact, the goods were paid for by the consignees. They were sold by them to their buyers. It seems to me there is no need to take a measure of value in this case, and search about to find what is the measure of value, because the goods' value is known, fixed. I am satisfied, as the learned registrar was, that there was no market value. This was Rumanian wheat of a certain standard by sample for which the plaintiffs paid 36*s.*, and they sold it at 36*s.* 6*d.* before it is delivered. They have in fact lost 36*s.* 6*d.* which they would have got if the wheat had been delivered, or at least 36*s.*, which they paid for it. They could not go into the market and buy similar wheat, or anything like it. I think any other view than this would work an injustice to the plaintiffs. It would deprive the plaintiffs of a certain profit of 6*d.* because they bought at 36*s.* and sold at 36*s.* 6*d.*, and cause them, as things have turned out, a very heavy loss.

If the market price is to be the rule in this case it can only be so, in my opinion, because the plaintiffs could go into the market and get their goods replaced. Obviously they could not do that. As I said I would refer to Halsbury's Laws of England in regard to the law on the matter. It is in vol. 25, pp. 270, 271. There are some very useful observations, and this is what is said: "Where there is an available market for the goods in question the measure of damages is *primâ facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time when they ought to have been delivered" (p. 270). The above-mentioned rule for the calculation of damages of the market price at the date of delivery is inapplicable, and damages for non-delivery are measured under other provisions where . . . (2) the price has been prepaid (p. 271). In *Watts* v. *Mitsui* (116 L. T. Rep. 353; (1917) A. C. 227, at 241), Lord Dunedin, in his speech states the rule as follows: "Where a party sustains a loss by reason of breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed." Here the owner can be placed more or less in the same position by having the price he paid returned, for he has paid it for nothing. Sometimes the principle is stated as being that the injured party is entitled to *restitutio in integrum.* I think that in one of the cases which was cited—*The Edison* (18 Asp. Mar. Law Cas. 276; 147 L. T. Rep. 141; (1932) P. 52)—Scrutton, L.J., says: "If the owner says: 'I have lost the ship, give me *restitutio in integrum*, the answer is: 'You cannot have the ship back; it is lost; but you have its value to you as a going concern.' This restores you *in integrum.*" So that he is approving of the view that the party who suffers loss is to be put back *in integrum.* It is no *restitutio* to give a man who has lost his wheat, worth to him 36*s.* 6*d.*, wheat which is worth only, according to the defendants, 20*s.* to 24*s.* or 26*s.* The plaintiffs by the defendants act have lost, in fact, 36*s.* 6*d.*

No doubt where there is no market price another measure must be taken: there is no doubt about

that. Scrutton, L.J., in the 13th edit. of his book, at p. 450, art. 160, dealing with the question of damages, says: "Damages will in the absence of special circumstances in the contract, be the market value of the goods when they should have arrived, less the sums which the cargo-owner must have paid to get them, such as freight." And then in note (*s*) "Where there is no market the damage must be ascertained otherwise, so as reasonably to compute the loss sustained, see, *e.g.*, *Montevideo Gas Company* v. *Clan Line* (1921, 37 Times L. Rep. 866), where shipowners carrying gas coal to a gas company delivered a different parcel of steam coal by mistake." So it seems to me to be here: if you have wheat of a certain sample to deliver it is no answer to the person to whom you have failed to deliver it to say "go into the market and buy some other sample of wheat," no more than it is of any good for a shipowner to say, having gas coal to deliver, "I will deliver furnace coal." Then in *Rodocanachi* v. *Milburn* (6 Asp. Mar. Law Cas. 100; 56 L. T. Rep. 594; 18 Q. B. Div. 67), Lord Esher said: "I think that the rule as to measure of damages in a case of this kind must be this: the measure is the difference between the position of a plaintiff if the goods had been safely delivered and his position if the goods are lost."

How can it possibly be said in this case it is putting the plaintiffs in the same position to give them wheat which is different to their wheat because they can go into some market and buy a different wheat? It is quite true that after that there are a great many remarks upon market value, and so on. But that, of course, assumes that there is a market value, and a market into which the person who has lost his goods through the act of the shipowner can go and buy and replace the goods. Then there is *France* v. *Gaudet* (*sup.*), the champagne case, which seems to come rather near this case in its facts; and *Hinde* v. *Liddell* (32 L. T. Rep. 449; L. Rep. 10, Q. B. 265)—the case of the grey shirtings—where it was held that there being no shirtings of the particular kind sold the plaintiff was entitled to go into the market and buy better shirtings to replace what had not been delivered. So that I suppose to apply *Hinde* v. *Liddell* to this case, the plaintiffs might have been entitled to go anywhere they could to find a similar grain to theirs, and pay any price for it in order to fulfil their contract, and if they had done so there could not be much doubt on *Hinde* v. *Liddell* the defendants would have had to make it good to them.

Then there were two other points that were taken as to some bilge damage, and as to agency; I do not think there is anything in either of these points.

The defendants appealed.

A. T. Miller, K.C., *Chappell*, K.C., and *Carpmael* for the appellants.

Pilcher and *Porges* for the respondents.

Cur. adv. vult.

Scrutton, L.J.—In this claim for damages against a shipowner for non-delivery of cargo, the registrar has assessed damages as 272*l.* The defendants have paid into court 230*l.* as damages for shortage. The amount in dispute is apparently trivial, but becomes important when it is known that the trial judge has made the costs of a five days' trial depend on whether the plaintiffs recover more than the sum paid into court. It is far better in such a case that the judge should adjourn his decision as to costs until he knows the result of the inquiry as to damages. Unfortunately, this course was not pursued, and we have no jurisdiction to alter the judge's order as to costs. Further, the determination of the amount of damages raises questions of principle affecting many cases and of far greater importance than the difference between 230*l.* and 272*l.*

Fortunately there is no dispute as to the facts necessary to raise the question of principle. On the 11th Aug., 1930, the plaintiffs, Messrs. Spear and Thorpe, grain merchants of Hull, bought from Mr. E. Kampffmeyer, of Berlin, 1000 tons of Rumanian wheat "at time and place of shipment about as per sealed sample marked No. 727 in possession of buyers" at 36*s.* per quarter of 480lb., less 2½ per cent. including freight and insurance to Hull. The contract provided for notice of appropriation by seller to buyer with ship's name, date of bill of lading and quantity shipped, and for provision for the case of resales, and disputes between the parties in a chain of resales, "last buyer and intermediate buyer."

There is no dispute that the sample was an exceptionally good sample; and all the witnesses at the reference called by either side admitted this. There is no evidence that the price was further above the market price at the date of the contract of good Rumanian wheat than would be justified by the excellence of the sample. On the conclusion of the contract in August, the buyers resold in parcels at the price of 36*s.* 6*d.* at once on the excellence of the sample. The Berlin seller at the end of October shipped at Braila and Sulina 1000 tons on the *Arpad* bound to Hull. There is some evidence that the price of good Rumanian wheat, though not of sample 727 at that date, the 31st Oct., was 24*s.*, there having been a heavy fall in the market for wheat generally; but as the buyer had resold at 36*s.* 6*d.*, this fall would not apparently effect him if he could make delivery under his resales.

The shipowners, the present defendants, issued bills of lading to the seller for 1,000,000 kilos of wheat in bulk "cargo stored in Nos. 1, 2, 3, and 4 holds, 'tween decks and bunkers as per plan, weight, quality, quantity unknown." The plan enables the specific wheat shipped to be identified. It is separated from other parcels. The seller then gave notice to the buyer appropriating the wheat on the *Arpad* under his contract, and the buyer in turn appropriated the proper quantities ex-*Arpad* to his sub-buyers.

When the *Arpad* arrived at Hull at the end of 1930 there was found considerable mixture of the wheat with barley, and in the result the trial judge found short delivery to the plaintiff of 47 tons of wheat. The question in this case is: What are the damages for that short delivery?

There is no question that if the wheat had been delivered by the ship, the buyers would have tendered it to their sub-buyers and would have received 36*s.* 6*d.* per quarter, less an allowance of 6*d.* per quarter under arbitration for inferiority of sample. They have lost that sum by the short delivery. Can they recover from the shipowner at law their actual loss? It is clear that there was no market at Hull on the 10th Jan., the date of the last delivery from the *Arpad* to which they could go and "buy Rumanian wheat as per sample No. 727," still less such wheat ex-*Arpad*. If the wheat had been delivered and the buyers had not already resold it, I think it is clear that they could have resold it, but at a price considerably below 36*s.* 6*d.* owing to the fall of market. Whether the price they would have obtained on this hypothesis would have left them with a loss greater than the sum paid into court is in dispute and is immaterial to the question of principle.

The registrar's report finds that there was no market in which wheat in accordance with sample No. 727 shipment, September–October, could be bought, and that as the buyers had paid for the wheat, they were entitled to recover the amount they had paid, less certain small allowances. He finds that only this rule would place the buyers in the position they would have been in if the wheat had been delivered according to contract. On appeal, Bateson, J. affirmed the result of the registrar's inquiry. He took the view that though no doubt the buyers, if they had the wheat and had not resold it, could have sold it at some price in Hull, they could not have bought any such wheat, and that to make a "market" you must have power to buy or sell. When the buyer has prepaid 'market price," says the judge, "is no criterion," and he is entitled to the repayment of what the wheat has cost him. That is what is necessary to give him *restitutio in integrum*, and the value of what he has lost, and there being no market, what he paid for the wheat and what he had sold it for are available to fix its value to him.

The appellants, the shipowners, contend that the registrar and judges were wrong because, as Lord Esher said in *Rodocanachi* v. *Milburn* (6 Asp. Mar. Law Cas. 100; 56 L. T. Rep. 594; 18 Q. B. Div. 67): "But the value is to be taken independently of any circumstances peculiar to the plaintiff. It is well settled that in an action for non-delivery or non-acceptance of goods under a contract for sale the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as, for instance, an intermediate contract entered into with a third party for the purchase or sale of the goods." This decision was approved by the House of Lords in *Williams* v. *Agius* (110 L. T. Rep. 865; (1914) A. C. 510). The appellants say that the law between shipowner and goods owner is the same, and that in this case it follows that the resales by the receiver of the goods, which the shipowner knew nothing about, are "accidental circumstances" which do not affect him.

On the other hand, in *Rodocanachi* v. *Milburn* (*sup.*) there was a market in which cotton seed could be bought and sold, and the decision of the Court of Appeal giving the goods owner, who had sold the goods, to arrive at a price below the market price at the date when the goods should have arrived, damages based on the market price of the goods, was based on the fact that there was a market in which the price of the goods could have been ascertained, and the fact that the goods owner could not have obtained that market price because he had sold the goods to arrive at a lower price was "accidental" and could not be relied upon by the shipowner. But Lord Esher, having dealt with the measure of damages when there is a market in which the value of the goods could be fixed, goes on to say: "If there is no market for such goods, the result must be arrived at by an estimate, by taking the cost of the goods to the shipowner and adding to that the estimated profit he would make at the port of destination." In the present case there is, on the 10th Jan., no market in which wheat, in agreement with sample No. 727, could be bought; the cost to the shipper, 36*s*., is known, and there is no need to estimate the profit, for there has been a contract of resale to a solvent buyer at 36*s*. 6*d*. If the wheat had arrived the receiver would have put that amount in his pocket; that is what he has in fact lost; he will not get *restitutio in integrum* unless he receives that amount as damages.

Where there is no market for the goods in question both the textbooks and the decided cases take the view that the contracts of the owner of the goods may be considered. Thus in Mayne on Damages, 10th edit., p. 17: "But if the goods cannot be replaced for want of a market, their value must be estimated in some other way. If there has been a contract to resell them, the contract price will be evidence of their value." Then in Benjamin on Sale, 7th edit., at p. 1019: "Where there is no market, where the seller at the time he made the contract knew that the goods would probably be sub-sold, the buyer may recover as special damages the loss of his actual or anticipated profits." In Chalmer's Sale of Goods, 11th edit., at p. 135, it says: "In the case of delivery where there is no market and the sale is for the purposes of resale, the measure of damages is the difference between the contract price and the resale price." Where there is no market, sect. 51, sub-sect. (2), of the Sale of Goods Act is the applicable provision: "The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract." This brings in, in claims of contract, the contemplation of the parties, including the knowledge of one contracting party, either from actual communication or from business knowledge, that the goods dealt with may probably be resold so that failure to deliver them may probably prevent, if there is no market, the performance of a contract for resale and cause probably loss of profit.

I am, of course, not overlooking the position that the circumstances of the resale contracts may be so peculiar or involve such an unusual price that the other party to the contract is not liable for them unless he has such notice of those circumstances that he must be taken to accept liability for them: (*Horn* v. *Midland Railway Company*, 28 L. T. Rep. 312; L. Rep. 7 C. P. 583).

It is often said that the measure of damages in contract and tort is the same. I do think this is strictly accurate. The second branch of the rule in *Hadley* v. *Baxendale* (9 Ex. 341) requires, in the case of breach of contract, where the damages are alleged to flow from the existence of another special contract which is affected by the breach of the first contract, that that consequence may be supposed to be in the contemplation of both parties as the result of the breach, and notice of the special contract or the probability of such a special contract being made is required to affect the defendant with liability for damage flowing from the special contract being affected by the breach of the contract. An instance of the sort of notice required is where the plaintiff is known to be buying for resale, though he has not yet resold. Thus in *Lyon* v. *Fuchs* (1920, 2 Ll. L. Rep. 333) where the seller knew the buyer was buying for resale though he did not know of the contract of resale which the buyer afterwards made, Rowlatt, J., there being no market, gave the plaintiff the profit he lost by being unable to perform the contract of resale. *Mott* v. *Muller* (13 Ll. L. Rep. 493) is to the same effect. The matter is fully discussed by Salter, J. in a careful judgment in *Patrick* v. *Russo-British Grain Export Company* (137 L. T. Rep. 815; (1927) 2 K. B. 535) to which I refer. In *Braun* v. *Bergenske Steamship Company* (1921, 8 Ll. L. Rep. 51), Bailhache, J., heard an action against a carrier by an owner of goods for conversion of his goods, by delivering them to a person who had no title to them. The plaintiff had resold the goods for 925*l*. They were bales of dried hides apparently sold by sample and apparently there was no market in which they could be bought in England, and therefore no evidence of market price. The judge gave the

plaintiff 925*l.* as the value of the hides, as there was no evidence that the person to whom he had sold had paid more than the market price at the time of the sale. No doubt if the plaintiff had got the goods, he could have resold them at some price. But in my view, one cannot consider a market price where there is no market in which you can buy to replace. It takes buyers and sellers to make a market.

In the cases of claims in tort, damages are constantly given for consequences of which the defendant had no notice. You negligently run down a shabby looking man in the street and he may turn out to be a millionaire engaged in very profitable business which the accident disables him from carrying on; or you negligently and ignorantly injure the favourite for the Derby whereby he cannot run. You have to pay damages resulting from the circumstances of which you have no notice. You have to pay the actual loss to the man or his goods at the time of the tort, which is fixed by the circumstances at the time of the demand: (see Benjamin on Sale, 7th edit., p. 1018).

In the peculiar case where goods carried by a carrier under a contract which protects him from liability for a particular damage, the goods owner cannot recover by claiming in tort, for the reasons given in the House of Lords in the well-known case of *Elder Dempster and Co.* v. *Paterson Zochonis and Co.* (16 Asp. Mar. Law Cas. 351; 131 L. T. Rep. 449; (1924 A. C. 522). But where, as in this present case, there is an unjustified breach of contract, and the tort of conversion, the goods owner can claim in tort for conversion and bring in the loss on a contract of resale without proving notice of it to the carrier, unless there is some very unusual feature in the contract. I am inclined to think that in contracts of carriage from wheat-producing districts, it is always so probable that the shipper is sending for resale, or for sale to a person who will resell, that the carrier will be liable if there is no market, for the effect on a contract of sale of his conversion or unjustifiable failure to deliver. I observe that Lord Macnaghten in *Ströms, Bruks Aktie Bolaget* v. *John and Peter Hutchison* (10 Asp. Mar. Law Cas. 138; 93 L. T. Rep. 562; (1905) A. C. 524) says: "Although it is not suggested that the respondents knew the particular terms of the bargain with Thomas Owen and Co., they must have known, as every business man in their position would know, that in all probability the goods were being dispatched to England in order to fulfil some contract either actually in existence at the time, or in contemplation, so that a breach of their contract with the manufacturer in Sweden might cause a breach of contract with some manufacturer or merchant in England and lead to a claim of damages by him against the shippers of the goods. The respondents therefore were certainly not justified in assuming that in the discharge of their obligations punctuality was a matter of little moment." The question of damages for the conversion in such a case was considered in *France* v. *Gaudet* (1871, L. Rep., 6 Q. B. 109). In that case the plaintiff had bought 100 cases of champagne at 14*s.* a dozen, laying at the defendant's wharf, and resold it to the captain of a ship about to leave England at 24*s.* a dozen. Champagne of that brand and quality was not procurable in the market. The wharfinger wrongfully refused to deliver until after the ship had sailed, the captain declining to wait for the champagne. It was urged, on the authority of *Hadley* v. *Baxendale* (*sup.*) that a wharfinger having no notice of the special value of the champagne, was not liable for the loss of profit, but a court comprised of Mellor, Lush and Hannen, JJ., held that there being no market, the actual value of the champagne, as measured by the price on the sale to a solvent customer, ought to be the measure of damage. In trover, the plaintiff can recover the special value attached by special circumstances to the article converted. The plaintiff was entitled to the immediate delivery of the article, and no notice would affect its actual value, which was the same as the actual present loss to its owner. In other words, there being no market either to fix its value or in which the owner could replace it, the actual value or loss to the owner could be fixed by what the owner could get by a resale to a solvent purchaser. Apart from that, there is no doubt that in fact, by the defendant's wrongful conversion, the plaintiff lost 36*s.*, 36*s.* 6*d.* the resale price less 6*d.* a quarter allowance for slight inferiority to sample which, under the resale contracts, did not entitle the sub-buyer to reject. There was no market in which the buyer could purchase wheat as per sample No. 727 ex-*Arpad.* In other words, the wheat ex-*Arpad* was a specific wheat resold and not capable of replacement.

France v. *Gaudet* (*sup.*) has stood unchallenged for over sixty years; the only comment I can find on it is in *Horne* v. *Midland Railway* (*sup.*), where Mellor, J. said it turned on there being no market. Martin, B. said that it was a case of vendor and purchaser and turned on different considerations. As to this, Blackburn, J. said that vendor and purchaser and carrier and goods owner were in contract the same thing, the carrier agreed to provide conveyance for goods, the vendor the goods themselves. The real distinction is, I think, between a tort, the damages for which do not require notice to the wrongdoer of their probability, and contract, where *Hadley* v. *Baxendale* (*sup.*) requires the consequence to be in the contemplation of the parties.

The damages for torts to property have been recently considered by the House of Lords in the case of *The Edison* (149 L. T. Rep. 49; (1933) A. C. 449). In that case the defendants ship sank the plaintiff's dredger, which was at the time engaged in a profitable contract of which the defendant had no notice. The House of Lords gave the plaintiff (1) the market price of a comparable dredger; (2) the cost of its adaption, transport, and insurance to the place of loss; (3) compensation for disturbance and loss in carrying out the contract up to the time at which the substituted dredger could reasonably have been available at Patras. The decision in *The Argentino* (6 Asp. Mar. Cas. 433; 61 L. T. Rep. 706; 14 App. Cas. 519) is to the same effect.

In *The Edison* (*sup.*) I endeavoured to give the defendant the value of the dredger to them as a going concern following the judgment of Lord Gorell in *The Harmonides* (9 Asp. Mar. Law Cas. 354; 87 L. T. Rep. 448; (1903) P. 1) I certainly intended to include in that value the dredger's position on a profitable contract, but apparently I did not express myself with sufficient clearness, as Lord Wright, "feeling grave doubt," did not think I intended to include any allowance for the disturbance of the contract. I did, to the best of my recollection, intend to cover that allowance by the words "value as a going concern to the owner." *The Edison* (*sup.*) appears to me to be a decision on the same lines as *France* v. *Gaudet* (*sup.*).

In my opinion the damages in conversion should be the value to the purchaser or goods owner at the time of the conversion. If there is a market in which he can buy, this will fix the value; if there

is no market, it may be determined by the goods owners' contract with a solvent purchaser, for that is what he has in fact lost by the conversion.

It may well be that this rule does not logically fit in with the damages in contract where there is a market, and where, as in *Rodocanachi* v. *Milburn* (*sup.*) the plaintiff may recover more than he has lost, or, as in *Hadley* v. *Baxendale* (*sup.*) and *British Columbia* v. *Nettleship Saw Mill Co.* (18 L. T. Rep. 604; (1868) L. Rep. 3, C.P. 499), less than he has in fact lost. But this depends on the fact that in contract you look at the date of the contract to see what was contemplated or of what there was notice, and in tort you look at the date of the tort when notice is irrelevant. I should therefore be of opinion that the result arrived at by the judge below and the registrar is correct, and that the appeal should be dismissed with costs. But as my brothers are of a different opinion, for reasons expressed in their judgments, the result will be as they direct. A complicated argument of fact was addressed to us to show that if the above conclusion was incorrect. yet the value of the market without considering the resale was sufficient to exceed, though only slightly, the amount paid into court. I do not think the Court of Appeal should be called on to do this calculation of fact, which is a matter for the registrar and merchants.

Greer, L.J.—The facts proved in this case so far as they are relevant to the question which arises for determination in this appeal may be briefly stated as follows.

On the 11th Aug., 1930, the respondents, who are grain merchants carrying on business at Hull, bought from Mr. E. Kampffmeyer 1000 tons of Rumanian wheat as per sealed sample No. 727 in possession of buyers at the price of 36*s.* less 2½ per cent. per 480lb. shipped, including freight and insurance to Hull, to be shipped from a Black Sea and (or) Danubian port or ports, on a bill or bills of lading dated or to be dated during September and (or) Oct., 1930, the bill of lading to be dated when the goods were actually on board. On the same date or the next day, the respondents contracted to sell to eight separate buyers various quantities of wheat amounting in the aggregate to 1000 tons to be shipped as per bill of lading during September and (or) Oct., 1930, from a Black Sea or Danubian port or ports, quality as per sealed sample in sellers' possession. The sealed sample was in fact the same sample as that on which the respondents had bought. The contracts were not c.i.f. contracts, but were contracts for delivery on arrival at Hull, at 36*s.* 6*d.* per quarter of 480lb. As the sub-contracts did not describe the goods as goods to be shipped on a steamship to be declared, it cannot be said that the sub-sales were specific sales of the agreed numbers of quarters which were shipped by the respondents on the *Arpad*, but I think this of no consequence, inasmuch as it was common ground in the case that all the sub-sales were of goods for deliver in Hull shipped in September–October and equal to sample No. 727, and goods answering to that description could not be bought in the grain market in England at the date when the plaintiffs cause of action arose. In September and October and the first days of November grain was put on board the steamship *Arpad* to the amount of one million kilograms of wheat in bulk and in accordance with the respondents' contract with their seller, the goods so shipped were appropriated to the contract. The goods so shipped were not quite up to the sample, and in accordance with a term in the contracts an allowance of 6d. per quarter became deductible from the contract price. The respondents were entitled to this allowance from their seller, and were bound to make a similar allowance to their buyers. Accordingly if the whole quantity which had been shipped had been delivered to the respondents, they would have been entitled to receive 36*s.* per quarter in respect of it, but unfortunately, when the *Arpad* had discharged her cargo it was found that the appellants were unable to comply with their contract to deliver the whole quantity shipped inasmuch as 47 tons had been so mixed with barley that a tender of it could not be properly described as a tender of 47 tons of the wheat that had been shipped. Therefore, on the facts as proved at the trial of the action, which are not now in dispute, there was a shortage of delivery for which the owners of the steamship were responsible to the amount of 47 tons. There were certain other questions disposed of in the course of the action, with which this appeal is not concerned, but Langton J., held the appellants liable in respect of the claim based on the short delivery of 47 tons. In the statement of claim this was put as a claim for damages for conversion, the conversion being the failure to deliver or refusal to deliver. The action came for trial before Langton, J., who decided that the appellants were liable, and gave judgment in favour of the respondents against the appellants for damages in so far as such claim related to the admixture and consequent short delivery of 47 tons of the said wheat, and ordered that the costs should depend on whether the respondents recovered more than the amount paid into court. The amount of the difference between the plaintiffs' claim and the sum paid into court is a matter of 40*l.* or 50*l.*, but unfortunately the costs are very heavy, as the trial before Langton, J. lasted for five days, the reference took about the same time, and there was then an appeal to Bateson, J. Now the case has been brought by way of appeal to this court. The amount originally in dispute must be comparatively insignificant compared to the amount of the costs which will have to be met by the defendant if he has underestimated, to however small a degree, the damages to which the plaintiff is entitled.

The *Arpad* finished discharging the bill of lading wheat early in Jan., 1931. There was evidence which entitled the registrar to find that there was at that time no Rumanian grain procurable equal to the sample No. 727. The respondents, therefore, were unable to tender to their buyers 47 tons of grain which the latter would have been bound to accept. The buyers were entitled to have September and October shipment of goods which would correspond to the sample, subject to the term of the contract that difference in quality or condition should not entitle them to reject except under the award of the arbitrators, or the committee of appeal of the Corn Trade Association. If the respondents had received the 47 tons, they would clearly have been entitled to have received in respect of them from their sub-buyers 36*s.* 6*d.*, less an allowance of 6*d.* per quarter for defective quality or condition. It was established to the satisfaction of the registrar and the judge that there was no market in which Rumanian grain could be purchased of the contract description which the respondents could have used for the purpose of implementing their sub-sales. There can be no doubt that in fact they lost 36*s.* per quarter on the whole of the 47 tons by reason of the fact that they had resold when the market was high, and were unable to perform their contracts by purchasing in the market goods that would comply with the description contained in their contracts with their buyers, nor were they able to prove that

there were any goods available on the market the purchase of which would enable them or their sub-purchasers to fulfil their requirements.

This case falls to be decided in the light of the fact that having regard to the forward contracts the respondents made with their buyers in Aug., 1930, they in fact suffered a loss of 36*s*. per quarter. The registrar and merchants found that their damages must be estimated on this basis, and Bateson, J. confirmed that finding on appeal to him. We have now to determine whether having regard to the law relating to the measure of damage in actions whether of contract or of tort, the decision of the learned judge was right.

Apart from any difficulty that may be occasioned by decisions of the courts, it seems to me to be unreasonable to hold that a shipowner contracting with the shipper on the terms of a bill of lading should be held liable to pay damages, measured by the loss sustained by reason of the latter's inability to comply with a contract made two months before the shipment by an unknown assignee, the shipowner having no notice of such contract and no opportunity of refusing to carry goods on the terms that he should be so liable. The decisions of the courts do not, in my judgment, involve any such unreasonable measure of the damage payable by a shipowner for failure to deliver the goods shipped. If there is a market at the time when the goods should be delivered in which goods of a kind fit to implement the contract made by the owner of the bill of lading at the time of the breach can be bought or sold, the measure of damage is the value of the goods ascertained by the market price of identically similar goods. When there is no such market, the value must be otherwise ascertained, and the price at which the holder of the bill of lading has in fact sold them five months before is not very satisfactory evidence of their value at the time of the breach. In the case of a claim by a purchaser against a vendor of goods as to which a market price is unascertainable, the price at which the buyer has resold the goods may be accepted as evidence of their value. But the court is not bound to accept such evidence as conclusive if the value can be otherwise ascertained. On the facts proved in the present case it is clear that the price fixed by the August contracts cannot be relied on as any evidence of the value of the goods at the date of the breach.

The judgment of the court in *Hadley* v. *Baxendale* (9 Ex. Cas. 341) opened a new chapter in the law of damages. The measure of damages there laid down by the Court of Exchequer has since been invariably applied in cases which involved the consideration of the true measure of damage. I had occasion in the course of my judgment in *The Edison* (18 Asp. Mar. Law Cas. 276; 147 L. T. Rep. 141; (1932) P. 52) to state in a summary manner the material facts proved in the case, and the rules for estimating damages as stated in the judgment of the court. I need not repeat my observations here.

In the present case no notice was or could be given by the respondents to the appellants before the goods were shipped, or at any time, of the price at which they had bought or the prices at which they had sold, or indeed that they were buyers or sellers at all. For all the shipowners knew the shippers might have been millers who were shipping the wheat for use at their own mills, or they might have been buying to fulfil contracts made when wheat was lower in price than it was when the goods were shipped, or they might have been bought by the shippers or by the plaintiffs in the expectation that market prices would rise. As far as appears, the respondents had no interest in the goods at the date of shipment. They only became interested when the bills of lading were assigned to them. If they had been able to buy other wheat equal to the sample shipped in September and October they would have been entitled to use the goods for their contracts of sale. There was no evidence showing the date when the bill of lading was assigned to them. The shipowner did not and could not know that the respondents were interested in any way in the goods until the bill of lading was presented to them by the plaintiffs. The point to be decided, so far as the claim is based on contract, is narrowed down to the answer to the question whether damages arising from the fact that the appellants had sold the cargo at the high values prevailing in Aug., 1930, "may fairly and reasonably be considered as arising naturally according to the usual course of things" from the breach of contract. Another question which has to be determined is whether, assuming that the court is precluded by the rules as to the measure of damage from taking into account the loss occasioned to the respondents by their inability to perform the contracts with their buyers, the same rule is applicable to the alternative claim for damages for conversion. At the time when the appellants broke their contract of carriage by short delivery, the value of the 47 tons which they failed to deliver, estimated by what it would sell at in the ordinary course of business at the date of the breach, was ascertainable, because it is quite true that though there was no market in which goods similar to the sample No. 727 could be bought, there was a market in which they could have been sold.

In my opinion it has been decided both by the Court of Appeal and the House of Lords that in estimating the loss occasioned to a claimant for non-delivery of the goods which he is entitled to have delivered to him, contracts which he has made at a date far removed from the date of the breach of contract have to be neglected in considering what is the measure of damage which has to be applied under the first rule in *Hadley* v. *Baxendale* (*sup.*). In the case of *Rodocanachi* v. *Milburn* (6 Asp. Mar. Law Cas. 100; 56 L. T. Rep. 594; 18 Q. B. Div. 67), the plaintiffs' before the shipment of a cargo of cotton seed in accordance with the charter-party, had sold the cargo to arrive at a price less than the market price at the port of discharge at the time when the ship in the ordinary course should have arrived there. The cargo never arrived, but was lost by negligence. It is clear that in that case the sale was a sale of the specific cargo, and the plaintiffs were unable to fulfil the sales they had in fact made, because the specific cargo had ceased to exist. They had sold the cargo at a price which was less than the market price at the port of discharge at a time when the ship in the ordinary course should have arrived there. It is plain that there was no market at that time in which the plaintiff could have bought the specific cargo which he sold. He might possibly have bought something as good, but he could not have compelled his buyers to take anything other than the specific cargo which he sold to them. It was held by the Court of Appeal that the court should leave out of consideration the sale made by the plaintiffs' and, as I understand the decision, it was held that the measure of damage was the selling value of the goods at the date when they would in the ordinary course have arrived, and whether this was more or less than the damage which a plaintiff sustained by reason of the fact that he had made a contract of resale is irrelevant; the damage is still to be estimated without regard to his contract of resale,

by finding what the value to him would have been if such sale was left out of consideration. Lord Esher, M.R., says: "The measure is the difference between the position of a plaintiff if the goods had been safely delivered and his position if the goods are lost. . . . Upon getting the goods he could sell them. He therefore would get the value of the good upon their arrival at the port of discharge less what he would have to pay in order to get them. But what is to be the rule in getting at the value of the goods? If there is no market for such goods, the result must be arrived at by an estimate, by taking the cost of the goods to the shipper and adding to that the estimated profit he would make at the port of destination. If there is a market there is no occasion to have recourse to such a mode of estimating the value; the value will be the market value when the goods ought to have arrived. But the value is to be taken independently of any circumstances peculiar to the plaintiff. It is well settled that in an action for non-delivery or non-acceptance of goods under a contract of sale the law does not take into account in estimating the damages anything that is accidental between the plaintiff and the defendant, as, for instance, an intermediate contract entered into with a third party for the purchase or sale of the goods. It is admitted in this case that, if the plaintiffs had sold the goods for more than the market value before their arrival, they could not recover on the basis of that price, but would be confined to the market price, because the circumstances that they had so sold the goods at a higher price would be an accidental circumstance as between themselves and the shipowners; but it is said that, as they have sold for a price less than the market price, the market price is not to govern but the contract price. I think, that if the law were so, it would be very unjust. I adopt the rule laid down in Mayne on Damages, which gives the market price as the test by which to estimate the value of the goods independently of any circumstance peculiar to the plaintiff, and so independently of any contract made by him for the sale of the goods." The law is stated to the same effect by Lindley, L.J., where he says: "The rule in an action such as this seems to be well settled, namely, that the damages are the value of the goods at the port of discharge, minus the accruing freight, and that any contract for sale of the goods made by the charterers, whether at a greater or less price than the market value, is not to be taken into account. It is admitted that a contract for sale at a larger could not have been taken into account, but it contended that nevertheless one made at a less price should be." Lopes, L.J. says: "I think the true rule is that the measure of damages in such a case must be the market value at the time when and place where the goods ought to have been delivered independently of any crcumstances peculiar to the plaintiff, but deducting therefrom what he would have had to pay to get the goods." I cannot understand the judgment as meaning other than this, that what has to be ascertained is the value of the goods at the date of the breach, and that in estimating that value the law does not take into account an intermediate contract entered into with a third party for the purchase or sale of the goods. That case was expressly approved by the House of Lords in *Williams* v. *Agius* (110 L. T. Rep. 865; (1914) A. C. 511). The House of Lords there held that in a case for non-delivery by a seller to a buyer, the true measure of damages was the difference between the contract price and the market price at the time of the breach, and that the fact that a seller had agreed to sell the goods at a lower price could not be taken into account to diminish the damages. It is true that the sub-sale does not appear to have been a sale of a specific cargo, but only a sale of a cargo of coals of the same amount and description. Lord Dunedin points out that claims for damages for delay in delivery are not the same as claims for damages for non-delivery. He there says: "But when there is no delivery of the goods the position is quite a different one, the buyer never gets them, and he is entitled to be put in the position in which he would have stood if he had got them at the due date. That position is the position of a man who has goods at the market price of the day—and barring special circumstances, the defaulting seller is neither mulcted in damages for the extra profit which the buyer would have got owing to a forward resale at over the market price (*Great Western Railway* v. *Redmayne*, 1886, L. Rep. 1 C. P. 329), nor can he take benefit of the fact that the buyer has made a forward resale at under the market price." I do not think these observations can be taken to mean that the difference between contract price and market price is recoverable because the buyer can diminish the damages by going into the market and buying. The market price which is treated as the value at which the goods are to be taken for the purpose of estimating the damages means the price at which the goods can be sold on the market. And the noble and learned Lord points out that even if the sub-sale is of the self-same thing or things, it would be equally right to say that the resale price ought not to be taken into account. If the courts are dealing with a case in which the sub-sale is a sale of the self-same thing, that involves the fact that there is no market in which the thing sold can be bought, but only a market in which it can be sold.

Hall v. *Pimm* (139 L. T. Rep. 50) was not a case in which the court had to consider the effect of the first rule in *Hadley* v. *Baxendale* (*sup.*); it was a decision as to damages as between buyer and seller, and the House of Lords held that the sub-sales could be looked at, because by reason of the contract between the plaintiff and the defendant such sub-sales were contemplated, so that the case was brought within the second rule in *Hadley* v. *Baxendale*. In the present case there is nothing in the bill of lading contract to call the attention of the shipowner to any question in any way relating to the sale of the goods by the shipper or his assignee. In my judgment, *Hall* v. *Pimm* has no bearing on the question to be decided in the present case.

There was evidence before the registrar which proved beyond the shadow of doubt that the selling value of all classes of wheat had greatly diminished between Aug., 1930, and Jan., 1931. I think the registrar ought upon the evidence to have made an estimate as what the value of 47 tons of grain of the quality of the goods when they were shipped was at the date of the appellants breach of their obligation to deliver, and that in making this estimate he ought to have disregarded entirely the contracts made by the respondents in August of the year before—about five months before the date of the breach.

So far I have dealt with the case as if the respondents claim in the action was merely a claim for damages for breach of contract of carriage. It remains for me to deal with the question as to what is the measure of damage as applied to the alternative claim for damages for conversion. It has been laid down in judgments of high authority with which I do not find myself able to differ, that the measure of damages in cases of tort are the same as those applied in cases of contract, with

the exception that in cases of tort the court has only to got to consider the first rule in *Hadley* v. *Baxendale* (*sup.*), whereas in cases of contract there may be, under the second rule in *Hadley* v. *Baxendale* (*sup.*), a larger measure of damages. In my judgment in *The Edison* (18 Asp. Mar. Law Cas. at pp. 276, 282, 283; 147 L. T. Rep. at pp. 148, 149; (1932) P. at pp. 52, 58, 69), I referred to these authorities and applied them to the case then under consideration. I referred especially to the judgment of Bowen, L.J. in *Cobb* v. *Great Western Railway* (68 L. T. Rep. 483; (1893) 1 Q. B. 459), and the same Lord Justice in *The Argentino* (6 Asp. Mar. Law Cas. 348; 101 L. T. Rep. 80; 13 Prob. Div. 191), and I acted upon the statement of the law by Bowen, L.J. and applied it to the case then being considered. What is perhaps more important is what Scrutton, L.J. said in the course of his judgment in *The Edison* (18 Asp. Mar. Law Cas. at p. 280; 147 L. T. Rep. at p. 145; (1932) P. 61): "Generally, however, it is clear on the authorities that the measure of damages is the same in Admiralty and common law; and that it is the same in tort and breach of contract, except that in the latter case damages can be given in respect of circumstances which were in the contemplation of the parties at the making of the contract, which damages would not be given in tort." I do not think there is anything in the decision of the House of Lords in *The Edison* case which is inconsistent with that proposition of law. Where the House of Lords differed from the Court of Appeal was in regard to the way in which the first proposition in *Hadley* v. *Baxendale* (*sup.*) applied to a case in which the plaintiff had been deprived of an instrument of his trade under circumstances which prevented him from immediately procuring a substitute. It has been frequently decided that if a shipowner is deprived for a short time of the use of a vessel which he uses in his business for the purpose of earning profits, the court can take into account the actual engagements of his ship during the time he is so deprived of the use of it. If, as in the case of *The Edison*, he is permanently deprived of his ship, it follows that during the time he is so deprived, that is to say, until he can supply himself with another ship to do the work, he is entitled to the same measure of damages for loss of business between the time when his ship has been destroyed and a reasonable time in which he can obtain a substitute as he would have been entitled to if his claim had been not for loss but for being temporarily deprived of the use of his ship. This seems to me, if it is not impertinent to say so, clearly right, but as far as the judgment in the Court of Appeal was concerned, the sum awarded as part of the value of the ship at the time of her loss was intended to include a sufficient sum for loss of the use of the dredger until the plaintiff obtained a substitute. I see nothing in the decision of the House of Lords in *The Edison* which has any bearing on the question as to what is the measure of damage whether claimed in contract or tort for the wrongful deprivation of a marketable article which has been bought for sale and can be sold. What, then, is to be said about cases like *Borries* v. *Hutchinson* (11 L. T. Rep. 771; 18 C. B. (N. S.) 445), *Grebert-Borgnis* v. *Nugent* (15 Q. B. Div. 85), and *France* v. *Gaudet* (L. R.), 6 Q. B. 199. The two former cases were cases of breach of contract, where the buyer had given notice that the goods were bought for resale but no notice of the terms of the resale. There was no market for the particular goods sold. It was admitted by the seller that the buyer was entitled to his loss of profit on the resale. The court, while approving of this admission as right in law, had to deal with further claims depending on the terms of the resale, some of which were allowed, and some disallowed. In both these cases there was notice that the goods were bought for the purpose of fulfilling contracts of resale, though the exact terms of such resale contracts were not communicated. They were cases which the parties accepted as within the second rule of *Hadley* v. *Baxendale* (*sup.*). Lord Esher (then Sir William Brett, Master of the Rolls), in giving judgment in the Court of Appeal in *Grebert-Borgnis* v. *Nugent* (*sup.*) used the words which since have been frequently accepted as applying to the measure of damage where there is no notice that the goods are bought for the purpose of fulfilling an existing or contemplated resale: "If such sub-contract was not made known to him at all the defendant cannot be made liable for what the plaintiff has had to pay under it. If there be no market for the goods then the sub-contract by the plaintiff, though not brought to the knowledge of the defendant, the original vendor, may be put in evidence in order to show what was the real value of the goods, and so enable the plaintiff to recover the difference between the contract price and the real value."

This statement of the law has been acted upon on frequent occasions. I fully accept it. But I do not read the law so stated as applicable to a case like the present, in which the value fixed by the sub-sale is proved not to be the real value of the undelivered goods at the date of the breach. In my judgment the damages claimed on the basis of the damages suffered by the respondents by reason of the sale made by them of similar goods to be shipped in September and October are, to quote the words of Blackburn, J. in *Horne* v. *Midland Railway Company* (28 L. T. Rep. 312; L. Rep. 8 C. P. 131): "Damages of an exceptional nature, arising from special and peculiar circumstances," of which no notice was given to the defendants when they received the goods for carriage. When there is no evidence of the value other than the price the plaintiff was able to obtain this value may be accepted as evidence of value at the date of the breach of contract. But in this case there was ample evidence that at the date of the breach the value of all wheat had greatly diminished. On the principle laid down in *Rodocanachi* v. *Milburn* (*sup.*), the registrar should have taken into account all the evidence given before him, and found the fair value at the date of the breach, disregarding the fact that the plaintiffs intended to use the cargo for the purpose of implementing the sales they made in August.

With regard to *France* v. *Gaudet* (*sup.*), in so far as the reasons given by the court depend on drawing a distinction between the damages that may be awarded on a claim for non-delivery which may in the alternative be treated as a breach of contract or a tort, I think, though the decision may be supported on other grounds, the reasons stated for the decision of Mellor, J. cannot be supported. I note in passing that the court adopts as the law applicable to non-delivery as a breach of contract the following sentence from Sedgwick on Damages, though they failed to apply the law so stated in the case they were deciding: "It appears to me that, in principle, unless the plaintiff has been deprived of some particular use of his property, of which the other party was apprised, and which he may thus be said to have directly prevented, the rights of the parties are fixed at the time of the illegal act, be it refusal to deliver or actual conversion, and that the damages should be estimated as at

that time." In my judgment, where the wrong complained of may be stated either in tort or in contract, the same rules as to damages must be applied.

In addition to the decisions already cited, I refer to *Fleming* v. *Manchester and Sheffield Railway* (39 L. T. Rep. 555; 4 Q. B. Div. 81). Adopting the words of Lord Bramwell, I say that in the present case under appeal "the real ground of complaint was the breach of contract to deliver." In *Horne* v. *The Midland Railway Company* (*sup.*), Mellor, J. explains the decision in *France* v. *Gaudet* (*sup.*) as based on the absence of any evidence of the value of the goods other than the sale to the plaintiff. "There was," he says "no other test of the value of the goods." *Horne* v. *The Midland Railway Company*, is an important authority against the respondents' claim in the case under appeal, because (1) The market value taken as the measure of the defendants' liability was not the cost of procuring similar goods in the market, but the price procurable by the plaintiff by sale in the market, (2) it was a claim against a carrier, and some of the judges who decided the case thought that the measure of damages was not necessarily the same in its application to claims against a carrier as it would be against a seller for late delivery or for non-delivery, and (3) though the claim was a claim for late delivery both Martin, B. and Blackburn, J. treat the principle as similar to that which would have to be applied if the goods had never been delivered at all. Martin, B. says: "Suppose the goods, instead of merely being delayed in delivery, had been burnt while in the defendants' custody. Would the plaintiffs have been entitled to recover from them at the rate of 4*s.* a pair, or only their value at the time when they were burnt? It strikes me that they could only recover their value when burnt and not their value calculated according to the price at which they were sold some time before, when the market was higher." and later, "If some other person had delivered a similar quantity of shoes to the defendants for carriage on the same day as the plaintiffs, not being under contract to deliver them, it is admitted that he could only recover 20*l.*" In the judgment of Blackburn, J. we find the following statement of the law as that eminent lawyer thought it was: "If a man contracts to carry a chattel and loses it, he must pay the value, though he may discover that it was more valuable than he had supposed. But when the damages sought to be recovered are not those which in the ordinary course of things would naturally arise, but are of exceptional nature, arising from special and peculiar circumstances, it is clear that in the absence of any notice to the defendant of any such circumstances, such damages cannot be recovered. It is worthy of note that in that case of *Horne* v. *Midland Railway Company* (*sup.*), there was not, in the proper sense of the word, any market in which goods of the kind which are specially made for the French could be procured. In my judgment *France* v. *Gaudet* (*sup.*) ought not to be accepted as a decision that in assessing the damage caused to a buyer by non-delivery, the damages are necessarily what he has lost on a contract of resale, but merely that in the absence of other evidence, the cost of resale may be treated as the value of the goods.

I do not think it is necessary to refer the case back to the registrar for reconsideration. We have the same materials that he had before him for determining what the value of the 47 tons was at the material date when the defendants failed to deliver the 27 tons in a condition in which the plaintiff was entitled to receive them. On consideration of the evidence taken before the registrar, I think we ought to decide that the value must be reckoned on the basis of 23*s.* 6*d.* per quarter for the 47 tons.

I desire to add in order to prevent a misunderstanding of this judgment, that the decision must not be treated as a binding decision with regard to the measure of damages in the case of an action for damages for personal injuries. So far as I am concerned, I desire to reserve the question whether a plaintiff in an action for damages for personal injuries can recover for the loss he has in fact sustained through inability to perform a contract of an unusual and exceptional remunerative character. We are only deciding the measure of damages applicable to damages of which the plaintiff complains of the temporary loss of an article of commerce usually purchased for resale.

The appeal will be allowed with costs, the judgment of Bateson, J. will be set aside and judgment entered for the amount so ascertained with the consequences as to costs provided for by the original order of Langton, J.

Maugham, L.J.—The question of law that arises on this appeal may be stated very simply. It is this: What is the proper measure of damages when upon a contract of carriage by sea the shipowner fails to deliver the goods at the port of arrival, and it happens that there is at that port no market at which similar goods could be purchased at the date of the breach? There is no dispute as to the main facts which have already been stated in the preceding judgments, and I need not repeat them; but I must make it clear that in the circumstances of this case the shipowner could not, in my view, properly be held to know that the plaintiffs or any other holder of the bill of lading had entered into contracts of sale or was procuring the goods for the purpose of resale. I agree with what my brother Greer has said on this point, and need not repeat it. Such cases as *Patrick* v. *Russo-British Grain Co.* (137 L. T. Rep. 815; (1927) 2 K. B. 535) have in my judgment no application, and I do not desire to express any opinion with regard to them. The question is in this court mainly one depending on authority, but I will permit myself two general observations. The first arises from a consideration of the nature of a market for goods. It seems to me illogical to apply one rule if the goods shipped have been sold by the plaintiff ex a particular ship or according to a sealed sample, with the result that generally speaking there is no market for those particular goods at the port of destination, and another measure of damage if the goods are merely goods of a particular description and quality. A rule which is in effect one of remoteness of damage ought, it seems to me, to apply in either case. The other observation is that I think it would be very unfortunate if shippers or purchasers of goods carried by sea were in a position, during perhaps a prolonged period, to enter into contracts of sub-sale and to please themselves as to whether these were disclosed in the event of a dispute arising such as one based on short delivery. Most of such disputes are settled otherwise than in the courts, and even if the matter comes to be determined by due process of law, I do not think that the right of the defendant to discovery is a satisfactory safeguard if there has been a considerable fall in the market since the contract of sale was made.

I will now refer to the leading authorities. It has long been settled as a general rule, in such a case, whether there is a market or not, that the owner is entitled to the value of the goods at the place where they were consigned. It follows, as

regards ascertaining the value, that if there is a market for such goods at the date when they should have been delivered. Such a purchase in the market is taken to put him in the same position as if the goods had been duly delivered ; but it is also well established that in such a case, at any rate, if the plaintiff is suing in contract, agreements for sale entered into with third parties by the plaintiff consignee (which may for convenience be cal ed " sub-contracts ") cannot be looked at either for the purpose of increasing or reducing the damages, unless sufficient notice of the sub-contracts has been given to the carrier or ship-owner. These rules are clearly similar to those which apply upon failure to deliver under a contract for the sale of goods, rules now embodied in sect. 51 of the Sale of Goods Act, 1893, a section declaratory of the existing law. The courts have refused to look at the sub-contracts entered into by the plaintiff in such a case (in the absence of notice to the defendant at the date of the contract) on the ground that any sub-contract is an accidental circumstance peculiar to the plaintiff ; and it is a rule closely analogous to the rule that actual loss of profits and damages payable to sub-purchasers and other sub-contractors are not ordinary consequences of delay or failure to deliver. As examples of the many cases that illustrate the rule, the following may be mentioned : *Hadley* v. *Baxendale* (9 Ex. Cas. 341), *Gee* v. *Lancashire and Yorkshire Railway Company* (1860, 3 L. T. Rep. 328 ; 6 H. & N. 211), *Great Western Railway Company* v. *Radmayne* (L. Rep. 1, C. P. 329), *Rodocanachi* v. *Milburn* (6 Asp. Mar. Law Cas. 100 ; 56 L. T. Rep. 594 ; 18 Q. B. Div. 67). It is manifest, then, that if there is a market the plaintiff will not be awarded damages on the footing of the actual loss to him occasioned by the defendant's default, since the sub-contract may have been a sale at a price substantially higher or lower than the market price at the date when the goods should have been delivered.

In the present case the first question that arises is whether the measure of damage for a breach of a contract of carriage in the case where the goods are not procurable in the market at the time of breach differed from the rule as above stated so far as regards the exclusion of the consideration of sub-contracts entered into by the plaintiff. It is not in dispute that even if there is not a market price the damages are to be taken by reference to " the value of the goods at the time of the breach," and there may be different methods of arriving at the value in the particular circumstances. I have, however, been unable to find any case which suggests that the law (in the absence of notice at the date of contract) will take into account in estimating the damages, an intermediate contract with a third party, which is, to use Lord Esher's words, accidental as between the plaintiff and the defendant. I will refer first to the case of *Borries* v. *Hutchinson* (1865, 11 L. T. Rep. 771 ; 18 C. B. (N. S.)), in which there was a valuable judgment by Sir James Shaw Willes. This was a contract by a defendant to sell caustic soda to the plaintiffs for shipment from Hull, delivery to be made in June, July and August, and the defendant knew that the plaiutiffs were buying for the purpose of fulfilling a contract with a foreign merchant. In fact, the plaintiffs had contracted to sell this soda at an advanced price to a merchant in Russia. The plaintiffs delivered a portion in September and October and the rest was never delivered at all. There was no market for caustic soda in June, July and August. The plaintiffs had had to pay damages under their sub-contract ; but it was held that they were not entitled to recover such damages, on the ground that they were too remote. The value to the plaintiffs of the goods which were never delivered was taken to be the value of the goods at the time when they ought to have been delivered, which, in the absence of a market price, was held to be the price which they could have got for those goods in Russia less the cost of sending them there. This case was followed in principle in *Hinde* v. *Liddle* (32 L. T. Rep. 449 ; L. Rep. 10 Q. B. 265). The defendant had contracted to supply the plaintiff with 2000 pieces of grey shirting for shipment on the 20th Oct. Before that date he informed the plaintiff that he would be unable to complete his contract, and it so happened that grey shirtings of the kind in question could not be procured in the market in England at that time. The plaintiff in fact had entered into a sub-contract to ship the goods in November, and, being unable to find goods of the same quality or to get them manufactured by the 20th Oct., he purchased some grey suitings near the quality contracted for, although of a somewhat superior quality, and for them he had to pay an advanced price. It was held that he was entitled to recover the difference between what he had agreed to pay and what he was compelled to pay for the substituted goods, not, however, because he had entered into a sub-contract, but because the true measure of damage was the value of the goods at the date of the breach, and that was the price of the best substitute procurable. It should be added that the defendants had been told that the shirtings were for immediate shipment, but nothing was decided as to what the effect of a notice of the sub-contract might have been : (per Blackburn, J., 32 L. T. Rep. at p. 450 ; L. Rep. 10, Q. B. at p. 270).

The next case I will refer to is *Horne* v. *Midland Railway Company* (28 L. T. Rep. 312 ; L. Rep. 7, C. P. 583 ; L. Rep. 8, C. P. 131), in which the matter was elaborately discussed by nine judges in the two courts. In that case an action was brought against a railway company for failure to deliver a quantity of shoes in London by the 3rd Feb., 1871. The plaintiffs had sold these shoes at an unusually high price, and they gave the railway company notice of the contract and stated that the goods would be rejected if not delivered on the fixed date ; but they did not inform the railway company that the goods had been sold at an exceptionally high price. The goods were not tendered for delivery until the 4th Feb. and were rejected by the buyer on that ground, and the question was whether the damages payable by the defendant company were to be measured by reference to the price at which the plaintiffs would have been paid for them on the sub-contracts if delivered in time, or by reference to the market price. It was held that the latter was the true measure of damages, the loss of the exceptionally high price not being such as might reasonably be considered as arising naturally from the defendants' breach of contract or such as might be reasonably supposed to have been in the contemplation of both parties at the time when they made the contract. It is clear from this case that the court rejected the view that the damages ought to be based on the footing of the value of the goods to the plaintiff, having regard to his sub-contracts.

These cases led up to the important decision of *Rodocanachi* v. *Milburn* (6 Asp. Mar. Law Cas. 100 ; 56 L. T. Rep. 594 ; 18 Q. B. Div. p. 67). In that case the plaintiffs had chartered the defendants' ship for carriage of a cargo of cotton seed from Alexandria to the United Kingdom, and the

plaintiffs had sold the cargo to arrive at a price less than the market value of the goods at the port of discharge at the same time when the cargo should have arrived. The cargo was lost by the negligence of the master, and it was held that in estimating the damages the market value must be looked to and not the price at which the plaintiffs had in fact sold the cargo. Lord Esher, after stating that the measure of damages must be the difference between the position of a plaintiff if the goods had been safely delivered and his position if the goods were lost, showed clearly that in his view sub-contracts, whether there was or was not a market value at the port of discharge, were not affected by the price obtained on a sub-contract. "What is to be the rule in getting at the value of the goods? If there is no market for such goods, the result will be arrived at by an estimate by taking the cost of the goods to the shipper and adding to that the estimated profit he would make at the port of destination." I pause here to say that he is considering a case where there has been no alteration in the value of the goods between the relevant dates. "If there is a market there is no occasion to have recourse to such a mode of estimating the value—the value will be the market value when the goods ought to have arrived. But the value is to be taken independently of any circumstances peculiar to the plaintiff. It is well settled that in an action for non-delivery or non-acceptance of goods under a contract of sale the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as, for instance, an intermediate contract entered into with a third party for the purchase or sale of goods." Lindley, L.J. makes a similar statement: "The damages," he says, in "such an action are the value of the goods at the port of discharge minus the accruing freight, and any contract for sale of the goods made by the charterers whether at a greater or less price than the market value, is not to be taken into account." This decision has constantly been cited and always approved. It was expressly approved in the House of Lords in the case of *Williams Brothers* v. *Agius Limited* (110 L. T. Rep. 865; (1914) A. C. 510), by Lord Haldane, L.C. and Lords Dunedin, Atkinson, Moulton, and Parker. It was a case of carriage of coal by sea and failure to deliver, followed by an arbitration, and there had been a sub-contract of sale. Lord Haldane observed, while referring with approval to *Rodocanachi* v. *Milburn* (*sup.*): "In that case it was held that in estimating the damages for the non-delivery of goods under a contract, the market value at the date of the breach was the decisive element. In the judgment delivered by Lord Esher he laid down that the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as, for instance, a contract entered into by the plaintiff with a third party," and he adds that the law so laid down had not been affected by sect. 51 of the Sale of Goods Act, 1893. It is true that in that case there was a market price for the goods, but none of the Lords intimated that the rule or exclusion depended on whether or not there was a market for the particular goods at the port of discharge. The decision of the Privy Council, in *Sheik Mohammed Habib Ullah* v. *Bird and Company* (1921, 37 Times L. Rep. 405) supports the view that the exclusion from consideration of sub-contracts does not depend on the existence of a market. In that case there was no market; but Lord Dunedin delivered the judgment of the Board and observed: "The appellants, however, before the Board argued that the damages could not be recovered, because, as a matter of fact, the respondents supplied the sleepers from other wood which they had and made a profit on that supply greater than the profit which they would have made by the contract wood. The answer to this argument is to be found in the well-known case of *Rodocanachi* v. *Milburn* (*sup.*), which was applied by the House of Lords in the recent case of *Williams* v. *Agius* (*sup.*)," and he cited the passage from the former case which is above set out. In my opinion it is clear from this that Lord Dunedin's view was that the exclusion of intermediate contracts entered into by the plaintiff from a calculation of damages is irrespective of the question whether there is or is not a market for the goods. I should add that the passages cited from *Williams* v. *Agius* (*sup.*) by my brother Greer show that, in my view, Lord Dunedin held that opinion when delivering judgment in the House of Lords: (see 110 L. T. Rep. at p. 869; (1914) A. C. 511, at pp. 522 and 523). It is, I think, plain from the cases I have cited, as well as from a number of other cases which I have referred to, that it is unsound to suggest that the true measure of damages is the amount necessary to indemnify the plaintiff against the loss that he has in fact sustained, or the value of the goods to him if he has entered into a sub-contract, or, in other words, that he is entitled to damages on the footing of *restitutio in integrum* so far as money will put him in that position. This contention was actually argued in the House of Lords case, which I have last mentioned, and it was contended that the rule laid down in *Rodocanachi* v. *Milburn* (*sup.*) was not the true rule, but this contention was negatived by the House. I do not think the decision of the Privy Council in *Wertheim* v. *Chicoutini Pulp Company* (104 L. T. Rep. 226; (1911) A. C. 301) can be said to be in conflict with the rule as above stated since I find this passage: "In the case of non-delivery, where the purchaser does not get the goods he purchased, it is assumed that these would be worth to him if he had them what they would fetch in the open market, and if he wanted to get others in their stead he could obtain them in that market at that price. In such a case the price at which the purchaser might in anticipation of delivery have resold the goods is properly treated, where no question of loss of profit arises, as an entirely irrelevant matter (*Rodocanachi* v. *Milburn* (*sup.*))."

There is, I think, nothing in the case of *Ströms Bruks Actie Bolag* v. *Hutchison* (93 L. T. Rep. 562; (1905) A. C. p. 515), which conflicts with the above general rule, for the decision of the House of Lords was based on the view that the proper measure of damages in the circumstances was the cost of replacing at the port of destination the goods which the defendants had neglected to deliver at the time when they should have been delivered, less the value of the goods in Sweden and the amount of the freight and insurance. This amount was greater than the sum paid by the plaintiffs under a sub-contract for sale, and this fact justified a judgment for the sum awarded by the Lord Ordinary as general damages. There is, at any rate, no hint that the case of *Rodocanachi* v. *Milburn* (relied on there by the respondents) was being in any respect disapproved.

The expressions of opinion in the textbooks on this matter, like the oracles of Delphi, are relied on by both sides. As I understand them they are in favour of the view above expressed. For example, the conclusions arrived at by the learned editor of Benjamin on Sale, 7th edit., at pp. 1018 to 1020, seem to me to be justified by the authorities as they now stand; and, dealing

with the case where there is no market and where the seller at the date of the contract did not know that the goods had been sub-sold or were bought for sub-sale, or would probably be sub-sold, he says that the buyer may buy the best substitute procurable or may charge the seller "the difference between the contract price and the value of the goods as general damages." The passage goes on as follows: "Some evidence of such value is afforded by the sub-sale price or the price of the goods at the market nearest to the place of delivery or at a distant market added to the expense of transportation to the place of delivery or their price at the market in the place of delivery at a time other than that fixed by the contract for delivery." The only criticism I have to make with regard to the passage I have quoted is that I doubt whether the words "were bought for sub-sale or would probably be sub-sold" are sufficiently precise. I suppose most vendors of goods and most carriers might be taken to know that if the purchaser or consignee is a trader the goods will probably be sold, or are bought for sub-sale, but the authorities seem to show conclusively that something more than that is necessary to enable the damages to be assessed by reference to a contract of sub-sale entered into before the date of delivery. The case of *Grébert-Borgnis* v. *Nugent* (15 Q. B. Div. 85) may be referred to. The Master of the Rolls there said that if the sub-contract was not made known to the vendor the defendant could not be made liable for what the plaintiff had to pay under it, and he proceeded thus: "If there be no market for the goods, then the sub-contract by the plaintiff, although not brought to the knowledge of the defendant, the original vendor, may be put in evidence in order to show what was the real value of the goods, and so enable the plaintiff to recover the difference between the contract price and the real value." He then dealt with the case where the sub-contract was fully made known to the plaintiff, and he said that the cases established that the original vendor was to be liable to so much of the sub-contract as was made known to him, but only to that extent. It is not in dispute that in some cases a sub-contract may afford evidence of "real value," but in my opinion such evidence is of little or no weight if it is proved, as in the present case, that there has been a disastrous drop in the market price of the goods between the date of the sub-contract and the date on which the goods should have been delivered. *Stroud* v. *Austin* (1 Cab. & E. 119) was a case where the sub-contract was accepted as affording evidence of value at the date of the breach. It was an action by a purchaser of English steel rails against the sellers for damages for non-delivery. The contract of sale was dated the 24th Nov., 1881, and four days later the plaintiff sold the rails to sub-purchasers in Canada at a price exceeding the contract price by 864*l*. The defendants shipped no rails under the contract, and it was proved that no English steel rails could be obtained at New York in bond or at all at the date when the steel rails should have been delivered in New York. Cave, J. held that this claim for 864*l*. must succeed, but it is material to note the grounds of the decision. He held that the defendants could not be made liable in respect of the sub-purchaser's claim against the plaintiff as they had no notice of the sub-contract, but that he was entitled to what he called "the market price" of the English rails in bond in New York in February, 1882, and the proof, he said, was that "on the 28th Nov. they had been sold at an advance over what the plaintiff had given to the defendants, of 864*l*. There has been no sale at all since then, the plaintiff having purchased and held the whole stock of English rails in bond in New York. Now it seems to me the price which was given on the 28th Nov. is good evidence of the value at that time, and that in the absence of any evidence to show the price of English rails in bond has gone down it is also good evidence of the value in 1882." It will be observed that the plaintiff was not given an indemnity, and that the damages were not based on the footing of the value to him of the steel rails since the defendants were not made liable in respect of the sub-purchaser's claim against the plaintiff. The contract of sub-sale was referred to merely as evidence of the value of the rails in the absence of any evidence of a fluctuation in the market.

It is, however, contended that in the present case the plaintiffs have pleaded in the alternative that the defendants wrongfully converted to their own use the quarters of wheat which were not delivered by the defendants, and it is laid down that whatever may be the rule with regard to damages founded on contract in such a case the plaintiffs are entitled, if the action is regarded as one for a tort, to bring into consideration the loss which they have incurred by reason of the sub-contracts which they have not been able to fulfil. I am not satisfied that there was in this case a right of action founded on tort. It may well be that to allow the wheat to become mixed with the barley at some uncertain date in the course of the voyage was a tortious act and would have justified an action for conversion; but that is not the tort complained of, which is based simply on the non-delivery of a certain number of quarters of wheat, with the result that the plaintiffs, having refused to accept the mixture, treated the defendants as having failed to deliver the 47 tons in respect of which the reference took place. An action based simply on non-delivery of goods has been hitherto treated as one founded on contract. The question is whether the defendant's acts amounted to an interference, not capable of justification, with the dominion of the plaintiff as the true owner of the goods (*Hollis* v. *Fowler*, 27 L. T. Rep. 168; L. Rep. 7 H. L. 757, 766), see the opinion of Blackburn, J. The mere omission or negligence of a carrier is not a conversion (Bullen & Leake, 8th edit., p. 355). An action based simply on non-delivery of goods is one founded on contract: *Fleming* v. *Manchester, Sheffield and Lincolnshire Railway* (39 L. T. Rep. 555, 4 Q. B. Div. 89). See Halsbury's Laws of England, Vol. XXVII., p. 892, note *n*, and Halsbury, 2nd edit., Vol. IV., p. 95, a title on "Carriers," which has an advantage of being contributed by Lord Wright and Mr. Manningham-Buller.

I am, however, reluctant to decide the question involved merely on this technical ground, and I will assume that in the present case we are entitled to assess the damage on the footing of a wrongful conversion by non-feasance or negligence of some kind. But is it true to say that the measure of damage which can be assessed against a carrier in such a case differs from that which would be assessed for breach of contract? I am, of course, assuming that the defendant has no notice of any sub-contract by the plaintiff. It is no doubt true that in a case of a claim in tort, damages are constantly given for consequences of which the defendant had no notice. In truth it is immaterial whether or not the damage which flows from his tortious act is such as the wrongdoer might reasonably have anticipated. On the other hand, in tort (as in contract, unless notice to the defendant has

affected the matter) the wrongdoer is responsible in damages only for "the natural and direct result of the wrongful act": *The Argentino* (6 Asp. Mar. Law Cas. 280, 348, 351; 59 L. T. Rep. 914, 917; 13 Prob. Div. 191, 200. 201), per Bowen, L.J.; *The Edison* (18 Asp. Mar. Law Cas. 276; 147 L. T. Rep. 141; (1932) P. 52), per Scrutton and Greer, L.JJ.; and see the speech of Lord Wright in the House of Lords, in which all the Lords concurred (18 Asp. Mar. Law Cas. 381; 149 L. T. Rep. 49, 50; (1933) A. C. 449, 459, 460). The cases, it is true, were cases of damages due to negligence by a wrongdoing vessel, resulting in the destruction of a vessel engaged in a profit-earning enterprise, and to such cases special considerations apply; but the observations to which I am calling attention have a much wider application.

As I have already indicated, the authorities in disregarding sub-contracts entered into by a plaintiff in actions for non-delivery, whether on a sale of goods, or in a case of non-delivery by a carrier, have acted on the ground that sub-contracts are taken to be accidental circumstances peculiar to the plaintiff. A loss on such sub-contracts is not the natural and direct result of the tortious act, any more than a special loss arising from the impecuniosity of the plaintiff (another circumstance regarded as peculiar to him) which is held to be, to use Lord Wright's phrase in *The Edison* (18 Asp. Mar. Law Cas. at p. 382; 149 L. T. Rep. at p. 51; (1933) A. C. at p. 460), "outside the legal purview of the consequences of those acts."

Turning to the earlier authorities on this part of the case, I may observe that, in the scores of cases which are reported as dealing with the measures of damage in an action against a carrier or in an action founded on failure to deliver goods sold to the plaintiff, there is, so far as I have been able to ascertain, no statement in any judgment that the damages might be higher on the allegation of a tort than they would be in contract. On the contrary, as between seller and buyer it has been decided that the buyer cannot recover larger damages in tort than in contract: see *Chinery* v. *Viall* (2 L. T. Rep. 466; 5 H. & N. 288), *Hiort* v. *London and North-Western Railway Company* (40 L. T. Rep. 674; L. Rep. 4 Ex. 188), and see particularly the judgment of Thesiger, L.J.). Sect. 51 of the Sale of Goods Act, 1893, shows that that view was accepted by the framers of the Act. (See Chalmers, 11th edit., p. 137; Benjamin on Sale, 11th edit., p. 984, note *x*.)

I find in Mayne on Damages, 10th edit., p. 40, the statement that in cases of tort to property, where there are no circumstances of aggravation, the damages are generally the same as in cases of contract. It has been held repeatedly that in trover the measure of damage, generally speaking, is the value of the goods. As an illustration of this it should be observed that in the case of *The Parana* (3 Asp. Mar. Law Cas. 399; 36 L. T. Rep. 388; 2 Prob. Div. 118) the claim was for damage arising from breach of contract to deliver goods shipped, the default being due to defects in the ship, and it was held that the plaintiffs could not recover damages based on a claim for loss of market.

A few years later a somewhat similar case was brought in connection with *The Notting Hill* (5 Asp. Mar. Law Cas. 241; 51 L. T. Rep. 66; 9 Prob. Div. 105), but in this case the claim was made in tort and not in contract. The judgments in the Court of Appeal—Brett, M.R., Bowen, L.J., and Fry, L.J.—decided that the rule with regard to remoteness of damage was precisely the same whether the damages were claimed in actions of contract or of tort and they followed the decision in *The Parana* (*sup.*). The judgments of Bowen, L.J. in *Cobb* v. *Great Western Railway* (68 L. T. Rep. 483, 485; (1893) 1 Q. B. 459) and in *The Argentino* (*sup.*), and of Scrutton and Greer, L.JJ. in *The Edison* (*sup.*) are to the same effect. To avoid misconception, I would add that I am dealing only with the case of an action in trover where there are no circumstances of aggravation and where, though technically the facts may be held to amount to conversion by the defendant to his own use, yet the real ground of the action is breach of contract to deliver. The case of *France* v. *Gaudet* (L. Rep. 6 Q. B. 199) was, however, relied on by the plaintiffs. That was an action for the wrongful conversion to their own use by the defendants of 100 cases of champagne. This wine had been bought at the price of 14*s*. per dozen, and had been immediately resold by the plaintiff to a Captain Hodder, whose ship was on the 13th Aug. in the London Docks and about to sail. The sale was for delivery on the following day, the 14th Aug., but when the plaintiff sent to the defendant's wharf, and required the delivery of the wine, the defendants refused to deliver it on an untenable ground, and Captain Hodder sailed without the wine. It was admitted that champagne of that peculiar brand and quality was not to be bought in the market so as to enable the plaintiff to substitute other cases of champagne for the 100 cases which he had purchased and contracted to sell to Captain Hodder. The defendants, however, had no notice of the contract between the plaintiff and Hodder, and the question for the Court of Appeal was as to the measure of damage. The material part of the decision of the court, delivered by Mellor, J., was in the following terms: "We are of opinion that the true rule is to ascertain the actual value of the goods at the time of conversion, and that a *bona fide* sale having been made to a solvent customer at 24*s*. per dozen, which would have been realised had the plaintiff been able to obtain delivery from the defendants, the champagne had, owing to these circumstances, acquired an actual value of 24*s*. per dozen, and we think that in the present case that ought to be the measure applied, and that a jury would not only have been justified in assuming that to be the value, but ought, where the transaction was *bona fide*, to have taken that as the measure of damages." The judgment goes on to state the grounds for the conclusion that notice of a special contract is not necessary in such a case, the defendant being *ex hypothesi* a wrongdoer, and this passage might be thought to have given some ground for the contention that in such a case as we are considering, the measure of damage should be greater if the action can be brought in tort rather than in contract. It is, however, to be noted that Mellor, J. himself explained the case in *Horne* v. *Midland Railway Company* (*sup.*). Counsel for the plaintiffs were arguing that the loss of profit on a contract of sub-sale might be taken into account, and they relied on *France* v. *Gaudet*; but Mellor, J. remarked: "That case was peculiar. Champagne of a similar quality was said not to be procurable in the market. There was therefore no other test of value of the goods." Having regard to this statement I can see no ground for doubting that the damages recoverable in *France* v. *Gaudet* (*sup.*) were based on the price obtainable on the sub-sale on precisely similar grounds to those which, as I have stated above, were anticipated in *Stroud* v. *Austin* (*sup.*).

My conclusion is that whether the action is ni tort or contract, whether there is or is not a market for the same goods at the port of discharge, circum-

stances peculiar to the plaintiff, such as a sub-contract by him not communicated to the defendant, must be excluded from consideration, although in a proper case such a sub-contract, like any other contract of sale at a relevant date, might be used as evidence of value. The sub-contracts in the circumstances of the present case are, in my view, valueless as evidence of value.

There remains the question of fact as to the true value on the evidence of the 47 tons of Rumanian wheat on or about the 10th Jan., 1931. On careful consideration I have come to the same conclusion as Greer L.J. on this question, namely, that the value has been shown to be 23*s.* 6*d.* per quarter. I therefore agree with the order on the appeal which has been proposed by my brother Greer.

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

Solicitors for the respondents, *Pritchard, Sons, Partington,* and *Holland,* for *Andrew M. Jackson and Co.,* Hull.

Judicial Committee of the Privy Council.

July 6, 9, 10, *and* 26, 1934

(Present: Lords ATKIN, TOMLIN, MACMILLAN, WRIGHT and Sir LANCELOT SANDERSON.)

Paterson Steamships Limited v. Canadian Co-operative Wheat Producers Limited. (*a*)

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

Canada — Quebec — Ship — Cargo — Loss by stranding—Unseaworthiness of ship—Fault or privity of owners—Canadian Water Carriage of Goods Act, 1910 (9 *&* 10 *Edw.* 7, *c.* 61, *R. S. C.*).

The Canadian Water Carriage of Goods Act, 1910, *provides: Sect.* 7: "*The ship, the owner, charterer, agent or master shall not be held liable for loss arising from fire, dangers of the sea or other navigable waters, acts of God or public enemies . . . or for loss arising without their actual fault or privity, or without the fault or neglect of their agents, servants or employees.*"

In an action brought by cargo owners against the owners of the ship carrying the cargo, claiming damages for the loss of and damage to their cargo of grain, the ship was found to be unseaworthy, in that the grain cargo was loaded in bulk and without shifting boards, and that this unseaworthiness was the cause of the loss, so as to render the shipowners liable under the above section. In an appeal by the shipowners,

Held, that the finding of unseaworthiness must necessarily involve some fault or failure within the meaning of sect. 7. *Hence the appellants could not avail themselves of the exception of dangers of the seas, though these dangers caused the loss, because they could not show in respect of the unseaworthiness which was the real cause of the loss, that it existed under conditions entitling them to the benefit of the general words of exception at the end of the section.*

Decision of the Court of King's Bench for the Province of Quebec (Appeal side) affirmed.

APPEAL from a decision of the Court of King's Bench for the Province of Quebec (Appeal side) dismissing the defendants' appeal from the judgment of the Superior Court of the District of Montreal, delivered on the 31st May, 1932, by Philippe Demers, J.

The plaintiffs' claim in the action was in respect of loss of and damage to a cargo of wheat and barley occasioned by the stranding of the defendants' steamship *Sarniadoc* in shallow water near Main Duck Island at the Eastern end of Lake Ontario. After the stranding of the *Sarniadoc* a portion of her cargo was salved and the plaintiffs' original claim in the action amounted to the sum of $83,029.03. The learned trial judge gave judgment in favour of the plaintiffs for the sum of $76,911.44 with interest from the 14th Jan., 1931, and costs. This judgment was affirmed on the 29th March, 1933, by the Court of King's Bench for the Province of Quebec (Tellier, C.J., and Dorion, Rivard, Letourneau, JJ.; Bond, J. dissenting).

The facts are fully stated in their Lordships' judgment.

Paterson Steamships Limited appealed.

A. T. Miller, K.C., *G. St. Clair Pilcher,* and *Lynch Staunton* (of the Canadian Bar) for the appellants.

D. N. Pritt, K.C. and *C. Russel McKenzie,* K.C. (of the Canadian Bar) for the respondents.

The judgment of their Lordships was delivered by

Lord Wright. — The appellants were sued as the owners of the steamship *Sarniadoc,* which on the 29th Nov., 1929, stranded at Main Duck Island at the eastern end of Lake Ontario and became practically a total loss: the respondents sued as owners of a parcel of wheat and barley, being part cargo of the *Sarniadoc* when she stranded, and in the action claimed damages in respect of the loss of the grain consequent on the stranding. The respondents have succeeded before the trial judge and before the Court of King's Bench (in Appeal) for the Province of Quebec, Bond, J. dissenting. The appellants now appeal. No question of amount need here be considered.

The respondents' parcel had been transhipped at Port Colborne and was being carried under the terms of a bill of lading which contained the clause "This shipment is subject to all the terms and conditions and all the exemptions from liability contained in the Water Carriage of Goods Act," that is the Canadian Act of 1910 so entitled; it will accordingly be necessary to consider the provisions of that Act in relation to the facts of the case.

The *Sarniadoc* was only partially loaded, her actual draft being about 14ft., as compared with a fully loaded draft of 15ft. 6in. She had two holds, which cannot have been full of grain. She was bound to Montreal, where it was intended to keep the grain in the holds over the winter. She came out of the Welland Canal at Port Dalhousie and entered Lake Ontario at 2.15 p.m. on the 29th Nov., 1929. The master was at first apprehensive of the

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

weather, and thought it was more prudent to take a northerly course in the direction of Toronto, where she might have remained with the cargo over the winter. But about 4.10 p.m., thinking the weather more favourable, he decided to proceed on an easterly course down the Lake. At night the weather got worse and the wind increased to a westerly to west-north-westerly gale. The temperature fell to zero, with heavy snow. When passing Peter Point Light about 3 a.m. on the 30th Nov., 1929, the master did not succeed in getting a satisfactory bearing, but he proceeded till about 6 a.m., when he reduced speed, being uncertain of his position. He decided, he says in his evidence, to make for Main Duck Island in order to shelter under it, instead of turning at the appropriate position northwards in order to make Kingston, which was on the course for Montreal. At about 7.10 a.m. the trees of the Island were suddenly seen about three-quarters of a mile distant. The master at once put his ship about to beat off the lee shore, but, owing to the force of the wind and sea, the vessel's head fell off, and she stranded on the reef at the northerly end of the island, where she remained fast and broke her back.

At a wreck inquiry held at Toronto on the 9th Jan., 1930, the Dominion Wreck Commissioner, sitting with two Nautical Assessors, found that the master was in default, and that the stranding was caused by his default; it was found that from the outset proper and ordinary judgment was not exercised.

At the trial, the master, in his evidence, was not prepared to say that the ship was seaworthy, and when challenged to explain why he kept on an easterly course instead of turning on a northerly course to Kingston, gave answers which were susceptible of the meaning that he did not do so because he knew the cargo might be liable to shift, and he was accordingly afraid to turn the ship on a course which would put her in the trough of the sea, though he also said that he decided to seek shelter because of bad weather conditions and poor visibility.

The circumstances of the loss appear to be somewhat peculiar, but their Lordships have come to the conclusion that for the purposes of this appeal they must accept the concurrent findings of fact arrived at by the trial judge and by the majority of the Court of Appeal. These findings may be summarised as being (1) that the ship was unseaworthy in that the grain cargo was loaded in bulk and without shifting boards or other precautions to keep it from shifting, and that the owners had not exercised due diligence to make her seaworthy; and (2) that this unseaworthiness was the cause of the loss, in the sense that the master had been apprehensive that his cargo, stored as it was, would shift if he were to put the vessel on the proper course, which would have involved putting her in the trough of the sea, and for that reason did not do so, whereas if he had felt able to take that course he would have cleared the shoal on which he stranded. The finding of the court below on this point was that there was in a sense bad navigation, but the navigation was justified by the master's legitimate fears. Rivard, J. thus sums up the position: "Car il ne semble pas douteux que l'échouement du *Sarniadoc* fut le résultat d'une manœuvre erronée en soi, mais que le maître dut adopter, parce que la marche normale du vaisseau l'aurait mis au creux de la lame, avec danger de désarrimage des grains. Le naufrage et une perte totale auraient pu résulter d'un désarrimage dans ces conditions; la manœuvre adoptée pour éviter ce désastre a causé l'échouement. Erreur de navigation, mais justifiée, chez le maître, par la crainte d'un désarrimage possible et qui en effet devait être prévenu."

The view of the case which found favour with Bond, J., who dissented in the Court of Appeal, was that the stowage of the grain did not render the vessel unseaworthy, but that the loss was due to errors in navigation which, in his view, seem to have mainly consisted in the action of the master in proceeding down the Lake in heavy weather with snowstorms without verifying his position by means of accurate bearings or soundings, until he suddenly found himself about three-quarters of a mile off Main Duck Island; the action he then took was not, in the view of the judge, "influenced to any appreciable extent by a consideration of the likelihood of the cargo shifting." On this view of the facts which seems to represent the case principally relied on by the appellants, Bond, J. held that the appellants were entitled to succeed under the Water Carriage of Goods Act. But the trial judge and the majority of the Court of Appeal, having found that the loss was caused by unseaworthiness, held that the provisions of the Act rendered the appellants liable.

Their Lordships regard these findings of the courts below as findings of fact. It is true that in some cases a finding that a ship was unseaworthy may be a mixed finding of fact and law; thus in *Elder Dempster and Co. Limited and others* v. *Paterson, Zochonis, and Co. Limited* (16 Asp. Mar. Law Cas. 351; 131 L. T. Rep. 449; (1924) A. C. 522), where the facts were not in dispute, it depended on construction of law whether these facts amounted to bad stowage or to that type of unseaworthiness which does not endanger the ship, but involves damage to the cargo in her. In the present case, however, the question was whether the loading of the grain without any precaution to guard against shifting, particularly where the holds were not fully loaded, endangered the safety of the vessel and made her unfit for the adventure as a ship. That was a question of fact. Equally it was a question of fact whether due diligence had been exercised to make the vessel seaworthy: the answer did not depend on the construction of any legal regulation; it was agreed that the standard of the duty which applied in the case of the *Sarniadoc*, which was registered in Great Britain, was to be found in sect. 452, sub-sect. (1), of the Merchant Shipping Act, 1894; all that is required by that section is that all necessary and reasonable precautions should be taken in order to prevent the grain cargo from shifting: what was necessary and reasonable in all the circumstances of the case, including the practice alleged by the appellants to prevail in the Canadian Lakes grain trade to do nothing but level off the grain in the hold, could only be determined as an issue of fact. Equally was it a question of fact whether the unseaworthiness found to exist did or did not cause the casualty. It cannot properly be said that the causation which the judge found to have operated was too remote in law.

This Board has said in a judgment delivered by Lord Dunedin in *Robins* v. *National Trust Company Limited and others* (137 L. T. Rep. 1; (1927) A. C. 515), on an appeal from the Supreme Court of Ontario, that it is not a cast-iron rule that the Board will not "examine the evidence in order to interfere with the concurrent findings of two courts on a pure question of fact." The rule is one of conduct which the Board has laid down for itself, and is not a rule based on any statutory provision. Their Lordships in the present case can discover no error in law which could vitiate

the findings, still less anything that could be said to involve a miscarriage of justice. The loss of this vessel is somewhat difficult to explain, even allowing for the storm and the bad visibility. A plausible suggestion that she was lost because of deficient engine power—that is, another form of unseaworthiness—has been unanimously rejected by all the judges below, and was not even argued before their Lordships. There remain the rival findings of Bond, J. on the one side and of the other judges on the other. Their Lordships can see no ground whatever in all the circumstances of this case for interfering with the concurrent findings of both the courts which have considered the matter.

To determine how these findings affect the obligations of the parties, it is necessary to examine the terms of the Water Carriage of Goods Act, 1910, which is incorporated in the contract under which the grain was being conveyed. The terms of the Act have been the subject of argument before this Board, and must now be considered. Except for a decision of this Board in *Corporation of the Royal Exchange Assurance (of London) and another* v. *Kingsley Navigation Company Limited* (16 Asp. M. C. 44; 128 L. T. Rep. 673; (1923) A. C. 23)5, there is apparently no authority on its construction: at least their Lordships have not been referred to any, and they have not themselves been able to find any. The Act, however, has a certain kinship with similar legislation in other countries on the same subject-matter, in particular, with the United States Harter Act, 1893, and the later Acts, the New Zealand Sea Carriage of Goods Act, 1922, and the British Carriage of Goods by Sea Act, 1924, with which in substance the Australian Act of 1924 is identical. These Acts differ in general scheme and framework from the Canadian Act, but in certain respects decisions under them may be helpful in construing the Canadian Act. And all these Acts agree in this respect, that they superimpose statutory restrictions on the freedom possessed by the shipowner at common law to restrict his liability as carrier, and at the same time give him the benefit of statutory provisions in his favour. These Acts accordingly cannot be understood or construed except in the light of the shipowners' common law liability and the usual methods of limiting that liability previously in vogue.

It will therefore be convenient here, in construing those portions of the Act which are relevant to this appeal to state in very summary form the simplest principles which determine the obligations attaching to a carrier of goods by sea or water. At common law, he was called an insurer; that is, he was absolutely responsible for delivering in like order and condition at the destination the goods bailed to him for carriage. He could avoid liability for loss or damage only by showing that the loss was due to the act of God or the King's enemies. But it became the practice for the carrier to stipulate that for loss due to various specified contingencies or perils he should not be liable: the list of these specific excepted perils grew as time went on. That practice, however, brought into view two separate aspects of the sea carrier's duty which it had not been material to consider when his obligation to deliver was treated as absolute. It was recognised that his overriding obligations might be analysed into a special duty to exercise due care and skill in relation to the carriage of the goods and a special duty to furnish a ship that was fit for the adventure at its inception. These have been described as fundamental undertakings, or implied obligations. If then goods were lost (say) by perils of the seas, there could still remain the enquiry whether or not the loss was also due to negligence or unseaworthiness. If it was, the bare exception did not avail the carrier.

In the concise words of Willes, J. (in *Notara and another* v. *Henderson and others*, 3 Mar. Law Cas. (o.s.) 419; 26 L. T. Rep. 442, at p. 445; L. Rep. 7 Q. B. 225, at p. 235), "the exception in the bill of lading only exempts the shipowner from the absolute liability of a common carrier, and not from the consequences of the want of reasonable skill, diligence, and care." Willes, J. is there referring to what may be called the specific excepted perils. The position is thus summed up by Lord Sumner in *F. O. Bradley and Sons Limited* v. *Federal Steam Navigation Company Limited* (17 Asp. Mar. Law Cas. 265; 137 L. T. Rep. 266, at p. 267; "The bill of lading described the goods as 'shipped in apparent good order and condition' . . . it was common ground that the ship had to deliver what she received, as she received it, unless relieved by excepted perils. Accordingly, in strict law, on proof being given of the actual good condition of the apples on shipment and of their damaged condition on arrival, the burden of proof passed from the consignees to the shipowners to prove some excepted peril which relieved them from liability, and further, as a condition of being allowed the benefit of that exception, to prove seaworthiness at Hobart, the port of shipment, and to negative negligence or misconduct of the master, officers and crew with regard to the apples during the voyage and the discharge in this country."

But negligence and unseaworthiness of the carrying vessel might generally, by British law, be excepted by express words; in such a case, though the exception of perils of the sea (to take an instance) might not *per se* for the reasons stated on the facts, avail the carrier, yet he could rely on the exception of negligence or of unseaworthiness as the case might be, when negligence or unseaworthiness had caused or contributed to the loss. One important object of the Acts under consideration was to limit the use of these general exceptive clauses.

The Canadian Act can now be considered, so far as material, in the light of these simple rules, simple in themselves, though in application involving many difficult refinements. Sect. 4 consists of prohibitions; the section recognises and enforces the fundamental obligations which have just been explained, and then goes on to enact that any clause, covenant or agreement which weakens or relieves against them is illegal and void unless it is in accordance with the other provisions of the Act.

It is, for the present purposes, in sects. 6 and 7 that these provisions are to be found.

Sect. 6 deals with the question of negligence and latent defect: it is limited so far as concerns negligence to "faults or errors in navigation or management of the ship": the meaning of these words (or of analogous words) in the Carriage of Goods by Sea Act, 1924, was discussed in *Gosse Millard Limited* v. *Canadian Government Merchant Marine Limited* (17 Asp. Mar Law Cas. 549; 140 L. T. Rep. 202; (1929) A. C. 223), where they were held not to be wide enough to cover matters involving simply a failure to take care of the cargo. What is important to note in sect. 6 is that the protection is conditional on the owner having exercised due diligence to make the ship seaworthy. At common law, seaworthiness of the ship in a contract for sea carriage has, if necessary, to be shown to have existed at the commencement of the voyage, but unseaworthiness involves no liability on the shipowner unless it has caused the damage complained of (*Kish and*

another v. *Taylor, Sons, and Co.* (12 Asp. Mar. Law Cas. 217; 106 L. T. Rep. 900; (1912) A. C. 604); but the obligation to provide a seaworthy ship is absolute, and is not limited to due diligence to make it so. The matter which sect. 6 deals with as the condition on which its privileges may be relied on is not seaworthiness, but due diligence to make the ship seaworthy: if, however, that condition is not fulfilled, the shipowner cannot, under sect. 6, excuse himself from liability for loss due to negligence in the respects specified in the section. What is meant in the British Sea Carriage of Goods Act by due diligence to make the ship seaworthy was discussed in *W. Angliss and Co. (Australia) Proprietary Limited* v. *P. and O. Steam Navigation Company* (17 Asp. M. C. 311; 137 L. T. Rep. 727; (1927) 2 K. B. 456); it is not limited to personal diligence on the part of the owner. The Act does not in terms say that there shall not be implied in any contract of sea carriage the absolute undertaking to provide a seaworthy ship, but it would, for practical purposes, seem to effect the same result, subject to the condition by the last words of the section "or from latent defect." The view that the whole section is subject to the condition of due diligence to make the vessel fit is supported by *McFadden Brothers* v. *Blue Star Line Limited* (10 Asp. Mar. Law Cas. 55; 93 L. T. Rep. 52; (1905) 1 K. B. 697), and by the case in the Supreme Court of the United States, the *Carib Prince* (170 U. S. Rep. 665), which dealt with analogous provisions in the Harter Act.

It follows that on this construction of the section the findings of fact of Bond, J. would entitle the appellants to succeed, as, indeed, the judge held. It is true that though he finds the ship was seaworthy he does not seem expressly to find that the owners had exercised due diligence to make her so, which is the essential finding under the section, and theoretically might be a different matter; but no doubt that finding was implied. The fault or neglect he finds to have caused the loss was a fault in navigation.

But apart from the case of latent defect, sect. 6 has said nothing about unseaworthiness causing the loss, nor does it cover any case of negligence not falling within its precise and limited terms. It is, then, to sect. 7 that resort must be had in order to determine the legal effect of the findings of fact of the courts below, that is, that the cargo was lost owing to the ship being unseaworthy. Even if the court do not find whether or not due diligence was exercised to make her seaworthy, that finding is clearly implied: the bad stowage, on its face, must have involved the fault or neglect of the owners or of their responsible servants or agents. There is no question of latent defect.

The words of sect. 7 which are material to this case are: "The ship, the owner, charterer, agent or master, shall not be held liable for loss arising from fire, dangers of the sea or other navigable waters, acts of God or public enemies . . . or for loss arising without their actual fault or privity or without the fault or neglect of their agents, servants or employees": Their Lordships disregard the intervening words which deal with matters such as inherent vice of the goods or delays or deviation, the last-named exception being somewhat difficult to construe.

The first words of the section contain a limited number of specific perils which are thus sanctioned by the Act. It is, however, clear that these exceptions will not *per se* protect the shipowner in respect of a loss caused by negligence or by unseaworthiness, and up to this point the shipowner will not be relieved from liability, unless the negligence is excused by sect. 6 or the unseaworthiness is a latent defect also within sect. 6. These exceptions do not cover the whole scope of the general obligations of the carrier, at common law or as set out in sect. 4. Thus, in the present case, the stranding was plainly a peril or danger of the sea, and in that sense the loss of the cargo was due to a danger of the sea. But it was also caused by unseaworthiness of such a character that it could not be described as a latent defect. On the principles already stated, the statutory exception of dangers of the sea does not in this case relieve the shipowner from liability: if he is to escape liability he can only find protection in the final sentence of sect. 7, which must next be construed.

In form the sentence is purely negative: "The owners, &c., are not to be liable for loss arising without the actual fault or privity, or without, &c." It is clear that the second "or" here must be read as "and": this was so held in *Gosse Millard's* case by the trial judge (17 Asp. Mar. Law Cas. at p. 3867, 138 L. T. Rep. at p. 423; (1927) 2 K. B. at p. 435), a ruling not questioned in the House of Lords (*sup.*). To avoid liability, the fault or neglect must not be that of either the shipowner or of any of the responsible persons who are enumerated. The negative form is appropriate because the words are intended to exclude what would otherwise be a liability for the loss. It may be questioned whether the shipowner can invoke these general words, unless the case is first brought within the specific exceptions set out in the earlier part of the section, and thereupon issues of negligence or unseaworthiness have fallen to be dealt with; it is not here necessary to decide this question, though the mode in which the analogous case of contractual exceptions has been dealt with, seems to suggest that the question should be answered in the affirmative: (see Lord Macnaghten in *Wilson and Co.* v. *Owners of the Cargo of the Xantho*, 57 L. T. Rep. 701, at p. 705; 12 App. Cas. 503, at p. 515). If these general words were to be read irrespective of the particular exceptions which precede them in the section it is difficult to see why these particular exceptions are stated at all; the general words would suffice to cover by themselves every case in which the shipowner could claim exemption from liability under sect. 7 for any loss due to the excepted perils.

What, then, is the precise effect of these words? The phrase "actual fault or privity" seems to be taken from sect. 502 of the Merchant Shipping Act, 1894, which relates to "fire." It has been held under that section that if the shipowner proves absence of actual fault or privity, he is exempted from loss, even if due to unseaworthiness (*Lennard's Carrying Company Limited* v. *Asiatic Petroleum Company Limited*, 113 L. T. Rep. 195; (1915) A. C. 705); that decision was applied in the construction of the same words in sect. 7 by this board in *Corporation of the Royal Exchange Assurance (of London) and another* v. *Kingsley Navigation Company Limited* (*sup.*), where the loss was by fire; as the fire was the result of unseaworthiness, the shipowners, not having established absence of actual fault or privity, were held to be liable. The meaning of the words was thus explained by Hamilton, L.J. (as he then was) in *Lennard's* case (109 L. T. Rep. 433, at p. 437; (1914) 1 K. B. 419, at p. 436): "Actual fault negatives that liability, which arises solely under the rule of respondeat superior." But as a matter of grammar the word "their" in sect. 7 relates back to the enumeration of persons at the beginning of the section and thus includes the actual fault or privity of the owner, charterer, agent or master, which is a much wider category

than that under sect. 502 of the Merchant Shipping Act; this may raise a question in the case of a loss by fire whether sect. 7 does not in this respect, and also by its reference next following to agents, servants and employees, put a heavier burden on the shipowner than sect. 502 of the Merchant Shipping Act, so as to be *pro tanto* inconsistent with that section. No such question, however, arises in this case. The general exception at the end of sect. 7 is obviously not limited to unseaworthiness, but goes to all cases apart from those covered in sect. 6, in which due care on the part of the enumerated persons is material to the due performance of the contract.

Now the general words go beyond the category of owner, &c., and deal with "the fault or neglect of their agents, servants or employees." But as regards unseaworthiness since the words "actual fault or privity" on the authorities quoted are to be construed as applying even to unseaworthiness it seems that the words which follow must also receive the same effect, with the result that if, but only if, the shipowner is able to exclude the actual fault or privity or the fault or neglect of the various persons enumerated, he will be able to relieve himself from liability for loss due, among other things, even to unseaworthiness, though the extent of that relief may be limited to cases where the loss is caused also by some one of the excepted perils specified in the earlier part of the section. The operative obligation to provide a seaworthy ship is thus under the Act reduced, even when unseaworthiness causes the loss, to an obligation which may be compendiously described as an obligation to use due diligence to make the ship seaworthy.

In the present case it is clear that the ship was, according to the findings of the courts below, not merely unseaworthy but unseaworthy in such a way as necessarily to involve some fault or failure within the final words of sect. 7. Such a finding, if not express, is obviously to be implied. Hence the appellants cannot avail themselves of the exception of dangers of the sea, though these dangers caused the loss, because they cannot show in respect of the unseaworthiness which was also a cause of the loss, and indeed the real cause of the loss, that it existed under conditions entitling them to the benefit of the general words of exception at the end of the section.

The appeal in their Lordships' judgment should be dismissed with costs.

They will humbly so advise His Majesty.

Appeal dismissed.

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

Solicitors for the respondents, *Middleton, Lewis, and Clarke.*

July 2, 3, 5 *and* 26, 1934.

(Present: Lords SANKEY, L.C., ATKIN, TOMLIN, MACMILLAN and WRIGHT.)

In the matter of Piracy jure gentium. (*a*)

REFERENCE UNDER THE JUDICIAL COMMITTEE ACT, 1833.

International law—Piracy jure gentium—*Question referred to Judicial Committee—Whether actual robbery necessary to support a conviction of piracy—Whether frustrated attempt not equally piracy.*

Actual robbery is not an essential element in the crime of piracy jure gentium. *A frustrated attempt to commit a piratical robbery is equally piracy* jure gentium.

CERTAIN Chinese nationals who had attacked a cargo junk on the high seas were brought as prisoners to Hong Kong and indicted for the crime of piracy. The jury found them guilty subject to the following question of law: "Whether an accused person may be convicted of piracy in circumstances where no robbery has occurred," which was referred to the Full Court of Hong Kong. That court having answered the question in the negative the accused were acquitted. Following on that decision, which was final, the following question was referred to the Judicial Committee: "Whether actual robbery is an essential element of the crime of piracy *jure gentium*, or whether a frustrated attempt to commit a piratical robbery is not equally piracy *jure gentium*."

Sir *Thomas Inskip*, K.C. (A.-G.) and *Wilfrid Lewis* contended that an attempt to rob on the high seas constituted piracy *jure gentium*.

Sir *Leslie Scott*, K.C. and *Kenelm Preedy*, for the Secretary of State for the Colonies, contended that in order to constitute piracy *jure gentium* there must be actual robbery on the high seas.

The opinion of their Lordships was delivered by

Lord Sankey, L.C.—On the 4th Jan., 1931, on the high seas, a number of armed Chinese nationals were cruising in two Chinese junks. They pursued and attacked a cargo junk which was also a Chinese vessel. The master of the cargo junk attempted to escape, and a chase ensued during which the pursuers came within 200 yards of the cargo junk. The chase continued for over half an hour, during which shots were fired by the attacking party, and while it was still proceeding, the steamship *Hang Sang* approached and subsequently also the steamship *Shui Chow*. The officers in command of these merchant vessels intervened and through their agency, the pursuers were eventually taken in charge by the Commander of H.M.S. *Somme*, which had arrived in consequence of a report made by wireless. They were brought as prisoners to Hong Kong and indicted for the crime of piracy. The jury found them guilty subject to the following question of law:—"Whether an accused person may be convicted of piracy in circumstances where no robbery has occurred." The Full Court of Hong Kong on further consideration came to the conclusion that robbery was necessary to support a conviction of piracy and in the result the accused were acquitted.

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

The decision of the Hong Kong court was final and the present proceedings are in no sense an appeal from that court, whose judgment stands.

Upon the 10th Nov., 1933, His Majesty in Council made the following order :—"The question whether actual robbery is an essential element of the crime of piracy *jure gentium* or whether a frustrated attempt to commit a piratical robbery is not equally piracy *jure gentium* is referred to the Judicial Committee for their hearing and consideration."

It is to this question that their Lordships have applied themselves, and they think it will be convenient to give their answer at once and then to make some further observations upon the matter.

The answer is as follows :

"Actual robbery is not an essential element in the crime of piracy *jure gentium*. A frustrated attempt to commit a piratical robbery is equally piracy *jure gentium*."

In considering such a question, the Board is permitted to consult and act upon a wider range of authority than that which it examines when the question for determination is one of municipal law only. The sources from which international law is derived include treaties between various States, State papers, municipal Acts of Parliament and the decisions of municipal courts, and last, but not least, opinions of jurisconsults or textbook writers. It is a process of inductive reasoning. It must be remembered that in the strict sense international law still has no legislature, no executive and no judiciary, though in a certain sense there is now an international judiciary in the Hague Tribunal and attempts are being made by the League of Nations to draw up codes of international law. Speaking generally, in embarking upon international law, their Lordships are to a great extent in the realm of opinion and in estimating the value of opinion it is permissible not only to seek a consensus of views, but to select what appear to be the better views upon the question.

With regard to crimes as defined by international law, that law has no means of trying or punishing them. The recognition of them as constituting crimes and the trial and punishment of the criminals are left to the municipal law of each country. But whereas according to international law the criminal jurisdiction of municipal law is ordinarily restricted to crimes committed on its terra firma or territorial waters or its own ships, and to crimes by its own nationals wherever committed, it is also recognised as extending to piracy committed on the high seas by any national on any ship, because a person guilty of such piracy has placed himself beyond the protection of any State. He is no longer a national, but *hostis humani generis* and as such he is justiciable by any State anywhere. Grotius (1583–1645), De Jure Belli et Pacis, vol. 2, cap 20, s. 40.

Their Lordships have been referred to a very large number of Acts of Parliament, decided cases and opinions of jurisconsults or textbook writers, some of which lend colour to the contention that robbery is a necessary ingredient of piracy, others to the opposite contention. Their Lordships do not propose to comment on all of them, but it will be convenient to begin the present discussion by referring to the Act of Henry VIII., c. 15, in the year 1536, which was entitled "An Act for the punishment of pirates and robbers of the sea." Before that Act, the jurisdiction over pirates was exercised by the High Court of Admiralty in England and that court administered the civil law. The civilians however, had found themselves handicapped by some of their canons of procedure, as for example, that a man could not be found guilty unless he either confessed or was proved guilty by two witnesses. The Act recites the deficiency of the Admiralty jurisdiction in the trial of offences according to the civil law and after referring to "all treasons, felonies, robberies, murders and confederacies hereafter to be committed in or upon the sea, etc." (it is not necessary to set out the whole of it), proceeds to enact that all offences committed at sea, etc., shall be tried according to the common law under the King's Commission to be directed to the Admiralty and others within the realm.

Many of the doubts and difficulties inherent in considering subsequent definitions of piracy are probably due to a misapprehension of that Act. It has been thought, for example, that nothing could be piracy unless it amounted to a felony as distinguished from a misdemeanour, and that, as an attempt to commit a crime was only a misdemeanour at common law, an attempt to commit piracy could not constitute the crime of piracy because piracy is a felony as distinguished from a misdemeanour. This mistaken idea proceeds upon a misapprehension of the Act. In Coke's (1552–1634) Institutes, Part III, edit. 1809, after a discussion on felonies, robberies, murders and confederacies committed in or upon the sea, it is stated (p. 112) that the statute did not alter the offence of piracy or make the offence felony, but "leaveth the offence as it was before this Act, namely, felony only by the civil law, but giveth a mean of triall by the common law and inflicteth such pains of death as if they had been attainted of any felony done upon the land. But yet the offence is not altered, for in the indictment upon this statute the offence must be alleged upon the sea ; so as this act inflicteth punishment for that which is a felony by the civil law and no felony whereof the common law taketh knowledge."

The conception of piracy according to the civil law is expounded by Molloy (1646–1690), De Jure Maritimo et Navali, or A Treatise of affairs Maritime and of Commerce.

That book was first published in 1676 and the ninth edition in 1769. Chapter 4 is headed "Of Piracy." The author defines a pirate as "a sea thief or *hostis humani generis* who to enrich himself either by surprise or open face sets upon merchants or other traders by sea." He clearly does not regard piracy as necessarily involving successful robbery or as being inconsistent with an unsuccessful attempt. Thus in par. 13 he says : "So likewise if a ship shall be assaulted by pirates and in the attempt the pirates shall be overcome if the captors bring them to the next port and the judge openly rejects the trial, or the captain cannot wait for the judge without certain peril and loss, justice may be done on them by the law of nature, and the same may be there executed by the captors." Again, in par. 14 he puts the case where "a pirate at sea assaults a ship but by force is prevented from entering her" and goes on to distinguish the rule as to accessories at the common law and by the law marine. A somewhat similar definition of a pirate is given by the almost contemporary Italian jurist, Casaregis, who wrote in 1670, and says : "Proprie pirata ille dicetur qui sine patentibus alicujus principis expropria tantum et privata auctoritate per mare discurrit depredante causa." But in certain trials for piracy held in England under the Act of Hen. 8, a narrower definition of piracy seems to have been adopted.

Thus in 1696 the trial of Joseph Dawson took place. It is reported in State Trials, Vol. XIII., Col. 451. The prisoners were indicted for "feloniously and piratically taking and carrying away from persons unknown a certain ship called the

Gunsway . . . upon the high seas ten leagues from the Cape St. John near Surat in the East Indies." The court was comprised of Sir Charles Hedges, then judge in the High Court of Admiralty Lord Chief Justice Holt, Lord Chief Justice Treby, Lord Chief Baron Ward, and a number of other judges. Sir Charles Hedges gave the charge to the Grand Jury. In it he said " now piracy is only a sea-term for robbery, piracy being a robbery committed within the jurisdiction of the Admiralty. If any man be assaulted within that jurisdiction and his ship or goods violently taken away without legal authority, this is robbery and piracy." *Dawson's* case was described as the sheet anchor for those who contend that robbery is an ingredient of piracy. It must be remembered, however, that every case must be read *secundum subjectam materiam*, and must be held to refer to the facts under dispute.

In *Dawson's* case the prisoners had undoubtedly committed robbery in their piratical expeditions, The only function of the Chief Judge was to charge the grand jury, and in fact to say to them : " Gentlemen, if you find the prisoners have done these things then you ought to return a true bill against them." The same criticism applies to certain charges given to grand juries by Sir Leoline Jenkins (1623–1685), Judge of the Admiralty Court (1685). See the Life of Leoline Jenkins, Vol. 1, p. 94. It cannot be suggested that these learned judges were purporting to give an exhaustive definition of piracy, and a moment's reflection will show that a definition of piracy as sea robbery is both too narrow and too wide. Take one example only. Assume a modern liner with its crew and passengers, say of several thousand aboard, under its national flag, and suppose one passenger robbed another. It would be impossible to contend that such a robbery on the high seas was piracy and that the passenger in question had committed an act of piracy when he robbed his fellow passenger, and was therefore liable to the penalty of death. " That is too wide a definition which would embrace all acts of plunder and violence in degree sufficient to constitute piracy simply because done on the high seas. As every crime can be committed at sea, piracy might thus be extended to the whole criminal code. If an act of robbery or murder were committed upon one of the passengers or crew by another in a vessel at sea, the vessel being at the time and continuing under lawful authority and the offender were secured and confined by the master of the vessel to be taken home for trial, this state of things would not authorise seizure and trial by any nation that chose to interfere or within whose limits the offender might afterwards be found." (Dana's Wheaton 193, note 83, quoted in Moore's Digest of International Law (Washington 1906), article Piracy, p. 953.)

But over and above that we are not now in the year 1696, we are now in the year 1934. International law was not crystallised in the seventeenth century, but is a living and expanding code.

In his treatise on international law, the English textbook writer Hall (1835–94) says at p. 25 of his preface to the third edition (1889), " looking back over the last couple of centuries we see international law at the close of each fifty years in a more solid position than that which it occupied at the beginning of the period. Progressively it has taken firmer hold, it has extended its sphere of operation, it has ceased to trouble itself about trivial formalities, it has more and more dared to grapple in detail with the fundamental facts in the relations of States. The area within which it reigns beyond dispute has in that time been infinitely enlarged and it has been gradually enlarged within the memory of living man."

Again another example may be given. A body of international law is growing up with regard to aerial warfare and aerial transport, of which Sir Charles Hedges in 1696 could have had no possible idea.

A definition of piracy which appears to limit the term to robbery on the high seas, was put forward by that eminent authority Hale (1609–76), in his Pleas of the Crown, Edit. 1737, cap. 27, p. 305, where he states, " it is out of the question that piracy by the statute is robbery." It is not surprising that subsequent definitions proceed on these lines.

Hawkins (1673–1746) Pleas of the Crown (1716), 7th edit., 1795, Vol. 1, defines a pirate rather differently, at p. 267, " a pirate is one who to enrich himself either by surprise or open force sets upon merchants or others trading by the sea to spoil them of their goods or treasure." This does not necessarily import robbing.

Blackstone (1726–80) 20th edit., book IV., p. 76, states, " the offence of piracy by common law consists in committing those acts of robbery and depredation upon the high seas which, if committed upon land, would have amounted to felony there."

East's Pleas of the Crown (1803), Vol. 2, p. 796, defines the offence of piracy by common law as " the commission of those acts of robbery and depredation upon the high seas which, if committed on land, would have amounted to felony there." This definition would exclude an attempt at piracy, because an attempt to commit a crime is, with certain exceptions, not a felony but a misdemeanour.

Their Lordships were also referred to Scottish textbook writers, including Hume (1757–1838) Scottish Criminal Law (1797) and Alison (1792–1867), Scottish Criminal Law (1832), where similar definitions are to be found. It is sufficient to say with regard to these English and Scottish writers that as was to be expected they followed in some cases almost verbatim the early concept, and the criticism upon them is : (1) that it is obvious that their definitions were not exhaustive ; (2) that it is equally obvious that there appears to be from time to time a widening of the definition so as to include facts previously not foreseen ; (3) that they may have overlooked the explanation of the statute of Henry VIII. as given by Coke and quoted above, and have thought of piracy as felony according to common law whereas it was felony by civil law.

In Archbold's Criminal Pleading (28th edit., 1931) will be found a full conspectus of the various statutes on piracy which have been from time to time passed in this country defining the offence in various ways and creating new forms of offence as coming within the general term piracy. These, however, are immaterial for the purpose of the case because it must always be remembered that the matter under present discussion is not what is piracy under any municipal Act of any particular country, but what is piracy *jure gentium*. When it is sought to be contended, as it was in this case, that armed men sailing the seas on board a vessel without any commission from any State, could attack and kill everybody on board another vessel sailing under a national flag without commiting the crime of piracy unless they stole, say, an article worth sixpence, their Lordships are almost tempted to say that a little common sense is a valuable quality in the interpretation of international law. This appears to be recognised in

the Digest of Criminal Law, by the distinguished writer, Sir James Fitzjames Stephen (1829–94), 7th edit., 1926, at p. 102. At the end of the article on piracy it is stated that "it is doubtful whether persons cruising in armed vessels with intent to commit piracy are pirates or not," but in a significant footnote, it is added that "the doubt expressed at the end of the article is founded on the absence of any expressed authority for the affirmative of the proposition and on the absurdity of the negative."

Murray's Oxford Dictionary (1909) defines a pirate as "one who robs and plunders on the sea, navigable rivers, &c., or cruises about for that purpose."

It may now be convenient to turn to American authorities, and first of all Kent (1826). In his Comm. I. 183, he calls piracy "a robbery or a forcible depredation on the high seas without lawful authority and done *animo furandi* in the spirit and intention of universal hostility."

Wheaton writing in 1836, Elements Part II., c. 2, par. 15, defines piracy as being the offence of "depredating on the seas without being authorised by any foreign State or without commissions from different sovereigns at war with each other." This enshrines a concept which had prevailed from earliest times that one of the main ingredients of piracy is an act preformed by a person sailing the high seas without the authority or commission of any State. This has been frequently applied in cases where insurgents had taken possession of a vessel belonging to their own country and the question arose what authority they had behind them. See the American case of *The Ambrose Light* (1885). Another instance is the case of *The Huascar*. In 1877, a revolutionary outbreak occurred at Callao in Peru and the ironclad *Huascar* which had been seized by the insurgents, put to sea, stopped British steamers, took a supply of coal from one of them without payment and forcibly took two Peruvian officials from on board another where they were passengers. The British Admiral justly considered the *Huascar* was a pirate, and attacked her. See Parl. Papers, Peru, No. 1, 1877.

In Moore's Digest of International Law (1906) (*ubi sup.*), Vol. 2, p. 953, a pirate is defined as "one who, without legal authority from any State, takes a ship with intention to appropriate what belongs to it. A pirate is a sea-brigand, he has no right to any flag and is justiciable by all."

Time fails to deal with all the references to the works of foreign jurists to which their Lordships' attention was directed. It will be sufficient to select a few examples.

Ortolan (1802–1873), a French jurist, and professor at the University of Paris, says, Dip. de la Mer, Book II., c. XI., "Les pirates sont ceux, qui courrent les mers de leur propre autorité, pour y commettre des actes de déprédation pillant à main armée les navires de toutes les nations."

Bluntschli (1808–81), a Swiss jurist and a professor at Munich and Heidelberg, published, in 1868, Le Droit International Codifié, which, in art. 343, lays down: "Les navires sont considerés comme pirates qui sans autorisation d'une puissance belligerante cherchent à s'emparer des personnes à faire du butin (navires et marchandises) ou à anéantir dans un but criminel les biens d'autrui."

Calvo (1824–1906), an Argentine jurist and Argentine Minister at Berlin, par. 1134, defines piracy: "Tout vol ou pillage d'un navire ami, toute déprédation, toute acte de violence commise à main armée en pleine mer contre la personne ou les biens d'un étranger soit en temps de paix soit en temps de guerre."

An American case strongly relied upon by those who contend that robbery is an essential ingredient of piracy, is that of the *United States* v. *Smith* (1820, 5 Wheaton, Sup. Ct. R. 153). Story, J. delivered the opinion of the court and there states (at p. 161), "whatever may be the diversity of definitions in other respects, all writers agree in holding that robbery or forcible depredation upon the sea *animo furandi* is piracy." He would be a bold lawyer to dispute the authority of so great a jurist, but the criticism upon that statement is that the learned judge was considering a case where the prisoners charged had possessed themselves of the vessel, the *Irresistible*, and had plundered and robbed a Spanish vessel. There was no doubt about the robbery and though the definition is unimpeachable as far as it goes, it was applied to the facts under consideration and cannot be held to be an exhaustive definition including all acts of piracy. The case, however, is exceptionally valuable because from pages 163–180 of the report it tabulates the opinions of most of the writers on international law up to that time. But with all deference to so great an authority, the remark must be applied to Story, J. in 1820 that has already been applied to Sir Charles Hedges in 1696, which is that international law has not become a crystallised code at any time, but is a living and expanding branch of the law.

In a later American decision, *United States* v. *The Malek Adhel* (2 How, 211) it was said at p. 232: "If he wilfully sinks or destroys an innocent merchant ship without any other object than to gratify his lawless appetite for mischief, it is just as much piratical aggression in the sense of the law of nations and of the Act of Congress as if he did it solely and exclusively for the sake of plunder *lucri causa*. The law looks at it as an act of hostility and being committed by a vessel not commissioned and engaged in lawful warfare, it treats it as the act of a pirate and of one who is emphatically *hostis humani generis*."

Having thus referred to the two cases, *Dawson's* case (1696) and *United States* v. *Smith* (1820), which are typical of one side of the question, their Lordships will briefly refer to two others from which the opposite conclusion is to be gathered.

It will be observed that both of them are more recent. The first is the decision in the case of *The Serhassan Pirates* (2 Robinson's Reports 354), decided in the English High Court of Admiralty by that distinguished judge, Dr. Lushington (1782–1873), in 1845. It was on an application by certain officers for bounty which, under the statute 6 Geo. 4, c. 49, was given to persons who captured pirates, and the learned judge said (it is not necessary to detail all the facts of the case for the purpose of the present opinion), "the question which we have to determine is whether or not an attack which was made upon the British pinnace and two other boats constituted an act of piracy on the part of the Prahns so as to bring the persons who were upon board within the legal denomination of pirates." He held it was an act of piracy and awarded the statutory bounty. It is true that that was a decision under the special statute under which the bounties were claimed, but it will be noted that there was no robbery in that case; what happened was that the pirates attacked, but were themselves beaten off and captured. A similar comment may be made on the case in 1853 of *The Magellan Pirates* (1 Spink, Eccl. and Adm. Reports 81), where Dr. Lushington said: "It has never, so far as I am able to find, been necessary to inquire whether parties so convicted of these crimes (*i.e.*, robbery and murder) had intended to

rob on the high seas or to murder on the high seas indiscriminately."

Finally, there is the American case of the *Ambrose Light*, reported in Scott's Cases, 1885, 25 Federal Reports, p. 408, where it was decided by a Federal Court that an armed ship must have the authority of a State behind it, and if it has not got such an authority, it is a pirate even though no act of robbery has been committed by it.

It is true that the vessel in question was subsequently released on the ground that the Secretary of State had by implication recognised a state of war, but the value of the case lies in the decision of the court.

Their Lordships have dealt with two decisions by Dr. Lushington. It may here be not inappropriate to refer to another great English Admiralty judge and jurisconsult, Sir Robert Phillimore (1810–85). In his International Law, 3rd edit., Vol. 1, 1879, he states: "Piracy is an assault upon vessels navigated on the high seas committed *animo furandi* whether robbery or forcible depredation be effected or not and whether or not it be accompanied by murder or personal injury."

Lastly, Hall, to whose work on international law reference has already been made, states, on p. 314 of the 8th edit. 1924, "the various acts which are recognised or alleged to be piratical may be classed as follows: robbery or attempt at robbery of a vessel by force or intimidation, either by way of attack from without or by way of revolt of the crew and conversion of the vessel and cargo to their own use." Possibly the definition of piracy which comes nearest to accuracy coupled with brevity is that given by Kenny (1847–1930), Outlines of Criminal Law, at p. 316, where he says: "Piracy is armed violence at sea which is not a lawful act of war." although even this would include a shooting affray between two passengers on a liner which could not be held to be piracy.

It would, however, correctly include those acts which, as far as their Lordships know, have always been held to be piracy, that is, where the crew or passengers of a vessel on the high seas rise against the captain and officers and seek by armed force to seize the ship. Hall (*ubi sup.*) put such a case in the passage just cited; it is clear from his words that it is not less a case of piracy because the attempt fails.

Before leaving the authorities, it is useful to refer to a most valuable treatise on the subject of piracy contained in The Research into International Law by the Harvard Law School, published at Cambridge, Mass., in 1932. In it nearly all the cases, nearly all the statutes, and nearly all the opinions are set out on pp. 749 to 1013.

In 1926 the subject of piracy engaged the attention of the League of Nations, who scheduled it as one of a number of subjects, the regulation of which by international agreement seemed to be desirable and realisable at the present moment. Consequently, they appointed a sub-committee of their Committee of Experts for the progressive codification of international law and requested the committee to prepare a report upon the question.

An account of the proceedings is contained in the League of Nations document, C 196, M 70, 1927 V. The sub-committee was presided over by the Japanese jurist Mr. Matsuda, the Japanese Ambassador in Rome, and in their report at p. 116 they state: "According to international law, piracy consists in sailing the seas for private ends without authorisation from the Government of any State with the object of committing depredations upon property or acts of violence against persons."

The report was submitted to a number of nations, and an analysis of their replies will be found at p. 273 of the League of Nations document. A number of States recognised the possibility and desirability of an international convention on the question. The replies of Spain, p. 154; of Greece, p. 168; and especially of Roumania, p. 208; deal at some length with the definition of piracy. Roumania adds, p. 208: "Mr. Matsuda maintains in his report that it is not necessary to premise explicitly the existence of a desire for gain, because the desire for gain is contained in the larger qualification 'for private ends.' In our view, the act of taking for private ends does not necessarily mean that the attack is inspired by the desire for gain. It is quite possible to attack without authorisation from any State and for private ends not with a desire for gain but for vengeance or for anarchistic or other ends."

The above definition does not in terms deal with an armed rising of the crew or passengers with the object of seizing the ship on the high seas.

However that may be, their Lordships do not themselves propose to hazard a definition of piracy.

They remember the words of M. Portalis, one of Napoleon's commissioners, who said: "We have guarded against the dangerous ambition of wishing to regulate and foresee everything. . . . A new question springs up. Then how is it to be decided? To this question it is replied that the office of the law is to fix by enlarged rules the general maxims of right and wrong, to establish firm principles fruitful in consequences and not to descend to the detail of all questions which may arise upon each particular topic." (Quoted by Halsbury, L.C., in Halsbury's Laws of England, Introduction, p. ccxi.)

A careful examination of the subject shows a gradual widening of the earlier definition of piracy to bring it from time to time more in consonance with situations either not thought of or not in existence when the older jurisconsults were expressing their opinions.

All that their Lordships propose to do is to answer the question put to them, and having examined all the various cases, all the various statutes, and all the opinions of the various jurisconsults cited to them, they have come to the conclusion that the better view and the proper answer to give to the question addressed to them is that stated at the beginning, namely, that actual robbery is not an essential element in the crime of piracy *jure gentium*, and that a frustrated attempt to commit piratical robbery is equally piracy *jure gentium*.

Solicitor: *The Treasury Solicitor.*

July 23, 24 ; *Dec.* 4, 1934.

(Present : Lords ATKIN, MACMILLAN and WRIGHT, sitting with Nautical Assessors.)

Nippon Yusen Kaisha v. The China Navigation Company Limited. (*a*)

ON APPEAL FROM THE SUPREME COURT OF HONG KONG (APPELLATE JURISDICTION).

Hong Kong—Collision—Fog—Fog signal heard forward of beam—Position of other vessel not "ascertained"—Engines not stopped—Regulations for Preventing Collisions at Sea, art. 16.

By art. 16 *of the Regulations for Preventing Collisions at Sea : "A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."*

The K., *belonging to the respondents, was entering the harbour of Hong Kong in a fog, on the northern side of the channel, which was her proper side, when she heard a fog signal some points on her port bow, from a vessel which was invisible in the fog, and which subsequently proved to be the* T., *outward bound, owned by the appellants. The* K. *assumed that the vessel from which the signal came was outward bound, and would be keeping to her own, the southern side of the channel, so that the vessels would pass port to port, and did not stop her engines. The* T. *had in fact crossed to the north of the fairway to make her way to the anchorage for foreign men-of-war. A collision occurred between the two vessels at the time when the* T. *had reached the area marked as the anchorage.*

Held, (1) *that the* T. *was at fault in crossing the fairway in fog ;* (2) *that the position of the* T. *was not "ascertained" by the* K. *within the meaning of art.* 16 ; *it was inferred, not ascertained, and the inference was wrong. The* K. *was therefore in breach of art.* 16 *by reason of her failure to stop her engines ; and* (3) *that in the circumstances both vessels must be held equally to blame.*

APPEAL by Nippon Yusen Kaisha from a judgment of the Supreme Court of Hong Kong (Appellate Jurisdiction) (Sir Peter Grain, P., Sir Joseph Kemp, C.J., and Wood, J. sitting with two nautical assessors) affirming a judgment of Sir Joseph Kemp, C.J., assisted by a nautical assessor, that the appellants' steamship *Toyooka Maru* was solely to blame for a collision which took place between her and the steamship *Kiangsu*, belonging to the respondents in Hong Kong Harbour on the 22nd March, 1931.

The facts which are summarised in the head-note are fully stated in their Lordships' judgment.

Lewis Noad, K.C. and *R. F. Hayward* for the appellants.

A. T. Miller, K.C. and *K. S. Carpmael* for the respondents.

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

The judgment of their Lordships was delivered by

Lord Macmillan.—On the 22nd March, 1931, a collision occurred in the harbour of Hong Kong between the appellants' steamship *Toyooka Maru* and the respondents' steamship *Kiangsu*. Each vessel blamed the other and cross-actions of damages, subsequently consolidated, were instituted by their respective owners against each other in the Supreme Court of Hong Kong. The trial judge, Sir Joseph Kemp, C.J. found the *Toyooka Maru* solely to blame, and his decision was affirmed by the Full Court on appeal. There were, however, considerable divergencies of view among the learned judges below (and also apparently among the nautical assessors who assisted them) on certain aspects of the case. The learned Chief Justice, who sat as a member of the Appellate Court, altered the opinion which he had reached at the trial, and was ultimately in favour of holding both vessels to blame.

The material facts are not complicated and are to a large extent common ground. It appears that the *Toyooka Maru*, on the morning of the day in question, left Kowloon Wharf outward bound shortly after seven o'clock. When she had proceeded some distance, but was still within the harbour waters, her master observed a bank of fog approaching from the N.E. She was then on the starboard or south side of the channel, being the proper side for an outgoing vessel. Her master, judging it unsafe to proceed in the fog, resolved to anchor, and, as the local ordinances forbade vessels to anchor in the fairway, he decided to make his way to the anchorage for foreign men-of-war, shown on the chart to the north of the fairway. To reach this he had to direct his course to the N.E. across the fairway, and at 7.43 a.m. he altered his course accordingly. No incoming vessel had been seen by him. He gave the usual fog signals by sounding prolonged blasts at short intervals. At 7.44 he heard an answering fog signal apparently from a vessel at some distance on his starboard bow, and immediately stopped his engines. Several more fog signals were interchanged between the vessels, and at 7.48 the master of the *Toyooka Maru*, which still had some way on, hearing a blast from the other vessel close on his starboard bow, ordered his engines full speed astern. At 7.49 the *Toyooka Maru* for the first time sighted the other vessel, which proved to be the *Kiangsu*, proceeding on a west north-westerly course at a distance of about 600ft. A collision was then inevitable, and at 7.50 the port side of the *Kiangsu* about amidships struck and buckled over the stem of the *Toyooka Maru*. At the time of the collision the *Toyooka Maru* had reached the area marked as the anchorage for foreign men-of-war, and the collision occurred within the anchorage.

The *Kiangsu* was inward bound. She had entered the harbour waters through the Lyemun Pass at 7.35. At 7.44, as she was proceeding on the northern side of the channel, which was her proper side, she heard a fog-signal some points on her port bow from a vessel which was invisible in the fog, and which subsequently proved to be the *Toyooka Maru*. She assumed that the vessel from which the signal came was outward bound and would be keeping to her own, the southern, side of the channel, so that the vessels would pass port to port. The *Kiangsu* did not stop her engines, but put them to slow, and, after altering her course a point to starboard, she proceeded on her way, sounding fog signals at short intervals. The fog signals from the other vessel were heard increasingly near and fine on the *Kiangsu's* port bow, and at 7.49 the vessels, as already stated,

became visible to each other for the first time. The *Kiangsu* put her engines full steam ahead and first ported and then immediately starboarded her helm so as to lessen the impact of the then inevitable collision. (The helm orders are in the old form throughout.)

The faults attributed to the *Toyooka Maru* are (1) that she adopted a negligent and dangerous course in crossing the fairway in fog; (2) that she failed, on hearing the *Kiangsu's* first fog signal, to port her helm and resume the proper course for outgoing vessels on the south side of the channel; and (3) that she failed to drop her anchors when she sighted the *Kiangsu* at 7.49. The faults attributed to the *Kiangsu* are (1) that she acted in breach of art. 16 of the Regulations for Preventing Collisions at Sea by not stopping her engines on hearing the fog signal from the *Toyooka Maru*; and (2) that she proceeded at a dangerously high speed through the fog.

The learned Chief Justice at the trial found that the *Toyooku Maru* was to blame for having directed her course across the fairway in fog and also in not having dropped her anchors on sighting the *Kiangsu.* He further found that the *Kiangsu* in not stopping her engines at latest at 7.47 had acted in breach of reg. 16 and he held (erroneously, in view of sect. 4, sub-sect. (1), of the Maritime Conventions Act, 1911) that the onus of showing that this breach did not contribute to the collision was thereby imposed on her. In his opinion "she obviously failed to discharge that onus." He nevertheless held the *Toyooka Maru* solely responsible for the collision on the ground that she mainly contributed to the accident by crossing the fairway in fog. and that by dropping her anchors she could have avoided the collision at the last moment, whereas the default of the *Kiangsu* was minor in degree and was due merely to an error of judgment in the "ambiguous position created by the *Toyooka Maru.*" He absolved the *Kiangsu* from the charge of excessive speed. As already indicated, the learned Chief Justice when sitting in the Full Court on appeal modified his original view and was in favour of holding both vessels to blame. Sir Peter Grain in the Full Court was of opinion that the *Toyooka Maru* was wholly to blame on account of her having crossed the fairway in fog and also on account of her not having altered her course to starboard when she heard the *Kiangsu's* second blast and knew that the *Kiangsu* was an incoming ship. He further held that the *Kiangsu* was not in breach of reg. 16. Wood, J. took the same view, while also holding that the *Toyooka Maru* was not to blame for not dropping her anchors when she first saw the *Kiangsu.*

The *Toyooka Maru* having been found by concurrent judgments in the courts below to have been at fault in crossing the fairway in fog, their Lordships accept this finding, from which they see no reason to differ, and they therefore find that the *Toyooka Maru* was to blame for the collision. But there remains the question whether she was solely to blame or whether the *Kiangsu* was also to blame. This question their Lordships now proceed to consider.

The critical point for determination is whether the *Kiangsu* was or was not in breach of reg. 16. That regulation provides in its second paragraph that:

> "A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

The *Kiangsu* admittedly heard apparently forward of her beam the first fog signal of the *Toyooka Maru* at 7.44 and also the subsequent fog signals, and admittedly she did not stop her engines either at 7.44 or at any time before the collision. Her argument is that the regulation did not apply, because the fog signals which she heard were those of a vessel the position of which was "ascertained," inasmuch as when she heard the first fog signal she judged the vessel from which it emanated to be an outward bound vessel and thus "ascertained" her position to be on the south side of the channel, the proper side for an outgoing vessel. Sir Peter Grain states that counsel for the appellants admitted, and that it was in fact admitted by all, that as far as the captain of the *Kiangsu* was concerned the *Toyooka Maru* was an "ascertained" vessel up to 7.47 when her signals became nearer and finer on the *Kiangsu's* port bow.

Their Lordships doubt the justification of this admission, but, accepting it, they have still to consider whether during the three minutes from 7.47 to 7.50, when the collision took place, the *Toyooka Maru* was a vessel whose position had been ascertained by the *Kiangsu.* The learned Chief Justice at the trial and when sitting in the Full Court on appeal was of opinion that from 7.47 "at latest" the position of the *Toyooka Maru* was not ascertained by the *Kiangsu.* Sir Peter Grain and Wood, J. were both of opinion that the *Toyooka Maru's* position was throughout "ascertained" on the ground that the *Kiangsu* was entitled to assume that she was an outward bound vessel whose position was necessarily on the southern side of the channel. Their Lordships do not agree with the view taken by the majority of the Full Court. The position of the *Toyooka Maru* was not, in their Lordships' opinion "ascertained" within the meaning of the regulation. It was inferred, not ascertained, and as it turned out the inference was wrong. The data on which an inference is founded may be so conclusive as to raise the inference to the level of a certainty, but in the present case the only data were that the fog signals were heard on the *Kiangsu's* port bow, that outward bound vessels keep to the south side of the channel and that it was improbable that a vessel would be crossing the fairway in a fog. An inference based on these data was not in their Lordships' opinion an ascertainment on which it was justifiable to disregard the precaution enjoined by reg. 16. In order that the position of a vessel may be ascertained by another vessel within the meaning of the regulation she must be known by that other vessel to be in such a position that both vessels can safely proceed without risk of collision: (see, *e.g.*, per Sir Gorell Barnes, P., in *The Aras*, 10 Asp. Mar. Law Cas. at p. 360; 96 L. T. Rep. 95, at p. 98; (1907) P. 28, at p. 34). The *Kiangsu* did not know the position of the *Toyooka Maru* in this sense; she inferred it and took the chance of her inference being right.

Then it was pointed out that the regulation is further qualified by the words "so far as the circumstances of the case admit" and it was suggested that the *Kiangsu*, inward bound with the tide behind her, could not safely have stopped her engines in the fairway and lost steerage way. Their Lordships are satisfied that the *Kiangsu* entirely failed to establish that the circumstances did not admit of her stopping her engines.

The result is that their Lordships are of opinion that the *Kiangsu* was in breach of reg. 16 by reason of her failure to stop her engines, if not when she first heard the *Toyooka Maru's* fog signal at 7.44,

at any rate from and after 7.47 when she heard the *Toyooka Maru's* further fog signals. This is also the view of the nautical assessors who assisted their Lordships at the hearing, and who advised that the *Kiangsu* ought to have stopped her engines when she heard the first fog signal of the *Toyooka Maru* at 7.44.

In view of this grave breach of the regulation on the part of the *Kiangsu* she cannot be absolved from a share in the blame for the collision. Their Lordships cannot too emphatically express their sense of the importance of implicit obedience to the regulations on whose observance navigators are entitled at all times to rely. If a vessel unjustifiably takes the risk of disregarding one of their injunctions, as the *Kiangsu* did on this occasion, she must suffer the consequences. In the whole circumstances their Lordships are of opinion that both vessels should be held equally to blame.

Their Lordships will humbly advise His Majesty that the appeal be allowed, the judgments of the Chief Justice of the 19th Feb., 1932, and of the Full Court of the 15th Aug., 1932, be reversed and the case be remitted to the Supreme Court of Hong Kong with a direction to find the *Toyooka Maru* and the *Kiangsu* both equally to blame for the collision and to dispose of the consolidated actions, including the costs in the courts below, in accordance with this finding.

The appellants having been in part successful, and in part unsuccessful, before their Lordships, will have one-half of their costs of the appeal.

Appeal allowed.
Case remitted.

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

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

Supreme Court of Judicature.

COURT OF APPEAL.

Wednesday, Jan. 23, 1935.

(Before GREER, SLESSER, L.JJ. and EVE, J.)

The London Corporation. (a)

ON APPEAL FROM THE ADMIRALTY DIVISION.

Collision—Damages—Vessels damaged whilst laid up — Amount of repair damages agreed—Vessel sold for breaking up—Repairs not carried out—Whether owners entitled to recover agreed amount of repair damages.

Where a vessel was damaged by collision and her owners agreed with the wrongdoer the amount of the estimated cost of repairs,

Held, that the wrongdoer was liable for such amount, although the vessel was subsequently sold for breaking up with the damage unrepaired.

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

APPEAL by the defendants from a decision of Bateson, J. confirming the report of the registrar in a collision action. The facts were as follows. During the months of Dec., 1932, and Jan., 1933, the plaintiffs' vessel, the *Benguela*, and the defendants' vessel, the *London Corporation*, whilst laid up in the River Blackwater, came into collision, and both vessels sustained damage. In the month of Feb., 1933, a surveyor, instructed on behalf of both parties, surveyed both vessels, and estimated the cost of repairs as follows: 250*l.* for the *Benguela* and 230*l.* for the *London Corporation.* Neither vessel was in fact repaired. In the month of May, 1933, the plaintiffs entered into a contract with Italian shipbreakers whereby the *Benguela* was sold for breaking up and was in fact broken up with the repairs unexecuted. The parties to the action subsequently compromised on the basis of both vessels to blame and the claims were then referred to the registrar and merchants for assessment. There was no evidence to show that the price paid by the Italian shipbreakers was in any way affected by the existence of the unrepaired collision damage in the *Benguela.* The defendants denied all liability in respect of the damage sustained by the *Benguela*, but admitted that, if they were liable, the cost of repairs as estimated by the surveyor would be the appropriate amount. At the reference the registrar found that the plaintiffs were entitled to recover from the defendants the agreed cost of repairs, and that the case was covered by the decision in *The Glenfinlas* 14 Asp. Mar. Law Cas 594*n*; (122 L. T. Rep. 655*n*; (1918) P. 363*n*). The defendants appealed and the motion was heard by Bateson, J., who gave the following judgment.

Cyril Miller for the defendants.

Willmer for the plaintiffs.

Bateson, J.—The facts of this case are set out in the learned registrar's reasons for his report, and it is unnecessary for me to recapitulate them. The only fact not set out in the report is that the parties agreed the amounts of items 3 and 4, the cost of the repair of this ship, before they entered on the reference. The sole question, therefore, as I understand it, is whether the plaintiffs are entitled to recover 250*l.*, the amount agreed as being the item for repair, or are entitled to nothing.

It seems to me that Mr. Willmer is right in his contention that the plaintiffs' chattel having been damaged they are entitled in law to recover damages. It may be that there might be a question as to the amount of those damages, but here there is no question of amount; that has been agreed. The plaintiffs say that if they are entitled to damages for injury to their chattel, the amount is agreed at the figure which is allowed by the registrar, and there is an end of the case; and it is no concern of the defendants what they choose to do with their chattel. Mr. Willmer says that the fact that they sold it some three or four months after the accident to shipbreakers does not prove anything at all beyond the fact that they did sell it to shipbreakers, and got a certain sum for it. It does not prove, he says, that they got more or less because of damage, or the same, whether damaged or not—it proves nothing at all.

In *The Mediana* (82 L. T. Rep. 95; 9 Asp. Mar. Law Cas. 41; (1900) A. C. 113) Lord Halsbury said: "What right has a wrongdoer to consider what use you are going to make of your vessel? More than one case has been put to illustrate this: for example the owner of a horse or of a chair. Supposing a person took away a chair out of my room and kept it for twelve months, could anybody say you had a right to diminish the damages by

showing that I did not usually sit in that chair, or that there were plenty of other chairs in the room ? The proposition so nakedly stated appears to me to be absurd." It is sometimes a matter of difficulty in assessing damages, but that the owner of a chattel is entitled to damages for injury to it seems to me now, at any rate, beyond controversy. Mr. Willmer points out that physical damage is quite different from consequential damage. That, he says, has been well recognised ever since the days of *The Endeavour* (6 Asp. Mar. Law Cas. 511; 62 L. T. Rep. 840) ; and before it, too. That case was decided in 1890 by Sir James Hannen, who puts the matter very shortly : " The *Endeavour* has been injured. Her owners are entitled to be paid the amount of such injuries. It has been ascertained that that amount is 464*l*. That is the measure of the defendants' damages, and is the amount they are entitled to recover. If somebody out of kindness were to repair the injury and make no charge for it, the wrongdoer would not be entitled to refuse to pay as part of the damages the cost of the repairs to the owner." So here, if the owners of the *Benguela* chose to give her away after this accident it would not be any ground for saying that the wrongdoer was not bound to pay for the damage that he had done. *The Endeavour* (*sup.*) has been followed in *The Glenfinlas* (14 Asp. Mar. Law Cas. 594*n* ; 122 L. T. Rep. 655*n* ; (1918) P. 363*n*) a case approved in the Court of Appeal twice, and particularly by Scrutton, L.J. in *The York* (17 Asp. Mar. Law Cas. 600 ; 141 L. T. Rep. 215 ; (1929) P. 178). This ship was injured ; if Mr. Miller's clients want to get out of paying for the damages I think they must show that the price the plaintiffs were paid for the ship was as good as it would have been if it had not been damaged. Mr. Willmer makes a complete case : " My ship was damaged ; the amount of the damage has been agreed at 250*l*." If more evidence than that is required to get out of paying the damage, I think the onus of proving it is on the defendants, and they have not by any means satisfied me ; although Mr. Miller ingeniously tried to persuade me that the fact that the vessel was sold to shipbreakers showed that the injury to the chattel itself made no difference to the price. How can I say that ? I think that people who buy damaged goods pay a less price than for sound goods, even though it makes no difference to them, personally. They use the fact to cheapen the article and knock something off its price. Similarly a man who sells a damaged article knows that he will not get the same price for it as if it was not damaged. It is no good saying it is damaged very little. Mr. Miller himself admits that there is no evidence that the price was not reduced by the damage or that the sale was not influenced because of the injury ; nor is there any evidence the other way. I do not think he discharges the onus, as he said he did, by showing a sale for 4200*l*. to shipbreakers. To my mind that does not prove anything at all.

The learned registrar, who was assisted by a merchant, has decided that a ship damaged is not worth so much as a ship that is not. I think Scrutton, L.J. said so in one of the cases ; in *The York* (*sup.*) he said that the registrar had given the shipowners the cost of permanent repairs rightly and obviously because " damage had been done to the ship, and at the time she was sunk she was of less value because of the damage done by the previous collision." He assumed that—I do not know that there was any evidence of it in that case, but that would be the natural assumption in any case. Mr. Miller relied on some observations of Greer, L.J. in *The York* (*sup.*).

But there the Lord Justice was discussing the position of a vessel that had suffered damage by reason of the fact that she had been prevented from profitable use, and of course that would result in consequential damage. He was dealing there with consequential damage : there is no question of consequential damage here at all. I was also referred to *The Minnehaha* (6 LL. L. R. 12) a case of the Italian State Railways against the *Minnehaha* —where the question before the registrar was as to whether the vessel should have been repaired at all, but that case does not seem to give me any assistance at all in deciding the present one.

For these reasons I think the learned registrar was right in the conclusion at which he came.

The defendants appealed.

Stranger, K.C. and *Cyril Miller* for the appellants. —The respondents are entitled to proved damage, but the cost of repairs is not proved damage. There is no *primâ facie* evidence of financial loss arising from the damage. The onus is on the respondents to prove diminution in value. The question to be decided is a matter of principle, namely, whether there was any diminution in value by reason of the collision, if the estimated repairs were never carried out and, in fact, were never intended to be carried out. [Reference was made to *The York* (17 Asp. Mar. Law Cas. 600 ; 141 L T. Rep. 215 ; (1929) P. 178), *The Glenfinlas* (14 Asp. Mar. Law Cas. 549*n*; 122 L. T. Rep. 655*n* ; (1918) P. 363*n*), *The Kingsway* (14 Asp. Mar. Law Cas. 590 ; 122 L. T Rep. 651 ; (1918) P. 344), *The Marpessa* (10 Asp. Mar. Law Cas. 464 ; 97 L. T. Rep. 1 ; (1907) A. C. 241), *The Endeavour* (16 Asp. Mar. Law Cas. 511 ; 62 L. T. Rep. 840), *The Mediana* (8 Asp. Mar. Law Cas. 493 ; 82 L. T. Rep. 95 ; (1900) App. Cas. 113) and Roscoe's Measure of Damages in Maritime Collisions, 3rd edit., at p. 9.]

Willmer for the respondents was not called on.

Greer, L.J.—This is an appeal from the decision of the late Bateson, J., affirming a decision of the registrar, with reference to one item of damage claimed by the owners of the steamship *Benguela* against the owners of the steamship *London Corporation* in relation to the agreed award that both parties were responsible in equal degrees for the damage which was occasioned to the *Benguela*.

The *Benguela* was an old ship built in 1910. The owners of both ships were suffering from the unprecedented slump in shipping business, and their vessels were laid up in the Blackwater River ; when laid up they came into touch with one another from time to time, and damage was occasioned to the *Benguela*, which was dealt with by the registrar, and, on appeal from him, on objection to his findings, by the learned judge.

The position was this. Before any action was started, or any agreement was made as to responsibility for the damage, there had been a survey by Lloyd's surveyor of the damage to each of these two vessels, and he estimated the damage done to the *Benguela* at the sum of £250—the cost of repairs to put her in the same position as she would have been in if she had not been damaged, with an additional sum of 25*l*. for expenses. Thereupon, the question arose as to how this matter should be dealt with, and letters passed between the representatives of both vessels. In the course of that correspondence, Messrs. Lawrence Jones and Co., for the *Benguela*, wrote this letter : " . . . The question in dispute between us is, as to whether or not our clients are precluded from making a claim for estimated damage by reason of the fact that the

Benguela has been sold for breaking up purposes. . . . . We would suggest, in the first instance, that we should meet you with a view to agreeing the amounts of the items other than repairs so that the matter to be dealt with either by the registrar or the arbitrator may be simply the question of estimated repairs." Then on the 9th May, Messrs. Middleton, Lewis, and Clarke, for the *London Corporation*, wrote as follows: "We have now received our clients' instructions to agree the figures in respect of both claims as recently discussed with you subject to the reservations made with regard to the items to be dealt with by the registrar. After you have issued a writ and the agreement has been filed, we will send you our clients' formal claim, and when you send us your clients' claim, will you please also furnish a copy of the agreement of sale of the *Benguela*." Then there followed another letter of the 10th May from Lawrence Jones and Co., for the *Benguela*: "We thank you for your letter of the 9th May from which we observe that all the figures of the respective claims are agreed, leaving only to the registrar to decide the question of principle as to whether the estimated repairs and estimated expenses during repairs are recoverable. We will accordingly proceed with the matter on the lines arranged, and will send to you shortly the writ for acceptance of service." After that the writ was issued, and an agreement was come to, which has the effect of a judgment of the court, that both vessels were to blame, and that the damage should be paid in equal proportions.

That being the state of things, the matter came before the registrar, and the registrar and the learned judge both decided that if in fact any damages were recoverable in respect of the injuries to the hull of the *Benguela*, the amount of those damages had been agreed at the 250*l.* plus the 25*l.* I find myself unable to differ from that view. I think that is what the parties intended. *Primâ facie*, the damage occasioned to a vessel is the cost of repairs—the cost of putting the vessel in the same condition as she was in before the collision, and to restore her in the hands of the owners to the same value as she would have had if the damage had never been done; and *primâ facie*, the value of a damaged vessel is less by the cost of repairs than the value it would have if undamaged, though it is true that evidence may establish that the value of the vessel undamaged is exactly the same as her value after she had been damaged. The learned judge decided that if that proposition were going to be established it was for the owners of the *London Corporation* to establish it. The defendants argued, however, that that basis has no application to this case, because, at the time she was damaged, the *Benguela* was certain to have no saleable value for use as a ship; all that could happen to her was what we know did happen to her after she was damaged, and which would, just in the same way, have happened to her if she had never been damaged. Well, if that be a fact to be taken into account, it seems to me that the learned judge was right in saying that it was for the defendants to establish it. He came to the same conclusion that the defendants had failed in that burden, because *non constat* that this vessel would have been sold for breaking up if she had not been a damaged vessel. She might have lived on in the hope that even shipowners sometimes successfully entertain, that an old vessel may have useful service for years to come in a time of boom, which everybody hopes will come some day. Further, it was not established that the owners would have parted with their vessel, if she had not been damaged, at the same price as they had got for the damaged vessel. It must not be lost sight of that the saleable value of a vessel does not depend merely upon what the purchaser says he would like to pay; it depends also on what the owner may feel that he can successfully hold out for, in the hope that another purchaser will come forward and give him a better price than that which has been offered.

I think that the learned judge was right in holding that some damages were necessarily established by the *primâ facie* evidence, and that if some damages were established, then there was no question for the registrar as to their amount, as that amount had been agreed; and that alone would be sufficient to dispose of this case.

Quite apart from that, however, I agree with the learned judge that in cases of this sort, the *primâ facie* damage is the cost of repair, and circumstances which are peculiar to the plaintiffs, namely, that they have, before the damage has been determined, sold the vessel to be broken up, is an accidental circumstance which ought not to be taken into account in the way of diminution of damages, any more than it is in a case of the sale of goods, where the difference in market price and contract price is always allowed, regardless of the fact that having regard to what the purchaser has done, no such damages are in fact suffered by him. It is desirable that there should be a measure of damage which can be easily and definitely found. In this case, circumstances which are accidental to the plaintiffs of which the defendants have no knowledge, or circumstances applicable to the defendants of which the plaintiffs have no knowledge, need not be taken into account.

A number of cases have been cited, and I think it is clearly established now that where damage is done to a vessel, then some damages are recoverable. I think that is the result of cases like *The Mediana* (8 Asp. Mar. Law Cas. 493; 82 L. T. Rep. 95; (1900) A. C. 113) and *The Marpessa* (10 Asp. Mar. Law Cas. 464; 97 L. T. Rep. 1; (1907) A. C. 241) and the other cases that have been cited, such as *The York* (17 Asp. Mar. Law Cas. 600; 141 L. T. Rep. 215; (1929) P. 178), *The Kingsway* (14 Asp. Mar. Law Cas. 490; 122 L. T. Rep. 651; (1918) P. 344) and *The Endeavour* (16 Asp. Mar. Law Cas. 511; 62 L. T. Rep. 840). I need not go into the details of those cases. It is now clear that the shipowner, who claims damages in respect of injuries to his ship, if it turns out that before he has in fact repaired her he has suffered the loss of the ship by something other than the act of the defendant, can still recover the estimated amount of the cost of repairing the ship, which he would have had to incur if she had not been lost. It seems to me that the principles that apply in those cases apply equally in this: that the owners of the *Benguela* are entitled to recover what has been agreed to be the amount they would have had to expend for repairing their vessel, even though it has turned out, by reason of a subsequent transaction, namely, the sale to shipbreakers, that they never would have to repair her at all. Further, it does not by any means follow that the price paid by the shipbreakers would have been the same if the vessel had been fully repaired, as it was in her unrepaired condition.

For these reasons, I find myself unable to differ from the learned judge and the registrar, and the appeal must be dismissed with costs.

Slesser, L.J.—I agree.

Eve, J.—I also agree.

Solicitors: for the appellants, *Middleton, Lewis, and Clarke*; for the respondents, *Lawrence Jones and Co.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Wednesday, April 10, 1935.

(Before Branson, J.)

Danneberg v. White Sea Timber Trust Limited. (*a*)

Charter-party—Ice-breaking clause—Charterers to arrange for provision of ice-breaking assistance—Operation of exceptions clause.

An ice clause in a charter-party provided, inter alia (*by par.* 1), *that, if the loading port were inaccessible by reason of ice or in case ice set in after the ship's arrival at the port, the charterers undertook to arrange for the provision by the port authorities of icebreaker assistance, if required, and (by par. 4) that the charterers should not be responsible for any loss of time during passage through the ice and (or) any loss or damage caused to the ship by ice or for any detention on passage through ice.*

Held, first, that the undertaking to " arrange for the provision " of icebreaker assistance did not differ in meaning from an undertaking to " provide " such assistance, and must be given the same interpretation as had been given to that phrase in Ugleexport Charkow *v.* Owners of Steamship Anastasia (ante, *p.* 482; 151 *L. T. Rep.* 261), *and therefore that the assistance provided must be reasonably continuous from the time the ship entered the ice until she was clear of it.*

Held, secondly, that par. 4 was an exception's clause and did not relieve the charterers of liability for loss caused to the ship by delay due to ice, unless they had first complied with the primary obligation to provide reasonably continuous icebreaker assistance.

Special case stated by an umpire.

By a charter-party dated the 14th Nov., 1933, the respondents chartered the claimants' ship to proceed to Leningrad, and there to load a cargo of timber and take it to Antwerp. After she had loaded, the ship was delayed by ice on her voyage to Antwerp, and the question in issue was whether the shipowners were entitled to damages for that delay, having regard to the terms of an ice-breaking clause in the charter-party. The umpire had held that they were so entitled, subject to this special case.

The clause read as follows :

" (1) In the event of the port of loading being inaccessible by reason of ice or in case ice sets in after vessel's arrival at port of loading, the charterers undertake to arrange for the provision by the port authorities of icebreaker assistance if required by the captain, free of expense to the steamer, the steamer complying with official instructions and rules issued by the authorities. . . . (2) Icebreaker assistance to be rendered free of expense to the steamer within forty-eight hours of receipt by the captain of the port (at loading port) of master's or owner's notification of arrival at the edge of ice, or, when leaving port, within forty-eight hours after notification by the master of readiness to leave. (8) Time lost by the vessel in waiting for icebreaker assistance at the edge of ice, and when leaving the loading port in excess of the time provided for in clause 2 to count as demurrage and (or) detention. . . . (4) Charterers shall not be responsible for any loss of time during passage through the ice and (or) any loss or damage caused to the steamer by ice or for any detention on passage through ice."

It was contended for the charterers that the clause only imposed on them a duty to ask the port authorities to provide such assistance as they normally gave, and that they (the charterers), were not responsible if the port authorities failed or delayed in doing so. The wording of the clause differed from that in *Ugleexport Charkow* v. *Owners of Steamship Anastasia* (*ante*, p. 482 ; 151 L.T. Rep. 261) where the undertaking was to provide icebreaker assistance to enable steamer to reach, load at, and leave the loading port. The House of Lords, in that case, had held that the obligation was to provide assistance which should be both effective and continuous, but the clause in this case only required the charters to arrange for the provision of assistance by the port authorities. Further, sub-clause (4) relieved the charterers from liability if they had complied with the requirements of sub-clause (1).

It was contended for the owners that the clause imposed on the charterers a duty to give continuous assistance to the ship until she was clear of the ice. Sub-sect. (4) only came into operation if sub-sect. (1) were first complied with.

H. I. P. Hallett for the charterers.

Cyril Miller for the shipowners.

Branson, J. — This is an appeal by way of special case from a decision of a learned umpire upon a claim made by the owner of the steamship *Spidola* against the charterers of that ship under a charter-party dated the 14th Nov., 1933, under which the ship had to go to Leningrad and there load a cargo of timber and carry it to Antwerp or Ghent as ordered. The ship went to Leningrad and loaded a cargo, but as is usual from one's experience of voyages in that part of the world at that time of the year, she suffered considerable delay in her passage through the ice from the ice edge up to Leningrad and through the ice again on her passage from Leningrad to the open sea.

Now, the question in this case is whether the learned umpire was right in holding that in the circumstances as he found them the ship was entitled to claim for delay which she suffered in the passage through the ice from the ice edge into Leningrad, for delay which she suffered while waiting to be helped out of Leningrad to the open sea, and for delay which she suffered during the passage through the ice from Leningrad to the open sea. The question whether the learned umpire was or was not right depends, in the first place, upon the construction to be placed upon the ice clause in the charter-party under which the ship was sailing. It is alleged by the ship that the charterers failed to carry out their contractual obligations under the ice clause in the matter of the provision of what is spoken of as " icebreaker assistance." It is contended on the part of the charterers, first of all, that, whatever their obligation might be, it never arose, because they were not given the necessary requisition or notification ;

and, secondly, that if they were, they did all that which under the contract they were bound to do, and that if any delay was suffered, upon the true contruction of the contract they are not liable for that delay.

The case is an interesting one by reason of the fact that whereas there have been before the courts of this country a number of cases containing ice clauses, the ice clause which I have to construe has been altered in a variety of respects, and, therefore, is not the same as any of those which have previously come before the courts for construction. It is argued by Mr. Hallett for the charterers that the differences which one finds in the clause as it exists at present from the clauses which have appeared in the past must be taken to have arisen in order to do away with the liabilities which the courts in those previous cases have held to attach to the charterers under the ice clauses as they stood in those days. The first consideration which seems to me to arise is how far, if at all, I am entitled to give weight to that contention.

It seems to me that the proper way for me to approach the construction of this clause is to read the clause, forgetting, so far as one can forget, what has been said about the meaning of particular phrases which occur in this clause and also in other clauses if the expressions appear in so different a setting as to make it apparent, or even to make it probable, that a different meaning should be attached to them. But where one finds a clause, or a group of words, which has been authoritatively construed in one of the other cases, then it seems to me to be my duty, as a judge of first instance, to follow the construction put upon that language by superior courts, unless I can see that the reason for the putting on of that construction in the previous cases does not exist in the present case.

Now, it is contended before me that the alterations in the present clause are such as to make it improper for me to follow the construction which has been placed, for example, upon the expression "icebreaker assistance" in the previous cases. The question then for consideration is how far that contention can stand, for unless there is some means of saying that the collocation of language in the present case is such that the interpretation put upon the expression "icebreaker assistance" in previous cases should not be applied in the present one, I think it would be improper for me to depart from the construction which has been put by the House of Lords upon that language.

Now, taking that point first, the argument which is pressed upon me by the ship is that in the opinion of Lord Wright given in the House of Lords in the case of *Ugleexport Charkow* v. *Owners of Steamship Anastasia* (*ante*, p. 482; 151 L. T. Rep. 261), he expresses what should be the meaning to be attached to those words, not by reference to other language in that clause, which does not appear in the present clause, but having regard to the fact that he is construing an expression which appears in an ice clause in a charter-party. For example, I think one must have some regard to the kind of argument which was being put forward on the part of the charterers. It was said "icebreaker assistance" is a perfectly vague and general expression, and there is nothing which could enable the court to say what sort of icebreaker assistance the contract calls for. It seems to me, apart altogether from authority, that a court seeking to construe a provision in a charter-party that icebreaker assistance is to be provided must ask itself why that clause appears in the contract, and the answer leaps to the eye. The assistance is to be provided to enable the ship to get to the port. The owner has contracted that his ship shall go to the port and the charterer has contracted that the ship shall be loaded at the port, and neither of those things can happen without icebreaker assistance. The contract provides that icebreaker assistance shall be rendered. As it seems to me, it is idle to argue that the icebreaker assistance which the contract calls for can be anything but icebreaker assistance to enable the ship to reach the port. That deals, I think, with the first of the differences which are supposed to exist between this clause and the previous ones, because my attention is called to the fact that in this clause the charterers undertook to arrange for the provision of icebreaker assistance, and the words "to enable the ship to enter and leave the port," which appeared in earlier ice clauses, do not appear in this. I do not think that makes the slightest difference.

Then one turns to what the noble and learned lord, Lord Wright, said in *Ugleexport Charkow* v. *Owners of Steamship Anastasia*, the case which I have already referred to. I do not think I need read a great deal of his opinion—it was read during the argument—but the main part appears in the following language. He says (*ante*, p. 482; 151 L. T. Rep. at p. 265): "There is in the clause a positive undertaking to render ice-breaking assistance, which I think means *primâ facie* assistance which is not casual or intermittent, and in order to justify a failure in that respect the charterers must show some excuse. The absence of icebreakers for such periods in the aggregate as the judge has here found is *primâ facie* a breach of the undertaking. I do not say that after the inception of the service, absence of icebreaker assistance at some period or periods may not be justified; but I think the words of the clause are *primâ facie* not satisfied by intermittent assistance."

I read the next passage because it is relied on for another purpose by Mr. Hallett. He goes on to say: "I have already stated my opinion that it is immaterial whether or not the icebreakers are controlled by the charterers, because their responsibility is the same in either event. But it seems to me that there may be contingencies, such as perils of the seas, which without anyone's fault hinder or interrupt the service, without any liability attaching to the charterers in those respects. In so hazardous and uncertain a service there can be no such thing as a normal time of getting from the loading berth to the ice edge, though *primâ facie* the service is, I think, contemplated as continuous; but in any case I do not at present see how the withdrawal of icebreakers for the convenience of the appellants themselves or of any other charterers (whether or not they can be treated as all members of one entity), as for instance for the purpose of waiting to collect other ships to be convoyed, can be other than a breach."

Now, applying that to the present case, "ice breaker assistance" in this case, unless there be some words in the present clause to show that it does not really mean that which the House of Lords has said it did mean in the case of *Ugleexport Charkow* v. *Owners of Steamship Anastasia* (*sup.*), must be taken to have the same meaning as has been put upon them in that case. It is said that there are other words and that sub-clause (4) of the ice clause in this charter-party, both in that respect and in another respect, with which I shall have to deal in a minute, affect the liability of the charterers in the present case. It is said that when you look at the rest of this clause you find that sub-clause (2) makes it obligatory upon the

charterers that icebreaker assistance should be rendered within forty-eight hours of receipt of a notification that the ship is at the ice edge when entering, or that it is ready to leave when leaving. Sub-clause (3) provides that if there is any failure in that respect and the ship has to wait for icebreaker assistance beyond those forty-eight hours, then the charterers become liable to pay, as and for demurrage and (or) detention, 20*l.* a day. It is said that that applies outside the ice edge, in the first instance, and inside the ice edge, that is to say, while still in the harbour, in the second instance, but that for the period from the time when the ship enters the ice to go into the port, or enters the ice on leaving the port, sub-clause (4) is to apply, and whether icebreaker assistance is being rendered or not, the charterers are not to be responsible for any loss of time during passage through the ice or for any loss or damage caused to the steamer by the ice, or for any detention on passage through the ice. It is said if you try to make that sub-clause fit with sub-clause (1) you will see that the icebreaker assistance contemplated by this ice clause must be something very different from that which was contemplated by the ice clause in its previous form.

I do not think that that argument is a sound one, because it seems to me that the liability which is being imposed upon the charterers is imposed by sub-clause (1); and sub-clause (4) is in the nature of an exception to that liability, and, therefore, according to the well-known rule in such cases, the exception operates only while the primary obligation is being carried out. I do not think it is necessary to read passages in support, or in explanation, of that principle, but it is instanced in the case of the *Cap Palos* (15 Asp. Mar. Law Cas. 403; 126 L. T. Rep. 82; (1921) P. 458), particularly in the judgment of Atkin, L.J., as he then was, where he says (15 Asp. Mar. Law Cas. at p. 406: 126 L. T. Rep. at p. 85; (1921) P at p. 471): "The principle appears to me to be common to all classes of contract, and is to be found applied in cases of marine insurance . . . carriage by sea and river . . . and contracts of bailment," and then he reads from the judgment of Scrutton, L.J. in *Gibaud* v. *Great Eastern Railway Company* ((1921) 2 K. B. 426, at p. 435).

But it is said, again, that unless one so construes sub-clause (4) as to enable it to apply, notwithstanding that the primary liability under sub-clause (1) is not being carried out, it can have no meaning at all. Again, I think the point fails because it seems to me that plenty of operation can be given to sub-clause (4) even though the charterers are fulfilling their obligations under sub-clause (1) in the following way. "Icebreaker assistance," even with the help which one has had from the partial definitions of the expression already given in previous cases, is a fairly vague term; for example, does it mean assistance of such a character as will enable the ship to get to port, notwithstanding the ice, as quickly as she would if the water had been open? Answer, by sub-clause (4): No, you are not to be responsible for loss of time during passage through the ice. Question: Is the icebreaker assistance to be such and so effective that the ship is not to receive any damage of any sort or description during its passage through the ice? Answer, under sub-clause (4): No, you are to have your assistance, but if, notwithstanding that proper assistance is being rendered, you are going to suffer damage in your passage through the ice, we are not responsible—and the last limb of sub-clause (4) is on the same footing. One knows, and I think one is entitled to use knowledge given in other icebreaker cases, that conditions of ice sometimes arise in which the ice becomes so solidly packed that the icebreaker cannot go through it. There you might get a case of detention on passage through the ice. It may very well be in circumstances of that kind, apart from such a clause as sub-clause (4), that there would be no liability thrown upon the charterers because they have done their best, but that does not say that a clause making it clear that in those circumstances they are not to be responsible is so otiose that you must give it a meaning that would deprive the ice clause of the whole of its operation once the ship is in the ice. In circumstances of that sort it seems to be quite sufficient to give the clause the operation which I suggest—and I do not feel driven into the position in which the argument for the charterers seeks to put me, that I cannot give any meaning to sub-clause (4) except the meaning which is contended for by the charterers without rendering the clause completely otiose because it protects the charterers from liabilities which, if they were properly carrying out their contract under the first sub-clause of the ice clause, they would not be liable for in those respects.

The result is that in my mind the proper construction of this ice clause, so far as this particular point is concerned, is that the icebreaker assistance has to be reasonably continuous, and if it is not, there is a breach of contract. I think that the assistance has to be reasonably continuous after the ship has entered the ice and that, as I say, sub-clause (4) does not make it necessary to come to the conclusion contended for by the charterers that all they have to do is to see that an icebreaker comes alongside the ship and that the moment the icebreaker takes the ship in tow, or starts breaking the ice for the ship, their responsibility ceases.

I think it is not immaterial to consider what the result of such a construction would be. If it were successful, you would have this position. The charterers undertake to arrange for the provision of an icebreaker. The charterers are liable for damages for detention or demurrage if the icebreaker does not come up within the time provided, but the moment it does come up they cease to be liable whether the icebreaker helps the ship or whether the icebreaker leaves the ship fast in the ice to be crushed and sunk or to be held there until the following spring. That is a construction which it seems to me no court should put upon a contract unless it is absolutely driven to do so by the plainest of plain language. As Atkin, L.J. said in the *Cap Palos* (15 Asp. Mar. Law Cas. at p. 406; 126 L. T. Rep. at p. 85; (1921) P. at 471): "I am far from saying that a contractor may not make a valid contract that he is not to be liable for any failure to perform his contract, including even wilful default; but he must use very clear words to express that purpose, which I do not find here."

I adopt that language, and for the reasons given, I hold that the contention that the liability of the charterers ceases the moment an icebreaker arrives to attend the ship is unsound.

A further point was taken also upon the construction of sub-clause (1), namely, that here, instead of the charterers undertaking themselves to provide icebreaker assistance, the undertaking is to arrange for the provision by the port authorities of icebreaker assistance. Now, I confess that I do not see that there is any distinction to be drawn. What they are agreeing

shall be provided is the same in either case—icebreaker assistance—and whether they agree to provide it themselves, or whether they agree to arrange for the provision of it by somebody else, it seems to me there is in either case a contract that that assistance shall be provided either by them or by the port authority. In the present case the learned umpire has found that the assistance contracted for was not provided. Therefore, apart from the point as to notification, it seems to me that the decision of the learned umpire was correct.

I now turn to that part of the case. The learned umpire has found, without, I think, saying so in so many words, that from the facts which were proved before him he inferred that the necessary requisition and the necessary notification were given, and he finds further that if they were not, the giving of them was waived by the charterers' agents who were acting upon the spot. The language of the ice clause with regard to this matter is as follows: "In the event of the port of loading being inaccessible, the charterers undertake to arrange" for icebreaker assistance, as I have already said, "if required by the captain," and it is said that a requisition by the captain is a condition precedent to the arising of any liability upon the charterers under this clause. It is plain upon the facts of this case that the Port of Leningrad was fast bound by ice at all relevant times, and, therefore, unless somebody was to suppose that the good ship *Spidola* was herself an icebreaker, it must have been obvious to anybody that she would require icebreaker assistance to enable her to get into the port. There have been produced communications from Exportles to the captain of the port, one of them on the 5th Dec., 1933, advising him that the *Spidola* was expected to arrive about the 10th Dec. and that the "captain has instructions to advise you by radio as to the time of his arrival and to give his position at edge of ice. Please confirm necessary arrangements have been made by you which may ensure rendering icebreaker assistance to the vessel on her arrival." The answer is: "I confirm that necessary measures have been taken by me to ensure rendering icebreaker assistance to the steamship *Spidola* on her arrival at the edge of ice in accordance with the Order of the People's Commissariat of Water Transport No. 307 and 345 of 1931 and 1932."

So there it appears that the captain of the port was informed of the expected arrival of the ship. He answers referring to the instructions relating to the taking of vessels through the ice, and I find that upon the 12th Dec. a telegram is sent by the master of the *Spidola* to Leningrad (it is addressed to Sovtorgflot) saying that the *Spidola* arrived at the ice edge on the 12th Dec., four miles west of Tolbukin.

Now, from those communications the learned umpire has inferred that a requisition was made upon the captain of the port to provide icebreaker assistance, and it seems to me that he was perfectly correct in so doing. It seems to me to be nothing to the point to inquire whether the fact that the captain would require assistance was passed to the captain of the port through Sovtorgflot or Exportles or in any other way. The information that the captain will want assistance really is quite unnecessary; everybody knows that a ship which is coming there will want assistance. The fact that she is at the ice edge waiting for assistance is specifically conveyed to the captain of the port through the wireless message which I have alluded to going to Sovtorgflot and Exportles.

It is said that there is no evidence in this case as to what the position of Sovtorgflot and Exportles and the captain of the port may be, but with regard to that point, I think I am entitled to follow the example of Greer, L.J. in the case of *Akties. Steam and Akties. Bruusgaard* v. *Arcos* (47 Ll. L. Rep. 225), in which he, I believe, used the following expressions after reference to the construction of a clause in the contract, because I think they are equally applicable to the matter at present in hand. He says (at p. 235): "The court is entitled to take judicial notice of the constitution of the Union of Socialist Soviet Republics just as it is entitled to take judicial notice of the constitution, say, of the United States of America. It is part of the constitution of the U.S.S.R. that no individual firm or company is permitted to engage in foreign trade. Foreign trade is the monopoly of the State. It follows that in shipping the goods and taking the bill of lading, Exportles must necessarily have been the agent of the Soviet Government."

In the same way in the present case, one knows that Exportles and Sovtorgflot, and everybody concerned with the export of timber from Russia, are officials of the U.S.S.R., and to say that because you have told Exportles that your ship is ready to sail you have not told the captain of the port, even though Exportles has conveyed on to the captain of the port the fact that they have been told by you, is, it seems to me, absurd. Therefore, I think the learned umpire had ample evidence upon which he could find that the necessary requisition to bring into operation the charterers' liability to provide icebreaker assistance, or to arrange for the provision of icebreaker assistance, was given and equally that the notification of arrival at the ice edge was given.

The other point that is taken is that there is no evidence that any notification of readiness to leave port was given. Here again the learned umpire has found as a fact that it was given, and if there was any evidence upon which he could properly so hold, it is not for me to interfere with his decision in any way. The evidence with regard to what was done when the ship was preparing to leave is found partly in the ship's log and partly also in the bundle of correspondence. The evidence is this. There is an entry in the log of the 21st Dec. in which it is said that the agent of the Sovtorgflot was advised at 12 o'clock that the ship would be ready to leave on the 23rd, and this advice was passed by Sovtorgflot to the Leningrad harbourmaster.

Now, the position with regard to these log entries appears to me to be that their accuracy was accepted at the arbitration, no evidence being called to contradict them and they themselves being admitted as evidence of the facts to which they speak. It is said here with regard to this particular point that be that so, the statement that the advice was passed on by Sovtorgflot to the Leningrad harbourmaster is only hearsay. It seems to me that when one is dealing with evidence on admissions of this kind—that is to say, producing a log book instead of calling people, that is hardly an objection which can be allowed to stand. I think *primâ facie* it is evidence of the fact that is stated in it in view of its admission in the way in which it was admitted in the present proceedings.

But the matter does not end there, because on the 23rd Dec. Exportles told the captain of the commercial port that the *Spidola* had finished loading the timber cargo at five o'clock and asked him to confirm "that you have taken the necessary measures to render this vessel icebreaker assistance

in due time." The captain of the port replied to that on the 23rd Dec. by saying that he was ready as soon as the ship was ready to sail. They remind him again on the 24th, and on the 25th he says that the *Spidola* has not yet been cleared out by the port authority, but that he is ready to take her as soon as she is ready to sail. Then I turn back to the log, which says that on the 24th Dec. the ship received an order that it was to follow the icebreaker *Krassin* in convoy. The 25th they spent waiting for the icebreaker, and on the 26th they were told they must follow the convoy of the icebreaker *Krassin* and that a small icebreaker would also be provided to free them from the ice in which they were then frozen. Upon that evidence the learned umpire has drawn the inference that the notification of readiness to sail reached the captain of the port. It is an inference which, upon those facts, he was well entitled to draw, and I think he has made no error in law in drawing it. Then he goes on to deal with the matter upon the assumption that that is not correct and that no sufficient notice was in fact given, and he finds if that was the case there was obviously a waiver of the notice.

Now, here again, if there is evidence upon which he could so decide, he is the judge of fact, and it is not for me to question his finding. That appears from the judgment given by Wright, J., as he then was, in the case of *Valkering* v. *Winter Brothers* (34 Ll. L. Rep. 30). He says this on p. 34: "All I have to do is to see that there was evidence upon which they could so find, because if there is any evidence upon which they could so find, their finding of fact is conclusive so far as I am concerned."

Here you have the fact that on the inward voyage the *Ermak*, I think it was, was alongside this vessel within six hours of her arrival at the ice edge. Now, if the captain of the port had not had due notice—she did not get there by accident—he must, as it seems to me, have sent her upon the notice which he did get and waived any better notice. That seems to follow from the very statement of the facts. Similarly, one finds that when the ship is ready to go, Exportles, that is to say, one of these Governmental institutions in the port, communicated the fact of her readiness to the captain of the port, and it appears from the log that the captain of the port informs the steamer that he will provide an icebreaker to enable the ship to be taken out of the ice and join the convoy. If that is not waiver of any further notice, I cannot see what possibly could be. If the captain of the port was not content with that as notice it seems to me what he should have done was to say: "That is not sufficient notice; give me a better one"; but he did not, and all that can be argued upon that is that it is said: "True enough the icebreaker arrived at the edge of the ice on the inward journey, and true enough the icebreaker assistance was promised when the ship was going to leave Leningrad, but that was not icebreaker assistance under the charter-party. It was the ordinary common or garden icebreaker assistance," if I may express it in that way, "current in the port." I fail to follow that. Here, there was the clause in the charter-party, and here we find Exportles, the people from whom the cargo is to be obtained, and who would be the people with whom the ship was in communication, giving to the captain of the port the notice which, under the charter-party, the charterers or their agents were bound to give, because it was for them to arrange for the provision of the icebreaker assistance, and I think it is perfectly plain that the learned umpire was right in arriving at the conclusion that he did, that if there was any informality about the giving of the notice, which, at the moment, I do not see, that informality was waived by the port authorities, who were the people to whom it had to be given, and who had to act upon it.

For these reasons I have come to the conclusion that the award of the learned umpire was correct and should be upheld, with costs.

Solicitors: for the charterers, *Pettite, Kennedy, Morgan*, and *Broad*; for the shipowners, *William A. Crump* and *Son*.

Supreme Court of Judicature.

COURT OF APPEAL.

October 15 and 16, 1935.

(Before Lord Wright, M.R., Romer, L.J., and Eve, J.)

Danneberg v. White Sea Timber Trust. (a)

Charter-party—Ice-breaking clause—Charterers to arrange for provision of ice-breaking assistance—Liability of charterers where assistance intermittent and inadequate—Operation of exceptions clause.

An ice clause in a charter-party provided, inter alia (*by clause* (1)), *that if the loading port were inaccessible by reason of ice or in case ice set in after the ship's arrival at the port, the charterers undertook to arrange for the provision by the port authorities of icebreaker assistance if required, and (by clause* (4)) *that the charterers should not be responsible for any loss of time during passage through the ice and (or) any loss or damage caused to the ship by ice or for any detention on passage through ice.*

Held, that in spite of the difference of language in clause (1) *from that used in* Ugleexport Charkow *v.* "Anastasia" (Owners) (sup. p. 482; 151 *L. T. Rep.* 261), *that clause was clear and unambiguous and imposed an obligation as absolute and peremptory as that embodied in the* Anastasia *case. There the House of Lords held that the agreement to supply ice-breaking assistance involved its supply by the charterers themselves or others. Here the contract provided that the assistance of the port authority should be arranged for. That did not involve the charterers merely asking for or suggesting the provision of assistance but their securing its effective provision by the rendering of assistance which was not casual or intermittent, and, therefore, the construction of clause* (1) *was the same as the construction of the corresponding clauses in the* Anastasia *case. Clause* (2) *supported the conclusion that clause* (1) *was clear and unambiguous by fixing the time within which assistance was to be given, and damages for breach of clause* (2) *were given by*

(a) Reported by Geoffrey P. Langworthy, Esq., Barrister-at-Law.

clause (3). *Clause* (1) *being clear and unambiguous, it could not be cut down by clause* (4), *for clause* (1) *was the dominant and overriding clause and clause* (4) *was merely a provision by way of exception.*

Decision of **Branson**, *J.* (sup. p. 538; *L. T. Rep.* 124) *affirmed.*

Appeal from a judgment of Branson, J. dated the 10th April, 1935 (reported *sup. p.* 538; 153 L. T. Rep. 124). The facts are stated in the judgment of the Master of the Rolls.

H. I. P. Hallett for the appellant, the charterers.

Cyril Miller for the respondents, the shipowners.

Lord Wright, M.R.—This is an appeal from a judgment of Branson, J. given on an award stated in the form of a special case for the opinion of the court by a very experienced city solicitor, Mr. Douglas Garrett. The case is one of a type which in the last few years has been frequently before the courts of this country, and I will indicate in the most general terms the nature of it. The appellants were the charterers of a vessel, owned by the respondent, called the *Spidola*. The appellants are the White Sea Timber Trust Limited, of Paris, and they were the charterers of the steamship *Spidola*, owned by P. Danneberg, of Riga. Both parties are foreigners, as one sees, but the contract was entered into on the Chamber of Shipping Baltic Wood Charter, 1926, a form of contract prepared by the London Chamber of Shipping, and the matter comes before the courts of this country because that contract contained an arbitration clause, clause 39. It was in that way that it went before an arbitrator in the city. The vessel was chartered in Nov., 1933, to proceed to Leningrad below bridges and to load a cargo of timber to be delivered to Antwerp or Ghent. It is well known that at that time of the year, or at least, the time of the year when the vessel was due outside the port, the port would be icebound, and equally it would be icebound when, having loaded her cargo in the ordinary way, the vessel was prepared to proceed to sea. In order to induce shipowners to send their vessels to Leningrad while it was icebound, a clause has been arranged called the ice clause; it is a clause which has taken different forms, but the object of that clause is to ensure that the shipowner will have the benefit of the assistance of icebreakers in order to enable the ship to enter port with as little delay as possible and to leave the port when the ship is loaded, also with as little delay as possible, and it provides that in certain events compensation, if there is undue delay, is to be payable to the shipowner by the charterer. Of course, in each case the precise rights and obligations of the parties must be determined by the exact terms of the clause which they have agreed upon. I am merely indicating the general nature of the position.

This vessel was delayed, or at least the owners complained that she had been delayed, because the requirements of the ice clause had not been properly fulfilled by the charterers, and thereupon proceedings at arbitration took place before two arbitrators and an umpire, and the umpire made his award in the form of a special case. Certain points which were raised in that award are not now material, but I shall read a few passages from the case which will indicate sufficiently, I think, first, what are the findings on the part of the umpire, and, secondly, what are the questions of law upon which he has required the opinion of the court. The facts as stated by him may be summarised in this way. The vessel "arrived at the edge of the ice"—that means the point outside the harbour at which it becomes impossible to proceed through the ice without the help of an icebreaker—"in the Gulf of Finland at about midnight on the 12th Dec., 1933. She did not arrive at her loading berth at Leningrad until 1.15 p.m. on the 18th Dec., 1933, and the period intervening between these two times was occupied by her in getting through the ice in the Gulf of Finland and Kronstadt Bay with the intermittent assistance of an icebreaker supplied by the harbour master or port authority of Leningrad, which is a department of the People's Commissariat of Water Transport and a governmental organisation. The icebreaker *Ermak* arrived at the vessel's position at 6 a.m. on the 13th Dec., 1933, but her assistance or attendance was intermittent, and during this period"—that is the period between her arrival at the edge of the ice and her arrival at the harbour—"the *Spidola* was frequently lying immobile in the ice. Exercising the best judgment I can upon the evidence, I find that the periods for which on the voyage to Leningrad the vessel was delayed owing to non-attendance or intermittent attendance upon her by the icebreaker and her consequent immobility in the ice were as follows," and then he sets out the periods and finds a total delay of ninety-one hours, fifty minutes. Then he turns to the other part of the voyage and says: "As regards the voyage from Leningrad to the port of discharge, basing myself upon the evidence above-mentioned"—because, as he pointed out earlier, the charterers did not produce the logs of any icebreakers, nor did they give any evidence in explanation of the delays which admittedly occurred in the vessel's passage through the ice—"I find that the vessel began loading her cargo at 8 a.m. on Tuesday, the 19th Dec., 1933, and completed her loading at 4.40 a.m. on Saturday, the 23rd Dec., 1933, and at 8 p.m. on the same date received her sailing orders from the shippers. As, however, no icebreaker assistance was then provided for her, the master took the opportunity of taking in some additional bunker coal, and this operation lasted from 9.45 p.m. on the 23rd Dec. until 4 a.m. on the 24th Dec., 1933, and I find that it was not until 7.30 p.m. on the 24th Dec., 1933, that the vessel was actually ready to leave. She did not reach open water in the Gulf of Finland until 5.35 p.m. on the 12th Jan., 1934, and much of the period intervening between these two dates was occupied in waiting for the icebreaker, whose assistance was again intermittent. I find that the periods at Leningrad and during the passage from Leningrad to open water for which the vessel was delayed owing to non-attendance or intermittent attendance upon her by the icebreaker and her consequent immobility in the ice were as follows," and then he sets out a number of periods of delay amounting to 393 hours, 45 minutes. Later in the award the umpire finds that there was no evidence given by either party of the mutual relationships of the charterers, Sovtorgflot, Sovfracht, and Exportles, nor of the connection (if any) of any of these bodies, with the Russian Government. That finding, in my judgment, although I quite appreciate why it was put in, is immaterial for the purposes of this case. Those facts having been found by the umpire, he goes on to discuss at length the various contentions on one side and the other, and then the question he puts is this: "If the charterers' obligations under the ice clause had in fact attached and become operative"—that clause may be disregarded because it is not now disputed that

the obligations do in fact attach and become operative, whatever they are—" what were those obligations and have the charterers fulfilled them ? " Then the umpire proceeds to hold in clause 16 of the case : " I hold, subject to the opinion of the court, that the words in par. 1 of the ice clause 'undertake to arrange for the provision by the port authorities of icebreaker assistance if required by the captain free of expense to the steamer, the steamer complying with official instructions and rules issued by the authorities concerning icebreaker assistance' constituted an unqualified undertaking by the charterers to procure the port authority to provide icebreaker assistance, within the meaning assigned to that term by the House of Lords in the cases of *Ugleexport Charkow* v. Anastasia (*Owners*) ; *Russian Wood Agency Limited* v. *Dampskibsselskabet Heimdal* (151 L. T. Rep. 261) (*a*) — cases to which I shall refer later, that is to say, assistance which should not be casual or intermittent, and that the latter part of the words quoted means that upon such assistance being provided the master must comply with the regulations. It does not appear to me to be material, having regard to the language of the clause, to consider what (if any) measure of connection with or control over the port authority existed in the charterers. The words above quoted are not, in my view, apt words to express nothing more than an obligation on the part of the charterers to give the instructions necessary to set in motion the free icebreaker assistance which existed by law at Leningrad, and which the master could have procured for the ship merely by complying with the regulations, and without the assistance of any express provision such as this in the charter-party. I further hold, subject to the opinion of the court, that by necessary inference from the ice clause and the charter-party as a whole, the object of assistance was to enable the vessel to reach her loading berth and after loading to reach open water, and that the assistance called for by the ice clause must be construed accordingly ; as regards par. 4 of the ice clause, I hold, subject to the opinion of the court, that the effect of this is merely to protect the charterers from liability for any delay which might (and doubtless would) be inseparable from a passage through the ice even with non-intermittent icebreaker assistance." Then the umpire proceeds to find that, if that view is correct, the charterers are to pay to the owner the sum of 252*l.* 11*s.* 4*d.*—I need not enter into the details as to how that sum is arrived at—and he asks the court to uphold that view if they think the opinions on this question of law which he expresses are correct. Then he proceeds in the alternative to find that if the court should be of opinion that " the obligations of the charterers under the ice clause were as contended for by them "—that is to say, the contentions which he set out earlier and to which I shall refer—" I find that the charterers are under no liability to the owner, and I hereby award that there is nothing due from the charterers to the owner." That award as made by the arbitrator, subject to the opinion of the court, was upheld, in the form in which he made it, by Branson, J., and it is from his judgment that the matter now comes before this court. In considering the ice clause it is necessary to bear in mind the decisions which had been given by Roche, J., the Court of Appeal, and the House of Lords on a form of ice clause which is similar to that now in question. Perhaps it would be convenient at this stage if I were to read the ice clause which is to be found in this charter-party and then to refer to such passages in the judgment of the House of Lords as seem to throw light upon its construction. The ice clause for present purposes contains four clauses. Clause (1) is : " In the event of the port of loading being inaccessible by reason of ice, or in case ice sets in after vessel's arrival at port of loading, the charterers undertake to arrange for the provision by the port authorities of icebreaker assistance if required by the captain, free of expense to the steamer, the steamer complying with official instructions and rules issued by the authorities concerning icebreaker assistance. . . . (2) Icebreaker assistance to be rendered free of expense to the steamer within forty-eight hours of receipt by the captain of port (at loading port) "—I think " of " is missed out here—" master's or owners' notification of arrival at the edge of ice, or when leaving port forty-eight hours after notification by the master of readiness to leave. (3) Time lost by the vessel in waiting for icebreaker assistance at the edge of ice, and when leaving the loading port in the excess of the time provided for in clause 2 to count as demurrage and (or) detention and to be paid by charterers at the rate of 20*l.* per day or *pro rata*, from which time days saved in loading and (or) discharging shall be deducted. (4) The charterers shall not be responsible for any loss of time during passage through the ice and or any loss or damage caused to the steamer by ice or for any detention on passage through ice."

The main arguments which have been put forward very clearly by Mr. Hallett for the charterers I think may be summarised thus. He contends, first of all, that the obligation under clause (1) is merely an obligation to arrange for the provision by the port authorities of icebreaker assistance ; that is to say, they have to take steps which in the ordinary course would secure that provision, and once they have taken those steps, their responsibility is discharged and they are not in any way responsible for any delay, neglect, or default in the actual provision by the port authority of the icebreaker assistance ; in other words, clause (1) is limited to an obligation merely to do something towards the form of arrangement. He did not put any stress upon the words : " the steamer complying with official instructions and rules issued by the authorities concerning icebreaker assistance," because he frankly admitted that he could not distinguish the words in the qualification in which they stood from those which were discussed by the House of Lords in the case of the *Anastasia* (*ubi sup.*), and which were held not to limit in any way the charterers' obligations. He further argued that the words, " icebreaker assistance," meant something different from " icebreaker assistance to enter or leave the port," and that they were satisfied by the provision of an icebreaker which might or might not give assistance ; in other words, he argued that there was no definition of the purpose or object for which the icebreaker assistance was to be provided, and *a fortiori* no provision which would involve any obligation if that purpose or object was not secured by the assistance which was provided. So much for clause (1).

As to clause (2), Mr. Hallett's contention, I gather, was that it was not absolute or peremptory in its terms ; it was merely inserted as an answer to such obligation as might be embodied in clause (1) and was to fix a time at which the icebreaker assistance—in the sense which I have just explained—was to be available.

Then with regard to clause (3), " Time lost by the vessel in waiting for icebreaker assistance," I gather there was no special argument advanced

(*a*) The latter case is referred to as the "Asko" case, the name of the ship concerned.

except this, that clause (3) was used in order to find a distinction between clause (3) and clause (4). As I follow it, Mr. Hallett's contention was that clause (4) was absolute, not only in language, but in effect, and reading it with clause (3) and also with clause (1), it amounts to this: If there had been such an arrangement as he contemplated to be required under clause (1) for such icebreaker assistance as he contemplated was involved on his construction, and that icebreaker assistance appeared and was available for the steamer within forty-eight hours of the receipt of the notification of arrival in the one case, and the notification of readiness to leave in the other case, no delay of any kind, or due to any circumstance which occurred after the icebreaker assistance was rendered free of expense to the steamer would involve any responsibility on the charterers, even though the delay and the loss of time and the detention—I put aside the damage as involving rather different considerations—was due to the fact that the icebreaker absented itself for indefinite periods, or indeed, went away altogether, because that was a matter which was foreign to the obligations or the responsibility. Such is the argument of the charterers. Before dealing with the contentions of Mr. Hallett in detail it may be convenient to look at the decision of the House of Lords in the cases of the *Anastasia* and the *Asko*, of which I have already given the reference. There were two appeals and they were heard together, and I think I will sufficiently indicate the broad distinctions between the contract in those cases and the contract in the present case by pointing to certain differences—I do not say there are no other differences—but the differences I am going to point to are, I think, sufficient. In the first case, the case of the *Anastasia*, dealt with in that court, the charterers undertook to provide "icebreaker assistance to enable the steamer to reach, load at, and leave loading port, steamer being free of expense for icebreaker assistance." There the difference was obviously this: The charterers undertook "to provide," and not "arrange for the provision by the port authorities" and that icebreaker assistance is further defined as being to enable the steamer to reach, load at, and leave loading port. Then there is a clause in the *Anastasia* case which is identical with clause (2) in the present contract, and there is a clause which is almost identical with clause (3). In the other case, the case of the *Asko*, the clause was, so far as is material: "Charterers to supply the steamer with icebreaker assistance if required by the captain to enable her to enter or leave the port of loading free of all expenses to the owners . . . Icebreaker assistance to be rendered within forty-eight hours after steamer's arrival at the ice edge or readiness to leave the port of loading. Any time lost in waiting ice-breaking beyond forty-eight hours after readiness to proceed to be for charterers' account." There again the differences, so far as material here, are comparable to those in the other case.

The principles which were laid down by the House of Lords for the construction of those words in those charter-parties may, I think, be quite shortly summarised. In the first place, the House of Lords held that the language of clause (2) to supply the steamer with icebreaker assistance is peremptory. It was said "That stipulation does not mean that the obligation is merely to make arrangements with the port authority or any other person for that supply. It is, I think, immaterial whether or not the charterers and the port authority can be treated as parts of one and the same juridical entity, whether the Soviet Government or any other person; as to this the evidence does not seem to me sufficient to justify my expressing any opinion; in either case the charterers have contracted to supply the assistance, and that, in my opinion, means either by themselves or by others, so that they cannot justify a failure to do so on the pretext that they had not the icebreakers under their control and could not get them supplied by those who controlled them. In that sense the obligation is absolute. The charterers assumed the obligation and the risk. It follows equally that the charterers' obligation is not limited to an obligation to do their best to supply. The language of the clause is peremptory."

The next point upon which I want to refer to the opinion of the House of Lords deals with another matter, and that is the position, in the opinion of the House of Lords, of the charterers in respect of the obligation to render icebreaker assistance after the specific time at which that obligation attaches; that is to say, forty-eight hours in this case after the notification, and in the other cases, after readiness. There is, of course, a provision for the period of delay if icebreaker assistance is not rendered within the forty-eight hours, and in that respect I can see no difference between the cases which were before the House of Lords and the present case, and I do not think any is suggested. Then the opinion of the House of Lords goes on in this way: "But once the assistance has been supplied there is no stipulation as to time. The exact character of what is meant by the icebreaker assistance is not particularised save that it is to enable the ship to enter or leave the port free of all expense to owners. The judge has found in this case that for a period of six days after the *Oktober* first came the steamer had only icebreaker assistance for nine or ten hours, and that she then lay unassisted in Kronstadt Roads for three days, and again was left for some periods without icebreaker assistance between the 9th and 12th Jan., 1931. The appellants did not explain why the assistance was so intermittent; in effect they contended that their obligation could not in any case be put higher than an obligation to do their best or to do what was reasonable, and that the onus lay on the respondents to show that they had not done their best or had not done what was reasonable. I think this contention is erroneous; there is in the clause a positive undertaking to render icebreaker assistance, which, I think, means *primâ facie*, assistance which is not casual or intermittent, and in order to justify a failure in that respect the charterers must show some excuse. The absence of icebreakers for such periods in the aggregate as the judge has here found is *primâ facie* a breach of the undertaking. I do not say that after the inception of the service absence of icebreaker assistance at some period or periods may not be justified; but I think the words of the clause are *primâ facie* not satisfied by intermittent assistance. I have already stated my opinion that it is immaterial whether or not the icebreakers are controlled by the charterers, because their responsibility is the same in either event. But it seems to me that there may be contingencies, such as perils of the seas, which, without anyone's fault, hinder or interrupt the service, without any liability attaching to the charterers in those respects." Then lower down it says this: "The express obligation to render icebreaker assistance to the chartered vessel—that is, assistance sufficient or satisfactory for the specified purpose—involves a due regard both to her safety and her dispatch, and is paramount; hence the convoy system can only

be justified so far as it can be reconciled with this paramount obligation." Then there is a discussion with regard to proceeding in convoy, which is not material here, because no one has been told whether the absence from time to time of the icebreakers, which was found by the umpire, was due to the fact that they had too many vessels in convoy or due to any other particular reason.

That was the decision of the House of Lords upon the construction of the contracts which they had before them, and although it is perfectly well recognised that the views of any tribunal, however exalted, upon the construction of a particular contract do not necessarily determine the construction of any other contract, because each contract is a thing by itself and has to be considered according to its own terms and according to the totality of its conditions, yet in the present case, even if the two sets of contracts are not treated as identical, still there is such similarity in the general conditions under which they are entered into and such similarity in phraseology and their specific provisions, that the opinion of the House of Lords upon the construction of the contracts before them in the case I have referred to must afford great assistance in construing this particular contract. Giving the matter the most careful consideration that I can, I have come to the conclusion that the views arrived at on the construction of this particular contract, both by the umpire and by the learned judge, are correct, and I find, in arriving at that conclusion, the greatest possible assistance by considering the previous decision of the House of Lords in the case to which I have referred. The first point which strikes one is a distinction in the language of clause (1). I have, however, come to the conclusion that, according to its true construction, clause (1) is quite clear and unambiguous, and that it imports an obligation as absolute and peremptory as the obligation which was held to have been embodied in the cases of the *Anastasia* and the *Asko*. In the cases of the *Anastasia* and *Asko*, as I have already pointed out, the House of Lords held that the charterers had contracted to supply assistance either by themselves or by others. In this particular case they had undertaken to arrange for the provision of icebreaker assistance, if required by the captain. It is not unimportant to remember that there is, as was found in this case, a right under Russian law of any captain coming to the port to require himself icebreaker assistance. The provision, therefore, in clause (1) is intended to give him a right against the charterers in excess of that right which he has at general law, and, in my opinion, the argument on behalf of the charterers would insert words qualifying "arrange." In my opinion "arrange for the provision of icebreaker assistance" means, not merely that the charterers are bound to take steps or to ask or to suggest to the port authorities that icebreaker assistance should be provided; they have to "arrange"—that means sufficiently or successfully—for the provision of icebreaker assistance; that means to secure the provision by the port authorities. If that is the true construction, then the obligation is on the charterers that that should be done—that the icebreaker assistance should be actually provided—and by that line of reasoning it seems to me that the result on the true construction of clause (1) is exactly the same as the result on the construction of the corresponding clauses in the cases of the *Anastasia* and the *Asko*. It is an obligation to provide icebreaker assistance, which, it is true, is not to be provided by the charterers personally, but they undertake they will effectively and successfully arrange for that provision by the port authorities; that is to say, they undertake that, through the agency of the port authorities, icebreaker assistance will be provided.

The next point which has been emphasised is that the words "icebreaker assistance" are used here without the addition of the words which are found in these other two cases, "to enable the vessel to enter or leave the port of loading." In my opinion, the absence of those words makes no difference. I think they are quite otiose. "Icebreaker assistance" means the assistance of an icebreaker, and not merely the physical presence of an icebreaker which does nothing; it means assistance for some purpose. The only possible purpose under a contract of this nature and in those circumstances for which icebreaker assistance would be required to be given is to enable a vessel to enter or leave the port, and I therefore treat as quite immaterial the absence of those words. I think it constitutes no distinction at all.

Clause (2), in my judgment, strongly supports my conclusion that clause (1) is clear and unambiguous. It is quite unqualified in its terms. It is peremptory in its terms: "Icebreaker assistance to be rendered free of expense to the steamer within 48 hours of receipt by the captain of port (at loading port) of master's or owner's notification," and so on. That is subject to no qualification at all. It does not say "If the port authorities had been able to satisfy our request, then icebreaker assistance will be rendered, and if it is not rendered within 48 hours, we will pay certain compensation." It says in terms "icebreaker assistance is to be rendered free of expense to the steamer," and that is the whole of the clause, which is absolute in its terms. It is perfectly true that when you come to the third clause you get a provision as to the damages or compensation which are payable in the event of clause (2) not being complied with. Clause (3) is in these terms: "Time lost by the vessel in waiting for icebreaker assistance at the edge of ice and when leaving the loading port in the excess of the time provided for in clause (2) to count as demurrage and (or) detention and to be paid by charterers at the rate of £20 per day or *pro rata* from which time days saved in loading and (or) discharging shall be deducted." That is treating the obligation under clause (2) as a firm obligation, not qualifying it in any way, but providing liquidated damages in the event of any breach being committed of that obligation. As I have said, I think the language of clause (2) supports the view I have arrived at, that clause (1) is clearly a peremptory clause imposing an obligation. Then comes clause (4), which has been very much relied upon by Mr. Hallett. He uses clause (4) as showing that the obligations under clause (1), resting on the charterers, were limited to doing something by way of arrangement with the port authorities, and then he says that view is corroborated and confirmed by clause (4) which, following out that idea, provides in terms that "the charterers shall not be responsible for any loss of time during passage through the ice and (or) any loss or damage caused to the steamer by ice or for any detention on passage through ice." He does not hesitate to say that that clause is to be read in its full scope and meaning, without any qualification at all, and the result, therefore, would be that the charterers, having fulfilled, as he says, the conditions of clause (1), and the icebreaker having appeared within 48 hours, no liability attaches to the charterers even though the icebreaker went away having broken a little ice and

got the vessel inside the ice and on its passage through the ice, and even though under those circumstances the icebreaker went away and left the vessel peacefully in the ice until the spring came and released it. Of course, if those words are to be taken in their widest sense, without any qualification or any other limitation, then, no doubt, that view is right. "Any detention on passage through ice," if unqualified, would cover anything of that sort, but in my judgment not only do I disagree with the suggested construction of clause (1), but I also think that clause (4) is to be read subject to a qualification which, so far as I know, is almost certainly, in the majority of cases, to be implied wherever you have an exceptions clause. I accept the statement of principle which was given by Scrutton, L.J. in the case of *Gibaud* v. *Great Eastern Railway Company* (125 L. T. Rep. 76; (1921) 2 K. B. Div. 426), a case which on the facts is considerably removed from this case. Indeed, the statement by Scrutton, L.J. evidently cannot be regarded as anything but a matter of observation, but coming from so great a lawyer in any view what he says is worthy of serious consideration, and I venture to think that the passage I refer to is so well expressed as to be of great value in a case like this, which is different on its facts. Scrutton, L.J. said (125 L. T. Rep. at p. 81; (1921) 2 K. B. at p. 435): "The point argued here was that the appellant was not bound by the conditions relieving the company from liability, because the company had not kept the bicycle in the place in which they had contracted to keep it." The question in that case was whether a bicycle could be kept in a cloakroom or could be kept in a station. The learned Lord Justice goes on to say this: "The principle is well known, and perhaps *Lilley* v. *Doubleday* (44 L. T. Rep. 814; 7 Q. B. Div. 510) is the best illustration, that if you undertake to do a thing in a certain way, or to keep a thing in a certain place, with certain conditions protecting it, and have broken the contract by not doing the thing contracted for in any way contracted for, or not keeping the article in the place in which you have contracted to keep it, you cannot rely on the conditions which were only intended to protect you if you carried out the contract in the way in which you had contracted to do it. In *Lilley* v. *Doubleday* the defendant had contracted to warehouse certain goods at the main warehouse. He warehoused part of them at another place, and, without negligence on his part, they were lost from the other place. It was held that though he would have been protected if the goods had been lost without negligence from the place where he had contracted to keep them, he lost that protection when he warehoused them in a place where he had not contracted to keep them." Atkin, L.J. in the later case of *The Cap Palos* (15 Asp. Mar. Law Cas. 403; 126 L. T. Rep. 82; (1921) P. 458) quoted these words with approval. That was a case where under a towage contract the vessel was lost because the defendant had either taken away the tugs, or not taken proper steps to send them back, and left the sailing ship on the shore so that she was lost; at any rate he had temporarily given up any attempt to continue the towage, and left the performance of his duties to others. It was held in that case that a similar limitation to that expressed by Atkin, L.J. must be put on the very sweeping words of exception in that contract.

In this case, if I am right in holding that clause (1) is clear and unambiguous in the sense in which I have indicated, then it cannot be cut down by clause (4), because from the very nature of things clause (1) is established as a dominant and overriding clause, and clause (4) is merely a clause of exception and as such must be construed with that limitation which always applies to a clause of exception in a case like this where it is sought to apply it to cases where the provisions of the dominant clause are not being fulfilled; in other words, clauses (1) and (4) must be read together so that they can receive harmonious effect; in other words, freedom from responsibility only applies to cases in which there is a performance or an attempt to perform the conditions of clause (1). If the conditions of clause (1) are not being complied with, then clause (4) will not, in my judgment, relieve from responsibility for any breach of clause (1), because clause (4) might have been quite differently expressed. However peremptory clause (1) might be in itself, you might have in clause (4) words of exception so precise and so sweeping as to excuse any breach whatever of clause (1), but that, I think, is not the effect of clause (4) in the present case. Again, it might be that if clause (1) was ambiguous and uncertain, then the language of clause (4) might be brought in in order to explain the ambiguity and to give a more limited effect to clause (1). Taking the view I do of the effect of both these clauses, I think they can only be read together by giving the dominant effect to clause (1) and the more limited effect to clause (4).

There is only one other point I need note, and that is that clause (4), it was said by Mr. Hallett, is clearly supererogatory in view of the decision of the House of Lords, the passage to which I have referred in the *Anastasia* case indicating that there may be difficulties in performance, but which are not inconsistent with a due regard to clause (1) in which no liability would attach to the charterers. That may or may not be so, but in any view the broad ruling which was given in the House of Lords was not given until this clause was settled. In effect, I do not question that the charterers have sought to minimise the liabilities which have been declared to attach to them under the former ice clause, but no doubt they have had to deviate as little as possible from the language which the shipowners had accepted, and would be willing to accept, and I think the changes which have been made in the ice clauses in this case have not relieved them of the obligation under which the shipowners in the earlier cases were held to be.

In those circumstances, I think the appeal fails and should be dismissed with costs.

Romer, L.J.—The question which falls to be decided in this appeal is whether the obligation of the charterers under the ice clause contained in the charter-party is merely an obligation to arrange for the provision of icebreaker assistance at the ice edge when the ship is going into port and at the wharfside when the ship has completed her loading, or whether it be an obligation to arrange for the provision of continuous icebreaker assistance while the ship is passing in the first case through the ice to the wharfside, and in the second case from the wharfside to the open sea. If the obligation is the former of those two, then this appeal is entitled to succeed; if, on the other hand, the obligation is the latter of the two which I have mentioned, then I think it has failed. Having regard to the decision in the House of Lords in the cases of *Ugleexport Charkow* v. Anastasia (owners) and *Russian Wood Agency Limited* v. *Dampskibsselskabet Heimdal* (the latter case referred to as the *Asko*)(*sup. p.* 482; 151 L. T. Rep. 261), and the decision of the Court of Appeal in *The Cap Palos* case, to which my Lord has referred, this

appeal must be dismissed. If clause (1) of the ice clause be ambiguous in its terms, that is to say, if it will admit of a construction which will place either the one or the other of those two obligations upon the charterers, there is, in my opinion, a great deal to be said on the part of the appellants, because if there be that ambiguity it may well be argued that clauses (2) and (4), and probably (3), resolve that ambiguity in favour of the charterers. Clause (2) provides as follows: "Icebreaker assistance to be rendered free of expense to the steamer within forty-eight hours of receipt by the captain of port (at loading port), master's or owner's notification of arrival at the edge of ice, or when leaving port forty-eight hours after notification by the master of readiness to leave." It is quite plain that if the icebreaking assistance be of the continuous nature to which I have referred, it cannot possibly be rendered within forty-eight hours after the ship's arrival at the ice edge, or within forty-eight hours after the ship has completed her loading. It might be said that that clause, therefore, indicates that the obligation of affording the icebreaker assistance required by clause (1) is an obligation of the more limited assistance and not of the continuous and full assistance to which I have referred. That construction would then be assisted by a consideration of clauses (3) and (4) inasmuch as by clause (3) it is found that sanctions are provided for in the event and in the event only, apparently, of a failure to render icebreaker assistance at the edge of the ice and at the wharfside, and that no express sanctions are mentioned in the event of failure on the part of the charterers to render continuous assistance until the ship has got through the ice, in the one case to the wharf and in the other case from the wharf to the open sea; on the contrary, clause (4) in express terms provides that: "The charterers shall not be responsible for any loss of time during passage through the ice and (or) any loss or damage caused to the steamer by ice, or for any detention on passage through ice." That argument, if clause (1) be ambiguous in its language, strikes me as being a very forcible one, but in my opinion clause (1) is not ambiguous. It was indeed suggested, I think, at one time, that no two business people should agree that a charterer should provide means of assistance at the edge of ice and at the wharf, and that the shipowner should be responsible for the provision of the giving of assistance during the passage through the ice. I do not myself understand that, because it must be remembered that in the vast majority of cases the charterer has no more control over the icebreaking vessels than has the owner of a ship. I do not know why *a priori* the obligation should be thrown on the charterers rather than on the shipowners, but, however that may be, it appears to me that clause (1), when properly read, admits of one construction and one construction only. Let me read it once more. It says: "In the event of the port of loading being inaccessible by reason of ice"—what does that mean? It means in the event of the ship being unable, by reason of ice, to reach the port. Then it goes on: "Or in case ice sets in after vessel's arrival at port of loading"—what does that mean? In case after loading, the ship is unable to reach the open sea by reason of ice. Then: "The charterers undertake to arrange for the provision by the port authorities of icebreaker assistance"—what is that assistance? It must be the assistance to enable the ship to overcome the difficulties which are referred to in the words I have already read, difficulties arising from those two events. If, as I think is the case, those words are unambiguous—that is to say, if it is plain from that language that the obligation is to provide continuous assistance until the ship reaches the wharf in the one case, and the open sea in the other case—it is our duty as a court of construction to put such a construction on the subsequent clauses, if that construction is proper, as will not render them repugnant to clause (1). Remembering that, I see whether it is possible to construe clause (2) and clause (4) so as not to be repugnant to the obligation in the plain terms imposed by clause (1). Clause (2) says: "Icebreaker assistance to be rendered free of expense to the steamer within forty-eight hours," and so on. It is to be observed that it does not say: "The icebreaker assistance which is referred to in clause 1," but merely "icebreaker assistance." In other words, the assistance must begin at the ice edge within forty-eight hours of the arrival of the ship, and that icebreaker assistance must begin again when the ship is ready to leave the wharf. Clause (2) is not necessarily referring to the full assistance which has to be rendered under clause (1). Then when we come to clause (4) we are entitled and bound, I think, to put a construction upon it which will have the effect of inserting in the clause the words: "Performing their obligation." The words are these: "The charterers shall not be responsible," and so on. I think the proper construction of that clause, having regard to the decision in the *Cap Palos* case, is: "The charterers performing their obligations under clause (1) shall not be responsible for any loss during passage through the ice and (or) any loss or damage caused," and so on. I will not read again the case of the *Cap Palos*, but in the course of giving his judgment in that case Atkin, L.J. quoted a statement of a principle which is to be applied in such cases, which was a statement of principle made by Scrutton, L.J. in an earlier case. The Master of the Rolls read out that passage, and I do not propose to read it again. Applying that principle to clause (4), as I think in the circumstances we are obliged to, it follows that this appeal fails, and must be dismissed.

Eve, J.—I agree entirely with the judgments which have just been pronounced, and the conclusions to which they take us, and I have nothing to add.

The Master of the Rolls.—I should have said that we attach no importance to the fact that in clause (3) there is a specification with regard to the liquidated damages, and that there is no reference to the measure of damages in clause (4). It is very common in contracts of affreightment to append a clause with regard to liquidated damages with regard to one particular breach, and to say nothing about the damages in regard to another class of breach. The appeal will be dismissed with costs.

Chapman.—My Lord, this is a very important matter for the charterers, and of course, as your Lordship will understand, it is not only confined to this one particular case necessarily. In those circumstances, my clients are anxious to take this matter to the House of Lords, and I ask your Lordships' permission for leave to appeal to the House of Lords.

The Master of the Rolls.—In this case the court is of opinion that they should not give leave to appeal to the House of Lords. This is a particular charter-party. We have no indication that precisely this type of clause is to be found in any other charter-party. The House of Lords has pronounced its views on the construction of a charter-party which does not appear to differ

either in principle or in substance from this particular charter-party, and, after all, some regard must be had to the position of this shipowner, Mr. Danneberg, of Riga, whoever he may be. Already there has been an arbitration before a very experienced arbitrator in the city; there has been a hearing before a very experienced commercial judge, and this court has heard the matter at very considerable length. In all those circumstances, this court is of opinion that there should be no leave to appeal given. Of course, that does not prevent you from going to the House of Lords, but this court is bound now to exercise a discretion in the matter, their opinion is that there should not be any leave given.

Chapman.—I entirely appreciate what your Lordship says, and in those circumstances I shall consider whether to exercise my right to go to the House of Lords.

The Master of the Rolls.—Of course this is not at all final; you quite appreciate that.

Chapman.—If your Lordship pleases.

Appeal dismissed.

Solicitors for the appellants, *Pettite, Kennedy, Morgan*, and *Broad*.

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

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Wednesday, May 22, 1935.

(Before Branson, J.)

Société Anonyme Comercial de Exportacion e Importacion (Louis Dreyfus et Cia) Limitada v. National Steamship Company Limited. (*a*)

Charter-party—Carriage of passengers by shipowners—Ship chartered for carriage of grain—Charter not a demise.

A charter-party, which was not a demise of the ship, provided that a steamer should carry a cargo of grain from the River Plate to ports in Europe. By clause 6 *thereof, "The charterers are to have the full reach and burthen of the steamer, including the 'tween and shelter decks, bridges, poops, etc. (provided same are not occupied by bunker coals and (or) stores)."*

Held, that notwithstanding the provisions of clause 6, *the shipowners were entitled to carry passengers on the voyage from the River Plate to Europe, in so far as to do so was not inconsistent with the obligations they had undertaken towards the charterers.*

Action claiming a declaration that under the terms of two charter-parties in the form known as "Centrocon," the defendants (the shipowners) were not entitled to carry passengers in either of the chartered ships. The two ships, the *Harpasa* and the *Harcalo*, had been chartered by the plaintiffs to load and carry cargoes of grain from the River Plate to European ports. One of the ships was lying in that river loaded and ready to sail when the action was heard, and the owners proposed to carry passengers in her on the voyage to Europe.

The charter-parties, which were not demises of the ships, each contained the following clause (clause 6): "The charterers are to have the full reach and burthen of the steamer, including the 'tween and shelter decks, bridges, poops, etc. (provided same are not occupied by bunker coals and (or) stores)." The other material parts of the charter-party are set out in his Lordship's judgment.

The plaintiffs contended that the defendants were not entitled to carry passengers. The charter-party was silent on the point, but it placed at the disposal of the charterers the whole of the vessel for the carriage of their goods, and that, it was submitted, was inconsistent with the owners using any part of her to carry passengers. The point was novel, but in *Shaw* v. *Aitken, Lilburn, and Co.* (Cab. & El. 195) it had been held conversely that, under a similar charter, the charterers might not carry passengers. The presence on board of passengers might be injurious to the plaintiffs, since the ship might be detained in quarantine.

The defendants contended that, as the charters were not demises, the owners remained in possession and control of the ships and were entitled to use them as they pleased, provided that such use did not prevent them from fulfilling their obligations to the charterers. The carriage of passengers would not interfere with the fulfilment of those obligations.

Cyril Miller for the plaintiffs.

W. L. McNair for the defendants.

Branson, J.—This action raises a short point in the following way. The plaintiffs are the charterers of two steamships, the *Harpasa* and the *Harcalo*. The charter-parties are, *mutatis mutandis*, identical, the one having been entered into on the 11th April, 1935, and the other on the next day. The *Harpasa* is now loading in the River Plate, and a dispute has arisen between the plaintiffs, the charterers, and the defendants, the owners, whether the owners are entitled or not entitled to take on board certain passengers for the homeward voyage. The way in which the case is put for the charterers is this: it is said that the charter-party is on the face of it the ordinary charter-party for the carriage of goods, as distinguished from passengers, from the River Plate to European ports, and that, if it be held that the owners are entitled to carry passengers, that will so alter the original intention of the parties to the contract as to amount to a deviation such as was discussed in *Glynn* v. *Margetson and Co.* (7 Asp. Mar. Law Cas. 366; 69 L. T. Rep. 1; (1893) A. C. 351) and *Attorney-General* v. *Smith* (*Benjamin*) *and Co.* (119 L. T. Rep. 252). On the other hand, it is said on behalf of the shipowners: "This is our ship and, in so far as we have not parted with our right to use it or any portion of it by our contract with the plaintiffs, we are entitled to do with it whatsoever we like." Mr. McNair then goes on to say: "If one looks at the charter-party it will be found that the carriage of passengers is not prohibited, because that is not inconsistent with any of the obligations which the shipowners have undertaken to the charterers."

That being the position, I look at the charter-party, by which it is agreed between the owners and the charterers that the steamer shall proceed

as ordered by the charterers to one of the undermentioned ports and there receive for them a full and complete cargo, except as qualified by clause 19, of wheat and (or) maize and (or) rye. Then it provides for the ports at which the ship shall load, and clause 4 states: "Being so loaded the steamer shall with all reasonable speed therewith proceed to St. Vincent (Cape Verde) or Las Palmas or Teneriffe (Canary Islands) or Madeira or Dakar, at the master's option, for orders (unless these be given to him by charterers on signing bills of lading) to discharge at Liverpool, Birkenhead, Manchester, Cardiff, Barry, Avonmouth, Swansea, London, Hull, Antwerp, Rotterdam, or Amsterdam (one port)." Clause 6 gives an option to the charterers to ship other lawful merchandise instead of wheat, or maize, or rye, which was provided for by clause 2, and an argument is raised on that clause to which I shall have to refer later. Clause 19 is a clause which expands the provisions of clause 2 with regard to the obligation to load a full and complete cargo, and it provides that the ship need not load more than 7480 tons and is not to load less than 6120 tons, and, provided that she has loaded her cargo within the above-mentioned limits, it is not incumbent on the master to sail with a full and complete cargo. Clause 21 provides for the signing of the bills of lading on the form printed on the back of the charter-party, clause 22 provides for orders as to the port of discharge, and clause 23 gives the charterers an option of ordering the steamer from the port of call to go to Falmouth for final orders to discharge. Clause 29 is an exceptions clause which provides, among other things, that the steamer is not to be liable for loss or damage caused by quarantine restrictions, and an argument is based on that. It is also provided: "The steamer shall have the liberty to call at any port or ports in any order for the purpose of taking bunker coal or other supplies, to sail without pilots, to tow and be towed, to assist vessels in distress and to deviate for the purpose of saving life or property."

That being the charter-party, one thing is perfectly plain—that it does not amount to a demise of the ship. That being so, it seems to me that I must begin the consideration of this case by bearing in mind that the defendants are the owners of the ship, and, in so far as they have not restrained their full rights of ownership by the charter-party, those rights remain in them. Mr. Miller contends that they have restricted their rights by entering into a charter-party which is one for the conveyance of grain from the River Plate to European ports, and which says nothing expressly about passengers. He says that, when one considers the possible effects of carrying passengers, it will be found that to do so is inconsistent with the obligations undertaken. I think that if it could be said that to carry passengers was inconsistent with the obligations undertaken, then the plaintiffs would be right. The question is whether that can be said.

The first way in which it is suggested that the carriage of passengers is inconsistent with those obligations is the contention that to take on passengers increases the risk of the ship being detained in quarantine. The next way in which it is put is that, if the taking on of passengers did lead to delays of the ship, the c.i.f. buyer of the grain which has been shipped might claim to reject for the delay. The third contention is that the c.i.f. buyer, when he got the bill of lading, would expect it to be a bill of lading given by the shippers of one cargo which was to be delivered at one port, and that if he found that there were passengers whose presence had necessitated one of them having to be landed, in order to save his life, because he was ill, that might give rise to a claim arising from delays on the voyage.

Dealing with these points, I think the answer to them is as follows. If the contract contains nothing to prevent the ship from carrying passengers, then neither the charterer nor any holder of a bill of lading given by the charterer could have any claim or right of rejection arising out of any delay which the carriage of the passengers might cause, because *ex hypothesi* to carry passengers would be one of the rights of the ship which had not been defeated by contract. Unless, therefore, it can be said that the matters which are put forward under this head are such that by reason of them the shipowner must be taken by implication to have agreed not to carry passengers, there is no force in that argument at all. With regard to terms to be implied, in order to imply a term in a contract between two commercial men who are sitting down to make a contract in writing one must be able to conclude that if the point had been raised when they were discussing the contract they would both have said: "Well, that goes without saying, we need not put it in." If one cannot find that amount of certainty about the matter the court will not imply a term into a written contract. It cannot possibly be said, as it seems to me, that the rather far-drawn possibilities of trouble which might arise from the carriage of passengers could ever have been treated, if it had occurred to anybody to think of them at all, in the way in which they would have had to be treated before one could imply a term into this charter-party that the shipowners would not carry passengers.

The last way in which it is said that the charter-party has disentitled the shipowners from the carrying of passengers is that under clause 6 of the charter "The charterers are to have the full reach and burthen of the steamer including the 'tween and shelter decks, bridges, poop, &c. (provided same are not occupied by bunker coals and (or) stores)." Mr. Miller quite fairly and frankly admits in a charter-party the words "full reach and burthen of the steamer" apply *primâ facie* to cargo spaces only. That was decided by *Weir* v. *Union Steamship Company Limited* (9 Asp. Mar. Law Cas. 111; 83 L. T. Rep. 91; (1900) A. C. 525), and no question can arise on that. But it is said that this clause expands the meaning of those earlier words by going on to include the 'tween and shelter decks, bridges, poop, &c., and it is argued that the passenger accommodation which this ship possesses may be held to come within that description so that the right to use that accommodation has been taken from the shipowners and handed over to the charterers. Dealing with the matter first apart from authority, I should hold that, when one looks at this sentence as a whole, one does not get any such extension of the ordinary *primâ facie* meaning attached to the words "full reach and burthen of the steamer." I cannot think that it was ever intended that any part of the accommodation of the ship which was not cargo space in the ordinary acceptance of that term could be included, in view of the provision "provided the same are not occupied by bunker coals and (or) stores." In other words, the generality of the earlier words has to be controlled by the proviso which indicates that the spaces which are intended to be dealt with in the earlier words are to be spaces which might in the ordinary course

be used for bunker coals and (or) stores. I do not think that anybody considering the passenger accommodation which we know that this ship possessed would, with that language before him, conceive the possibility of filling the state rooms or the dining-room with either bunker coals or stores, any more than he would think of filling the captain's cabin or the officers' rooms or the accommodation of the crew. Therefore I think that the argument for the charterers that the shipowners have disentitled themselves from carrying passengers by having entered into this charter-party fails.

I have come to that conclusion apart from authority, but I think that *Shaw, Savill and Co.* v. *Aitken, Lilburn and Co.* (Cab. & El. 195), properly looked at, is an authority for the view which I am taking of this charter-party. In that case an action was brought by charterers against the shipowners in the following circumstances. The vessel was chartered to go to Wellington, in New Zealand, and there to receive a full and complete cargo in consideration of a lump sum freight. The vessel went to Wellington and there loaded a full and complete cargo of lawful merchandise, the cabin spaces being left unoccupied. The charterers then desired to fill those cabin spaces by carrying passengers to England, and their right to do so was disputed by the shipowners. The charterers and the shipowners thereupon agreed that the space should be used and that the passengers should be carried for the benefit of whom it might concern. This was done, and then both parties sought to adduce evidence to prove a custom, the charterers to prove a custom that in some circumstances they should have the use of the cabins, the shipowners to prove a custom that they should have the use of the cabins. The case came before Denman, J. who found that both parties failed altogether to prove any custom at all. He therefore proceeded to decide the case on the construction of the charter-party. The judgment, which is quite short, proceeds as follows (Cab. & El. at p. 196): "The attempt to prove a custom utterly failed on both sides; nothing of the sort exists. The matter must therefore be decided on the construction of the charter-party and the authorities bearing on the point. Mr. Cohen contended that the authorities show there is no right to use the cabin space for cargo. Mr. Bigham, while admitting that there was no demise of the ship, contended that, when the whole charter-party was looked at, it amounted to an undertaking that the plaintiffs should have the use of the whole ship, and that although passengers were not cargo, yet the plaintiffs, having the use of the ship, might use the ship for passengers." Then the learned judge refers to the argument with regard to the tonnage and goes on: "Reliance was also placed on the words 'use and hire of the ship.' In my opinion, however, these words are used indifferently; and the meaning is that the charterer should have the use or hire of the ship for the purpose of carrying lawful produce and merchandise only, and not passengers. The ship is at their disposal for a particular purpose only. The defendants are therefore entitled to the freight earned by the carrying of the passengers." That judgment is not expressly put on the grounds on which I am basing my judgment, but I think that those are the grounds on which that case was decided.

Starting, therefore, from the fact that, unless they have precluded themselves from carrying passengers in their ship, the shipowners are entitled to do so, and holding, as I do hold, that there is nothing in the charter-party which does so preclude them, the net result is that the declaration asked for by the plaintiffs cannot be made, nor can the injunction for which they ask be granted.

Judgment for the defendants.

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

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

Judicial Committee of the Privy Council.

March 25 *and April* 12, 1935.

(Present: Lords Atkin, Tomlin, Macmillan and Wright.)

Maritime National Fish Limited v. Ocean Trawlers Limited. (*a*)

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Nova Scotia—Charter-party—Trawler—Number of trawlers limited by Government—Failure to apply for licence to fish—Frustration of contract—Claim for hire.

By sect. 69*a*, *which was an amendment dated the* 14*th June*, 1929, *to the Canadian Fisheries Act, it was a punishable offence to leave any port in Canada with intent to fish with a vessel that used an otter trawl, except under licence from the Minister. The appellants were charterers of the* St. C., *a steam trawler belonging to the respondents, which was fitted with, and could only operate as a trawler with, an otter trawl. It was expressly agreed that the trawler should be employed in the fishing industry only. The charter-party was dated the* 23*rd Oct.*, 1928, *and was to continue from year to year. It was renewed on the* 25*th Oct.*, 1932, *for one year. On the* 11*th March*, 1933, *the appellants applied to the Minister of Fisheries for licences for the five trawlers they were operating. The Minister in his reply stated that only three licences would be granted, and he requested the appellants to state for which of the five trawlers they desired to have licences. The appellants thereupon gave the names of three trawlers, other than the* St. C., *and licences were in due course issued for those three trawlers. In consequence the appellants claimed that they were no longer bound by the charter-party. In an action brought by the respondents for hire due under the charter, the appellants pleaded that the charter-party contract had become impossible of performance, and that thereupon they were wholly discharged from the contract.*

Held, that what was claimed to be a frustration by reason of the withholding of the licence was a matter for which the appellants were responsible. It happened in consequence of their election which prevented performance of the

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

contract, which was dependent on a licence being granted. The appellants therefore remained liable under the contract.

Krell *v.* Henry (89 *L. T. Rep.* 328; (1903) 2 *K. B.* 740) *commented on.*

Judgment of the Supreme Court of Nova Scotia affirmed.

APPEAL from a judgment of the Supreme Court of Nova Scotia en Banco dated the 9th June, 1934, reversing a judgment of the Supreme Court of Nova Scotia, dated the 19th Jan., 1934. The appellants were the charterers of a steam trawler of which the respondents were the owners.

The facts, which are sufficiently summarised in the headnote, are fully set out in the judgment of the Judicial Committee.

C. B. Smith, K.C. and *Frank Gahan*, for the appellants.

H. U. Willink, K.C. and *Mocatta*, for the respondents.

The judgment of their Lordships was delivered by

Lord Wright. — The appellants were charterers of a steam trawler, the *St. Cuthbert*, which was the property of the respondents. The charter-party, dated the 25th Oct., 1928, had originally been entered into between the respondents and the National Fish Company Limited, but was later by agreement taken over by the appellants. It was for twelve calendar months, but was to continue from year to year unless terminated by three months' notice from either party, the notice to take effect at the end of one of the years. It was expressly agreed that the trawler should be employed in the fishing industry only; the amount of monthly hire was to be fixed on a basis to include a percentage of the purchase price, and also operating expenses. There was an option given to the charterers to purchase the trawler.

By letters dated the 6th and 8th July, 1932, exchanged between the appellants and respondents, it was agreed that the charter-party as then existing should be renewed for one year from the 25th Oct., 1932, but at a rate of monthly hire which was 25 per cent. lower than that previously paid: the amount so agreed came to $590.97 per month. It was also then agreed that in the event of the appellants giving notice on or before the 25th July in any year that they did not intend to renew they should further give notice whether or not they intended to exercise the option to purchase. In fact the appellants gave notice on the 27th Jan., 1933, that they did not intend to renew the charter or to purchase the vessel.

When the parties entered into the new agreement in July, 1932, they were well aware of certain legislation consisting of an amendment of the Fisheries Act (c. 73, R. S. Can. 1927) by the addition of sect. 69A, which in substance made it a punishable offence to leave or depart from any port in Canada with intent to fish with a vessel that uses an otter or other similar trawl for catching fish, except under license from the Minister; it was left to the Minister to determine the number of such vessels eligible to be licensed, and regulations were to be made defining the conditions in respect of licences. The date of this amending sect. 69A was the 14th June, 1929. Regulations were published on the 14th Aug., 1931, former regulations having been declared invalid in an action in which the appellants had challenged their validity.

The *St. Cuthbert* was a vessel which was fitted with, and could only operate as a trawler with, an otter trawl.

The appellants, in addition to the *St. Cuthbert*, also operated four other trawlers, all fitted with otter trawling gear.

On the 11th March, 1933, the appellants applied to the Minister of Fisheries for licences for the trawlers they were operating, and in so doing complied with all the requirements of the regulations, but on the 5th April, 1933, the Acting Minister replied that it had been decided (as had shortly before been announced in the House of Commons) that licences were only to be granted to three of the five trawlers operated by the appellants; he accordingly requested the appellants to advise the Department for which three of the five trawlers they desired to have licences. The appellants thereupon gave the names of three trawlers other than the *St. Cuthbert*, and for these three trawlers' licences were issued, but no licence was granted for the *St. Cuthbert*. In consequence, as from the 30th April, 1933, it was no longer lawful for the appellants to employ the *St. Cuthbert* as a trawler in their business. On the 1st May, 1933, the appellants gave notice that the *St. Cuthbert* was available for redelivery to the respondents; they claimed that they were no longer bound by the charter.

On the 19th June, 1933, the respondents commenced their action claiming $590.97 as being hire due under the charter for the month ending the 25th May, 1933; it is agreed that if that claim is justified, hire at the same rate is also recoverable for June, July, Aug., Sept. and Oct., 1933.

The main defence was that through no fault, act or omission on the part of the appellants, the charter-party contract became impossible of performance on and after the 30th April, 1933, and thereupon the appellants were wholly relieved and discharged from the contract, including all obligations to pay the monthly hire which was stipulated.

The defence succeeded before the trial judge, Doull, J. His opinion was that there had been a change in the law, including the regulations, which completely changed the basis on which the parties were contracting. He thought it "not unreasonable to imply a condition to the effect that if the law prohibits the operation of this boat as a trawler the obligation to pay hire will cease." He also thought the appellants were not bound to lay up another boat instead of the *St. Cuthbert*.

It seems that the learned judge proceeded on the footing that the change of law was subsequent to the making of the contract, whereas it was in fact anterior to the agreement of 1932 under which the trawler was being employed at the time the licence was refused.

This judgment was unanimously reversed by the judges in the Supreme Court *en banco*. The judges of that court rightly pointed out that the discharge of a contract by reason of the frustration of the contemplated adventure follows automatically when the relevant event happens and does not depend on the volition or election of either party. They held that there was in this case no discharge of the contract for one or both of two reasons. In the first place they thought that the appellants when they renewed the charter in 1932 were well informed of the legislation and when they renewed the charter at a reduced rate and inserted no protecting clause in this regard, must be deemed to have taken the risk that a licence would not be granted. They also thought that if there was frustration of the adventure, it resulted

from the deliberate act of the appellants in selecting the three trawlers for which they desired licences to be issued.

Their Lordships are of opinion that the latter ground is sufficient to determine this appeal. Great reliance was placed in the able argument of Mr. Smith for the appellants on the *Bank Line Limited* v. *Arthur Capel and Co.* (14 Asp. Mar. Law Cas. 370; 120 L. T. Rep. 129; (1919) A. C. 435), and in particular on the judgment of Lord Sumner in that case. That case was in principle very different from this, because the vessel which was chartered in that case was actually taken from the control of the shipowners for a period such as to defeat the contemplated adventure: it was in consequence impossible during that time for the shipowners to place the vessel at the charterers' disposal at all. In the present case the *St. Cuthbert* was not requisitioned: it remained in the respondents' control, who were able and willing to place it at the appellants' disposal: what happened was that the appellants could not employ the *St. Cuthbert* for trawling with an otter trawl. No doubt it was expressed in the charter-party that the *St. Cuthbert* should be employed under the charter in the fishing industry only, but the respondents did not warrant the continued availability of the vessel for that employment nor was payment of hire made dependent on that condition. The *St. Cuthbert* was available for the appellants to make such use of her as they desired and were able to make. This case is more analogous to such a case as *Krell* v. *Henry* (89 L. T. Rep. 328; (1903) 2 K. B. 740), where the contract was for the hire of a window for a particular day: it was not expressed but it was mutually understood that the hirers wanted the window in order to view the Coronation procession; when the procession was postponed by reason of the unexpected illness of King Edward, it was held that the contract was avoided by that event: the person who was letting the window was ready and willing to place it at the hirer's disposal on the agreed date; the hirer, however, could not use it for the purpose which he desired. It was held that the contract was dissolved, because the basis of the contract was that the procession should take place as contemplated. The correctness of that decision has been questioned, for instance, by Lord Finlay, L.C. in *Larrinaga and Co. Limited* v. *Société Franco-Americaine des Phosphates de Medulla, Paris* (16 Asp. Mar. Law Cas. 133, at p. 136; 129 L. T. Rep. 65, at p. 68; 29 Com. Cas. 1, at p. 7). Lord Finlay observes: "It may be that the parties contracted in the expectation that a particular event would happen, each taking his chance, but that the actual happening of the event was not made the basis of the contract."

The authority is certainly not one to be extended: it is particularly difficult to apply where, as in the present case, the possibility of the event relied on as constituting a frustration of the adventure (here the failure to obtain a licence) was known to both parties when the contract was made, but the contract entered into was absolute in terms so far as concerned that known possibility. It may be asked whether in such cases there is any reason to throw the loss on those who have undertaken to place the thing or service for which the contract provides at the other parties' disposal and are able and willing to do so. In *Hirji Mulji and others* v. *Cheong Yue Steamship Company Limited* (17 Asp. Mar. Law Cas. 8; 134 L. T. Rep. 737; (1926) A.C. 497), Lord Sumner (17 Asp. Mar Law Cas. at p. 13; 134 L. T. Rep. at p. 742; (1926) A. C. at p. 510), speaks of frustration as "a device by which the rules as to absolute contracts are reconciled with a special exception which justice demands." In a case such as the present it may be questioned whether the court should imply a condition resolutive of the contract (which is what is involved in frustration) when the parties might have inserted an express condition to that effect but did not do so, though the possibility that things might happen as they did, was present in their minds when they made the contract.

This was one of the grounds on which the judges of the Supreme Court were prepared to decide this case. Their Lordships do not indicate any dissent from the reasoning of the Supreme Court on this point, but they did not consider it necessary to hear a full argument, or to express any final opinion about it, because in their judgment the case could be properly decided on the simple conclusion that it was the act and election of the appellants which prevented the *St. Cuthbert* from being licensed for fishing with an otter trawl. It is clear that the appellants were free to select any three of the five trawlers they were operating and could, had they willed, have selected the *St. Cuthbert* as one, in which event a licence would have been granted to her. It is immaterial to speculate why they preferred to put forward for licences the three trawlers which they actually selected. Nor is it material, as between the appellants and the respondents that the appellants were operating other trawlers to three of which they gave the preference. What matters is that they could have got a licence for the *St. Cuthbert* if they had so minded. If the case be figured as one in which the *St. Cuthbert* was removed from the category of privileged trawlers, it was by the appellants' hand that she was so removed, because it was their hand that guided the hand of the Minister in placing the licences where he did and thereby excluding the *St. Cuthbert* The essence of "frustration" is that it should not be due to the act or election of the party. There does not appear to be any authority which has been decided directly on this point. There is, however, a reference to the question in the speech of Lord Sumner in the *Bank Line Limited* v. *Arthur Capel and Co.* (*sup.*) (14 Asp. Mar. Law Cas. 375; 120 L. T. Rep. at p. 133; (1919) A. C. at p. 452). What he says is: "One matter I mention only to get rid of it. When the shipowners were first applied to by the Admiralty for a ship they named three, of which the *Quito* was one, and intimated that she was the one they preferred to give up. I think it is now well settled that the principle of frustration of an adventure assumes that the frustration arises without blame or fault on either side. Reliance cannot be placed on a self-induced frustration; indeed, such conduct might give the other party the option to treat the contract as repudiated. Nothing, however, was made of this in the courts below, and I will not now pursue it."

A reference to the record in the House of Lords confirms Lord Sumner's view that the court below had not considered the point, nor had they evidence or material for its consideration. Indeed in the war time the Admiralty, when minded to requisition a vessel, were not likely to give effect to the preference of an owner, but rather to the suitability of the vessel for their needs or her immediate readiness and availability. However, the point does directly arise in the facts now before the Board, and their Lordships are of opinion that the loss of the *St Cuthbert's* licence can correctly be described, *quoad* the appellants as "a self-induced

frustration." Lord Sumner in *Hirji Mulji and others* v. *Cheong Yue Steamship Company Limited* (17 Asp. Mar. Law Cas. at p. 12; 134 L. T. Rep. at p. 741; (1926) A. C. at p. 507) quotes from Lord Blackburn in *Dahl and Co.* v. *Nelson, Donkin, and Co.* (4 Asp. Mar. Law Cas. at p. 397; 44 L. T. Rep. at p. 386; 6 App. Cas. at p. 53) who refers to a "frustration" as being a matter "caused by something for which neither party was responsible": and again (17 Asp. Mar. Law Cas. at p. 12; 134 L. T. Rep. at p. 741; (1926) A. C. at p. 508) he quotes Brett, J.'s words which postulate as one of the conditions of frustration that "it should be without any default of either party." It would be easy, but is not necessary, to multiply quotations to the same effect. If either of these tests is applied to this case, it cannot in their Lordships' judgment be predicated that what is here claimed to be a frustration, that is, by reason of the withholding of the licence, was a matter for which the appellants were not responsible or which happened without any default on their part. In truth, it happened in consequence of their election. If it be assumed that the performance of the contract was dependent on a licence being granted, it was that election which prevented performance, and on that assumption it was the appellants' own default which frustrated the adventure; the appellants cannot rely on their own default to excuse them from liability under the contract.

On this ground, without determining any other question, their Lordships are of opinion that the appeal should be dismissed with costs.

They will humbly so advise His Majesty.

Appeal dismissed.

Solicitors for the appellants, *Charles Russell and Co.*

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

Supreme Court of Judicature.

COURT OF APPEAL.

Friday, June 21, 1935.

(Before Lord Hanworth, M.R., Romer and Maugham, L.JJ.)

Re Nautilus Steam Shipping Company Limited. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Insurance—Third-party insurance—Liquidation of company after and accident before Third Parties Act, 1930—*Payment of amount to liquidator—Claim by third party—Rights of general creditors—Third Parties (Rights against Insurers) Act,* 1930 (20 & 21 *Geo.* 5, *c.* 25), *s.* 1, *sub-s.* (1).

On the 21st Sept., 1925, *a policy of insurance was taken out by the Nautilus Steam Shipping Company Limited, now in liquidation. On the 6th Oct.,* 1925, *there was an accident under which the insurers became liable to the company in respect of an accident to a third party. On the 10th July,* 1930, *the Third Parties (Rights against Insurers) Act,* 1930, *came into operation. The liquidation commenced on the 10th Aug.,* 1931, *the date when the petition to wind up was presented, and a compulsory winding-up order was made on the 13th Oct.,* 1931. *A summons was issued in the liquidation by which the liquidator to whom the sum for the insurance was paid asked to have determined the rights of the third party in respect of money due to third parties under the contract of insurance. Sect.* 1, *sub-sect.* (1), *of the Act provides that: "Where under any contract of insurance a person (hereinafter referred to as the insured) is insured against liabilities to third parties which he may incur"; then: "If . . . any such liability as aforesaid"—that was a liability to third parties—"is incurred by the insured, his rights against the insurer under the contract in respect of the liability shall, notwithstanding anything in any Act or rule of law to the contrary, be transferred to and vest in the third party to whom the liability was so incurred." On the* 23*rd Jan.,* 1935, *Bennett, J. considered he was bound by the decision in* Ward *v.* British Oak Insurance Company Limited (146 *L. T. Rep.* 323; (1932) 1 *K. B.* 392) *to hold that the Act of* 1930 *was not applicable and therefore the liquidator held the insurance moneys for the benefit of the creditors of the company generally and the preference given to third parties by the Act was not operative.*

Held, that Ward *v.* British Oak Insurance Company Limited (ubi sup.) *did not govern the present case, as there the accident and the date of the liquidation were both before the Act came into operation, and the rights of general creditors had vested before the Act operated and could not be taken away by the Act unless so expressly provided, but in the present case as the liquidation was after the coming into operation of the Act no rights had arisen for the general benefit of the creditors before the Act and their rights in the third party insurance moneys were therefore postponed by sect.* 1, *sub-sect.* (1), *to the rights given by the section to the third parties under the contract of insurance.*

Decision of Bennett, J. (infrà) *reversed.*

Appeal from the decision of Bennett, J.

The facts are stated in the headnote and are more fully set out together with the material sections of the Third Parties (Rights against Insurers) Act, 1930, in the judgment of the Master of the Rolls.

Lionel Cohen, K.C., *W. N. Stable,* K.C., and *G. A. Avgherinos* for the plaintiffs.

W. P. Spens, K.C. and *R. J. T. Gibson* for the defendants.

Bennett, J.—I refuse to make the first declaration upon the ground that the liability of the insurers to the assured arose before the Act. The

(*a*) Reported by J. H. G. Buller and Geoffrey P. Langworthy, Esqrs., Barristers-at-Law.

Court of Appeal in *Ward* v. *British Oak Insurance Company Limited* (146 L. T. Rep. 323; (1932) 1 K. B. 392) decided that the Act had no application to a liability arising before the Act came into force.

Gibbs and Company appealed.

Lionel Cohen, K.C., *W. N. Stable*, K.C., and *G. A. Avgherinos* for the appellants.

W. P. Spens, K.C. and *R. J. T. Gibson* for the respondents.

Lord Hanworth, M.R.—This appeal must be allowed. It raises a very interesting point and a point undoubtedly of some importance. The facts are these. A policy of insurance was entered into insuring the insured against claims by third parties and it was a policy which covers the period when a liability arose. On the 6th Oct., 1925, a collision took place between a vessel, the *Pear Branch*, belonging to the Nautilus Steam Shipping Company, and a vessel called the *Dharma*. The *Pear Branch* went into Valparaiso after the collision and proceedings *in rem* were threatened by the owner of the *Dharma* under the Admiralty jurisdiction prevailing. In order to prevent the *Pear Branch* from being detained there was a bond entered into on behalf of the company by Messrs. Gibbs and Co., the well-known firm in Chile and Argentina. The liability which arose in the matter of damage to the *Dharma* was ultimately determined at 6200*l*. That was determined in 1928, and Messrs. Gibbs and Co., in accordance with their bond, paid that sum and they were reimbursed by the insurance company. But that did not exhaust the possible liability of the colliding vessel to the owners of the *Dharma*, and a claim was made for loss of profits which might have been earned by the *Dharma* owing to her being disabled by the collision from being placed under charter. That claim has not yet been finally determined. The matter has been litigated and in the Chilean courts apparently has gone from one court to the Court of Appeal and is still under consideration. On the 13th Oct., 1931, a compulsory order to wind up the Nautilus Steam Shipping Company was made, and the proceedings which are before us in respect of which Bennett, J. gave judgment, were for the purpose of a declaration as to what were the rights of Messrs. Gibbs and Co. in respect of any sum which might be payable under the policy of insurance as moneys due to third parties under the contract of insurance entered into as between the owners of the *Pear Branch* and the owners of the *Dharma*. Two dates must be remembered: one is the date of the collision, which is some time ago, namely, the 6th Oct., 1925, and the other the date on which there was a compulsory order made to wind up the company, on the 13th Oct., 1931. This question of the rights of third parties to receive the insurance moneys which accrued under a policy of insurance to the insured persons who were liable to the third parties has raised questions from time to time. In *Re Harrington Motor Company Limited*; *Ex parte Chaplin* (138 L. T. Rep. 185; (1928) Ch. Div. 105), "the applicant recovered judgment for damages and costs in an action against a limited company for personal injuries caused to him by the negligence of one of its servants. Before execution could be levied the company went into liquidation, and the insurance company with which the company in liquidation was insured against third party risks paid the amount of the damages and costs to the liquidator."

The reason why that sum was payable at all to the liquidator as representing the insurance company was because there had been a liability declared in favour of the third party for personal injuries which he, the third party, had suffered. Not unnaturally he thought that inasmuch as that sum had been paid by the insurers to their insured, the person who was liable to him for personal injuries, it would be fit and proper that the money so received by the insured company should be paid over to him. But it had to be held in that case that the money which was paid by the insurance company was paid by them under the contract of insurance which obtained between the insurance company and the company which had caused the injuries to the third party. Inasmuch as the liquidation had supervened the money which was paid over to the liquidator was general assets in the hands of the liquidator and could not be earmarked or paid over to the third party who had been insured, but remained assets in the hands of the liquidator for general distribution amongst the creditors of the company. The judgments in that case pointed out that that position was an unsatisfactory one, and pointed out that in certain legislation steps had been taken to give the third party a definite and direct right to receive moneys which were receivable by the person who had caused the injury who was insured and who had received in respect of the injuries so caused moneys with which to defray his own liability.

Upon that the Third Parties (Rights against Insurers) Act, 1930, was passed, and it received the Royal Assent on the 10th July, 1930. Sect. 1, sub-sect. (1), provides: "Where under any contract of insurance a person (hereinafter referred to as the insured) is insured against liabilities to third parties which he may incur," then certain results are to follow. Those opening words, to my mind, connote a declaration of a nexus between the person who is insured and his insurers. It refers to what may be called a state of insurance between the insured and the insurers. So long as no loss is incurred the relationship between the insured and the insurers is one which continues the nexus between the parties, but which is merely indicated by the steady and regular payment of premiums. It does not follow that there is any money which shall be received under the policy; it merely declares that there is a state of insurance existing between the insured and the insurers. When that state of insurance so exists this Act provides for two events: "If . . . any such liability as aforesaid"—that is a liability to third parties—"is incurred by the insured, his rights against the insurer under the contract in respect of the liability shall, notwithstanding anything in any Act or rule of law to the contrary, be transferred to and vest in the third party to whom the liability was so incurred." The events which are contemplated are the event of the insured person becoming bankrupt or, in the case of a company, of liquidation. I put the words in the shortest possible form and leave out words like "composition" or "making arrangements" and the other words in relation to a company. So that we have a direct liability or, rather, the rights of the insured person against his insurer are transferred to and vest in the third party to whom the liability was so incurred. Here, of course, there was a liability incurred though not yet quantified by the collision in 1925. There was not until after this Act had come into operation a liquidation of the Nautilus Steam Shipping Company, but that event, namely, the liquidation and the appointment of the receiver, who is respondent to this appeal, took place after the Act was in operation.

The interpretation that was put upon this Act came before the other division of the Court of Appeal in a case of *Ward* v. *British Oak Insurance Company Limited* (146 L. T. Rep. 323; (1932) 1 K. B. 392), and it was held that the section was not retrospective so as to affect cases in which the liability had been incurred before the 10th July, 1930, when the Act came into operation. The basis of that decision, which is stated somewhat broadly, was this: The writ in the action had been issued on the 22nd Feb., 1928, before the Act was in operation, and the liquidation became effective in 1927. Bearing in mind the case of the *Harrington Motor Company*, what was the position upon those facts? It was this, that, although there was a contract of insurance, inasmuch as there had been a voluntary winding up of the company liable to the third party and a liquidator had been appointed, the position was one which was comparable to the issue which had been determined in the *Harrington Motor Company* case. There was a right which had accrued to the liquidator to receive the moneys which were payable in respect of the damages payable to the third party and, as Greer, L.J. puts it, " one of the assets of the company was the liability of the respondents to pay the amount of the insurance. That was an asset divisible among the creditors, notwithstanding that the amount which it might provide for any creditor might be small." Then, as Greer, L.J. points out, the Third Parties (Rights against Insurers) Act was passed. Then he says: " It is clear from the dates that if that Act transferred to the appellant the right to recover from the respondents it could only do so by depriving the creditors of James and Clark Limited of a right which had already accrued to them. There are numerous cases which clearly show that the courts lean against so interpreting an Act as to deprive a party of an accrued right." Slesser, L.J. refers to certain passages in the judgment in the *Harrington Motor Company* case. But in the present case, although there was a possible liability in damages, there was not any order for liquidation until the 13th Oct., 1931, some months after this Third Parties Act was in operation. When one turns to sect. 1 the words which I have already read seem to me to deal with a situation which is different from that which had to be dealt with in *Ward's* case, but which cover a case where there is a liquidation after the Third Parties Act had come into operation. Let me read two sentences again of sect. 1: " Where, under any contract of insurance, a person . . . is insured against liabilities to third parties which he may incur," then " in the event of bankruptcy or liquidation if, either before or after that event, any such liability as aforesaid is incurred by the insured "—that must mean " has been or is or shall be incurred " because in dealing with a case before the event of bankruptcy the word " is " is necessarily inappropriate if it is to connote the existing moment of time. Something that had taken place before the event of bankruptcy and before the event of liquidation can be only introduced by giving a wider interpretation and meaning to that word " is," in fact. It appears to me, therefore, that this Act was intended as and when after its passing there was a bankruptcy or a liquidation and a question arose whether or not the sum payable by insurance was to be handed over to the trustee in bankruptcy or the liquidator in liquidation for the general benefit of the creditors —that situation was dealt with by giving to the third party in respect of his rights against the insurer in respect of the liability that the insurer had incurred to him a right to have the insured's rights against the insurers transferred to and vested in him. It appears to me, therefore, that when one carefully considers sect. 1 and interprets its somewhat imperfect language upon the facts of the present case, the liquidation supervening after the Act was in operation, there is a clear distinction from the *Ward* case and the section must be held to be operative and to enure to transfer the benefit of the policy from the insured to the third party.

It has been said and was said in the *Ward* case that one must look very carefully to see that you are not taking away rights which have already accrued by an Act of Parliament unless it can be found in very clear terms that that was the intention. Slesser, L.J. refers to that and says: " In my opinion, the wording is not clear enough to escape from the rule that vested interests are not intended to be interfered with by legislation, except when that intention is expressed in clear words." What did he mean by " vested interests "? Well, there is a well-known decision of Sir George Jessel, Master of the Rolls, who had to deal with a point which is not dissimilar under sect. 10 of the Judicature Act of 1875, which directs that in the winding up of a company whose assets may prove insufficient for payment of debts the same rules shall be observed as may be enforced under the law of bankruptcy. The question was whether under those terms the Act was retrospective or not. Sir George Jessel held that in a case where a supervision order had been made before the commencement of the Act to secured creditors, although their claim had not been ascertained they were entitled to prove for the full amount of their debts without deducting the value of their securities, and he decided it upon the general rule that where the Legislature alters the rights of parties by taking away or conferring any right of action its enactments, unless in express terms they apply to pending actions, do not affect them. Then he refers as an exception to the question of procedure. This, of course, as in that case, was not a question of procedure. But in the present case the creditors with their rights did not exist until the order was made for the winding up of the company. It was then, and then only, that they became entitled to have their aliquot part of the assets of the company distributed to them on a basis of equality. That right accrued to them on the 13th Oct., 1931, and not before. They might have had what has been expressed in the course of the argument to be some hopes, but they cannot actually have had any hopes because they cannot ever have hoped, being creditors of the company, that the company should be put into liquidation. But as creditors their rights have to be determined not earlier than the 13th Oct., 1931, and at that date this statute had become operative to say what was to happen in respect of the sum payable by the insurers to the insured arising out of a liability of the insured to the third party. To my mind the case is different from the case of *Ward* by which the learned judge below felt himself to be bound, and for these reasons the appeal ought to be allowed.

Romer, L.J.—I have come to the same conclusion. Bennett, J. felt in the circumstances, having regard to certain observations which had fallen from members of the court in the case to which the Master of the Rolls has referred, *Ward* v. *British Oak Insurance Company Limited* (146 L. T. Rep. 323; (1932) 1 K. B. 392) that it would be more respectful on his part to dismiss the summons of Messrs. Gibbs and Co. without expressing

any view of his own on the matter. The case of *Ward* v. *British Oak Insurance Company Limited* was a case in which, as the Master of the Rolls has pointed out, the insured company had gone into liquidation before ever the Act came into force. The question was whether in those circumstances the Act had any operation upon the affairs of that company. To use the words of Lindley, L.J. in giving judgment in the case of *Lauri* v. *Renad* (67 L. T. Rep. 275, at p. 279; (1892) 3 Ch. 402, at p. 421): "It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction."

To hold that the Act applied to a liquidation commenced before the Act came into force would have been indeed to hold that the Act had a retrospective operation. The members of the Court of Appeal in that case had to consider, and did consider, whether the language of the Act was such as plainly to require such a construction. Scrutton and Slesser, L.JJ., in particular, did call attention to the fact that throughout sect. 1 words of futurity seemed to be implied by the Legislature. That perhaps enabled them to arrive at the conclusion that the language of the section was certainly not such as to require them to give a retrospective effect to the Act. The court did not consider and did not express any view as to the true construction of the section in relation to its operation in the case of a liquidation begun after the Act came into force. As I said just now, to hold that the Act applied in the case of a liquidation commenced before the Act came into force would be to give a retrospective action to the statute. To hold that in the case of a liquidation begun after the Act came into force it relates to liabilities of the company insured incurred before the Act comes into force is in no way to give a retrospective effect to the statute.

To use an illustration which was employed by Mr. Cohen in the course of his argument, if a statute enacts that in the case of a person dying intestate his property shall be distributed in a particular way, it is indeed to give a retrospective effect to the Act to say that it applies in the case of a person who dies before the Act comes into force. But to hold that in the case of a person who dies after the Act comes into force, his property, whether acquired before or after the Act comes into force, is to be distributed in manner directed by the Act, is in no sense to give a retrospective effect to the Act. The language of the statute may indeed be such as to raise a question of construction as to what property it refers to, and I agree with Mr. Spens that this Act does give rise to a question, and a serious question, of construction as to whether it does apply, in the case of a company entering into liquidation after the Act comes into force, to liabilities which arose before the Act was passed. I therefore am entitled to treat this case as a question of construction, and construction only, unfettered by any presumption such as Lindley, L.J. referred to.

Turning to sect. 1 of the Act, it begins as follows: "Where under any contract of insurance a person (hereinafter referred to as the insured) is insured against liabilities to third parties which he may incur," it is perfectly plain that the word "is" there does not mean at the date of the Act. To do so would be of course to prevent the Act applying in any case other than insurance effected after the Act came into force. Plainly that word "is" refers to the state of affairs existing at the happening of the events which are immediately afterwards mentioned under letters (*a*) and (*b*) to which I need not refer. The sub-section must therefore be read as follows: "Where under any contract of insurance a person at the happening of the events next hereinafter mentioned is insured against liabilities to third parties which he may incur." There *primâ facie* it means "which he may incur after the happening of the event." Passing over (*a*) and (*b*) we come to these words—(*a*) and (*b*) really refer to certain events—"if, either before or after that event, any such liability as aforesaid is incurred by the insured"—that shows at once that the words "may incur" must be read as "may or may have been incurred," which he may incur or may have incurred. So I approach this section almost from the beginning with the knowledge that when the Legislature is using words of futurity it does not necessarily mean to refer to future events. The words which cause the trouble in the present case are these, "if, either before or after that event, any such liability as aforesaid is incurred by the insured." The question we have to determine is: does that mean if either then or at a later date the insured is under such liability, or does it mean that the liability must be incurred after the event mentioned in (*a*) or (*b*) as the case may be? As I say, guided by the fact which I have already discussed, that the Legislature when using words of apparent futurity means to include events which have happened in the past, I have no difficulty at all in saying that these words "is incurred by the insured" mean is incurred or have been incurred by the insured at the date of the happening of that event. I am encouraged to do so by the fact that it is plain this Act was passed to remedy the hardships that had been involved on third parties, by the decision of this court in *Re Harrington Motor Company Limited*; *ex parte Chaplin* (138 L. T. Rep. 185; (1928) 1 Ch. 105) and also by the fact that to put any other construction upon the words "is incurred" would be to lay down that in the case of a company, where a third party has been insured by a company, he is in a much worse position than if he has been insured and has a claim against an individual who subsequently becomes bankrupt whose case is dealt with by sub-sect. (2) in words that make it plain that in such a case a liability already incurred at the date of the passing of the Act is a liability which is covered by the sub-section.

For these reasons I agree that this appeal should be allowed.

Maugham, L.J.—I am of the same opinion, and will shortly express my reasons. The question which arises is, I think, one which depends solely on the true construction of sect. 1, sub-sect. (1), of the Third Parties (Rights against Insurers) Act, 1930. The only material dates at present are these. On the 21st Sept., 1925, there was a policy of insurance taken out by the company now in liquidation. On the 6th Oct., 1925, there was an accident under which the insurers became under a liability to the company in respect of an accident to a third party. On the 10th July, 1930, the Act in question came into operation. The liquidation commenced on the 10th Aug., 1931, the date when the petition to wind up was presented. The whole question is this, whether on those facts, *primâ facie*, the third party is entitled to the benefits conferred by sect. 1 of the Act in question. The dates which existed in the case of *Ward* v. *British Oak Insurance Company Limited* (146 L. T. Rep. 323; (1932) 1 K. B. 392) were quite different, inasmuch as there the winding-up had commenced before the Act came into force. It is plain that there would be the greatest possible objection to construing such

an Act as this one as applying to a company—I need not deal with bankruptcies for the present purpose—of which the winding-up had commenced before the Act in question came into force. Under the Companies Act, 1929, s. 383, it was expressly provided that the provisions of the Act with respect to winding-up should not apply to any company of which the winding-up had commenced before the commencement of the Act, and, indeed, but for that provision being either express or implied, there would be the very greatest difficulty in a bankruptcy or winding-up which had commenced and as to which the rules and regulations were altered as from a date subsequent to the commencement and before the completion of the winding-up in question. Accordingly, there was, as I think, the strongest possible reason for the decision in *Ward* v. *British Oak Insurance Company* (*ubi sup.*), a decision not only binding on us but which we all agree was undoubtedly right. In that case it might well be said that the claim which failed was a claim that sect. 1, sub-sect. (1), of the Act in question was retrospective; and for the reasons given in the judgments of the learned judges that argument that it was retrospective failed. In the present case, as my brothers have pointed out, there is no question, and I may add that Mr. Spens frankly enough admitted it, as to whether the section is retrospective in any proper sense or not. The question on the true construction of the Act is simply this, whether it can be fairly said that the accident must take place after the Act comes into force. The hardship or mischief to provide for which the Act was passed is obviously just as great if the accident takes place before or after the 10th July, 1930. On the other hand, there are fewer grounds for saying that, although the section cannot be applicable if the liquidation or a bankruptcy has already commenced, there is nothing in the Act which clearly points to the fact that the accident must be one which takes place after the commencement of the Act. I will not repeat what has already been said by my brethren with regard to that. I will only add this, that to my mind the real question depends upon the true meaning of the words in sub-sect. (1) of sect. 1, beginning with the words: "if, either before or after that event, any such liability as aforesaid is incurred by the insurer." The difficulty which apparently might have been thought to have been caused by the words "is incurred" is, I think, removed by the circumstances that if you consider that the liability is in reference to something which happened either before or after that event so that the word "is" must by necessary construction be construed as meaning "has been" or "is," if you impose that construction upon the section, in my opinion the whole of the difficulties which were contended for by Mr. Spens disappear and we have a section which may be properly held as applicable to cases where the accident in question occurs either before or after the Act comes into force.

I would only add this, that under the present policy the liability strictly does not arise upon the accident happening, but the liability in strictness applies only if the assured becomes liable not only to pay but shall pay by way of damages certain sums in question. But for the construction which we have seen our way to put upon the Act there might be considerable difficulty in treating the Act as intelligible in reference to such a case as we have before us.

For the reasons given by my brethren and for these reasons I think the appeal must be allowed. The form of the order may require a word of consideration.

The Master of the Rolls.—The appellants will have the costs of the appeal but with the liquidator's rights of recourse to the assets.

Appeal allowed.

Solicitors: for the appellants, *Johnson, Jecks, and Colclough*; for the respondents, *Middleton, Lewis, and Clarke*, agents for *Middleton and Co.*, Sunderland.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

July 2 and 3, 1935.

(Before GODDARD, J.)

Tynedale Steam Shipping Company Limited v. Anglo-Soviet Shipping Company Limited. (*a*)

Charter-party—Construction—Ship "prevented from working"—Accident putting out of action winches in forepart of ship.

A charter-party provided that hire was to cease if any accident occurred to the ship which prevented her from working.

The ship lost her foremast during a gale, and on coming into port she was, in consequence thereof, unable to make use of her forward winches, and the forward part of her cargo had to be unloaded by means of floating derricks. Delay and expense were thereby incurred.

Held, that the inability to make use of the forward winches amounted to a prevention from working within the meaning of the charter-party, and therefore that the ship was off hire during the period of delay.

Held, further, that such additional expense as was caused by the inability to unload by the ship's winches must be borne by the shipowners.

Miller v. Hogarth (7 *Asp. Mar. Law Cas.* 1; 64 *L. T. Rep.* 205; (1891) *A. C.* 48) *applied.*

SPECIAL case for the opinion of the High Court stated by arbitrators, involving the construction of a clause in a charter-party in the form known as Uniform Time Charter, 1912. By the charter-party, which was dated the 4th May, 1934, the steamship *Horden* was hired by the respondents (charterers) from the claimants (owners) for a period of four months. The material clause (clause 10) was as follows: "In the event of loss of time caused by . . . damage to hull or other accident preventing the working of the steamer and lasting more than twenty-four consecutive hours, hire to cease from commencement of such loss of time until steamer is again in efficient state to resume service. . . . In case of accident to cargo causing detention of steamer, time so lost and expenses incurred shall be for charterers' account, even if caused through fault or want of due diligence by owners' servants."

The arbitrators found that while on a voyage from Archangel to Liverpool the ship encountered

exceptional weather, whereby part of the deck cargo was washed overboard and the foremast was broken. She was towed to a temporary berth where the broken mast was cut away and where unloading was begun by means of shore cranes. She was then taken to her permanent berth, where she discharged the cargo in the after part by means of her own winches, but the cargo in the forepart could not be so discharged owing to the absence of the foremast. It was, therefore, necessary to discharge that part of the cargo by floating derricks, and expense and delay were thereby incurred.

The questions for the court were: (1) whether the owners were entitled to hire for the period during which the loading time had been exceeded, and (2) whether the owners or the charterers were to pay for the extra cost of unloading. The owners contended that the ship had not been "prevented from working" within the meaning of clause 10, because it was only part of the ship which could not be unloaded, and therefore she was only "hindered" and not "prevented" from working, and was not off hire. The charterers said that the work of the ship when in port was to unload, and that the loss of the foremast had prevented her from performing that work.

C. T. Miller for the shipowners.

H. I. P. Hallett for the charterers.

Goddard, J.—In my opinion the answer to the questions asked in this case should be in favour of the charterers. The special case is stated by arbitrators appointed under the arbitration clause of a charter which is made between the owners of a ship, the *Horden*, belonging to the claimants, and the respondents, the charterers, in a form called the Uniform Time Charter, 1912.

The matter arises in this way. The vessel, on a voyage from Archangel to Liverpool with a deck cargo, made very heavy weather at the entrance to the Mersey; the result of the weather was that the ship took a heavy list, her cargo shifted, and at the same time as her cargo shifted (either because of the shifting or as an independent happening) the foremast fell overboard owing to a heavy squall as the vessel was rounding the Formby Light Vessel. The consequence was that she then took a heavy list to starboard, and the cargo stowed on the starboard side of the deck fell overboard, and the ship had to proceed up the Mersey entangled among this floating cargo. She was taken to a temporary berth and finally sent, when the cargo had been disentangled from the ship, into Brocklebank Dock, to which it had been originally intended to take her. When they got to the Brocklebank Dock it was found that the afterpart of the vessel could be discharged by her own winches, but the foreward part could not, because there was no foremast. Accordingly, there being no shore cranes, floating derricks had to be hired, and the forward end of the vessel was discharged by means of those floating derricks.

The owners of the ship claim hire for the period during which the vessel was delayed as a consequence of these happenings, and they also claim that the cost of hiring the floating derricks is for the charterers' account and not for theirs. The charterers, on the other hand, say that they are not bound under the provisions of the charter-party to pay the additional hire, that is to say, the hire for the period during which the ship was being discharged in the manner I have described, and that the shipowners are liable for the hire of the derrick assistance.

Mr. Miller appears for the shipowners, and his argument is that there is an unqualified obligation on the charterers to pay hire until the vessel is returned to the owners unless the charterers can bring themselves within the exceptions. Clause 10 of the charter reads: "In the event of loss of time caused by dry-docking or by other necessary measures to maintain the efficiency of steamer, or by . . . breakdown of machinery, damage to hull, or other accident preventing the working of the steamer and lasting more than twenty-four consecutive hours, hire to cease from commencement of such loss of time until steamer is again in efficient state to resume service."

One might say, speaking compendiously, that that provides that the hire should cease if the steamer is delayed by reason of some defect or accident to the ship itself. Then it is provided: "Should steamer be driven into port, or to anchorage by stress of weather, or in the event of steamer trading to shallow harbours, rivers, or ports with bars"—these being matters *primâ facie* under the control of the charterers—"or in case of accident to cargo, causing detention to steamer, time so lost and expenses incurred shall be for charterers' account, even if caused through fault or want of due diligence by owners' servants."

I think, whatever opinion I might have formed, I cannot hold that this delay was caused by an accident to the cargo, because if I did I think I should be deciding contrary to what was decided by Bailhache, J. in *Burrell and Sons* v. *F. Green and Co.* (12 Asp. Mar. Law Cas. 307; 112 L. T. Rep. 105; (1914) 1 K. B. 293). In that case, as I read it, it was decided that where a ship is detained because an accident to the cargo causes damage to the ship, that is a matter which falls upon the owners and not upon the charterers; that any time that is lost by the damage to the cargo is a matter for the charterer, but that any damage to the ship is a matter for the shipowner. Therefore, as what happened here to cause the delay was the damage to the foremast, the foremast being injured, whether it was injured simply by the squall, or whether it was injured by the cargo falling against it, or by a combination of both, it seems to me that the case of *Burrell and Sons* v. *F. Green and Co.* (*sup.*) prevents my holding that the detention here was caused by an accident to the cargo.

Then Mr. Miller says that, however that may be, the working of the steamer was not prevented for a period of more than twenty-four hours, because the steamer could work; her propelling machinery was all right, her after winches were all right, and it was only the forward winches which could not work. Therefore, he says, it is not the fact that the steamer was prevented from working.

I do not think that is sound. In the first place, one has to remember here that under the charter the shipowner is under an obligation to provide the winches and to maintain them. If there are no winches, and if there are no winches which will discharge the forward part of the ship, it seems to me that the ship was not in a condition which can be said to be a working condition when it was lying alongside the quay. I think Mr. Hallett is justified in saying that the case of *Hogarth* v. *Miller* (7 Asp. Mar. Law Cas. 1; 64 L. T. Rep. 205; (1891) A. C. 48) is strong authority in his favour, because there the words in the charter were "the working of the vessel." Lord Halsbury, L.C. says (at pp. 207 and 57 respectively): "How does a vessel work when she is lying alongside a wharf to discharge

her cargo? She has machinery there for the purpose. It is not only that she has the goods in the hold, but she has machinery there for the purpose of discharging the cargo. . . . It is not denied that during the period that she was lying at Hamburg there was that machinery at work enabling the hirer to do quickly all that this particular portion of her employment required to be done."

In that respect he held that that ship was capable of working while she was alongside the quay. Here it appears to me you have the converse case. The ship is not capable of working when she is alongside the quay; part of the ship is capable of working, but for the working of the ship the ship must be able, in my judgment, to do that which is necessary to discharge the cargo when she is lying alongside. As I put it to Mr. Miller just now, could it be said that the ship would have been capable of working in port if the circumstances had been these, that the after-part of the cargo had all been discharged with the after winches at first, and then when it was a matter of discharging the cargo in the forward part of the vessel there were no winches to discharge it as the winches that there were would not work? Then it seems to me the ship would be prevented from working; it would be prevented by an accident, no doubt, but it is an accident for which the owners are liable.

The other point which was decided in *Hogarth* v. *Miller* (*sup.*) seems to me to lend strong support to Mr. Hallett's argument, because although the ship was held to be capable of working within the meaning of the charter-party while she was in the port of Las Palmas in that case, yet on her voyage she was held to be incapable of working because, although she had one low pressure boiler working which was of assistance to her, she had to be towed, and she was not independently efficient, as it was put in that case, for the voyage.

For those reasons, in my judgment, the first question which the arbitrators have asked, which is "whether upon the true construction of the charter and upon the facts as herein found, the shipowners are entitled to hire for the vessel in respect of the time occupied in discharge," must be answered in the negative.

Then there is a second question asked: "Whether the additional costs of discharge, &c., are for account of shipowners or charterers?" From the documents attached to the case it is shown that such additional cost includes dock pilotage, boat assistance, tug assistance, telegrams and postages, &c. Mr. Hallett says that he claims none of those. All the expenses he does claim are in respect of steam cranage and derrick barges, which amount to 91*l.* 11*s.*

It seems to me that my answer to the first question in effect answers the second. It is true that under clause 3 of the charter-party it is provided that the charterers are to provide and pay for such matters as pilotage, boatage, tug assistance, unloading, weighing, tallying and delivery of cargoes, surveys on hatches and all other charges and expenses whatsoever, but it is provided that "the steamer to be fitted and maintained with winches, derricks, wheels, and ordinary runners capable of handling lifts up to 3 tons," and it is also provided in clause 2 that the owners are to maintain the ship in an efficient state in hull and machinery during the service, and that they are to provide one winchman per hatch. If further winchmen are required, or if the stevedore refuses to work with the crew, the charterers are to provide and pay qualified winchmen from land. Therefore, the winches are entirely the owners' concern. I think Mr. Hallett is justified in putting it as he does, that if the expense is incurred to do that which the owners are under an obligation to do, the expense must not be thrown upon the charterers.

For this reason I hold that the expense which has been incurred in this matter is an expense which was made necessary by the failure of the ship to do that which it was the obligation of the owners to do, namely, to provide winches which would discharge the ship. If floating derricks were provided in place of winches, I think the expense of that must fall upon the owners. The answer to the second question, therefore, is that the additional cost of discharge to the amount of 91*l.* 11*s.*, being the charge for steam cranage and derrick barges, falls upon the owners, and that the rest of the charges, amounting to 59*l.*, falls upon the charterers. The charterers will have the costs of the argument.

Solicitors for the shipowners, *Sinclair, Roche, and Temperley*, for *Botterell, Roche, and Temperley*, Newcastle.

Solicitors for the charterers, *Pettite, Kennedy-Morgan, and Broad*.

Wednesday, Oct. 23, 1935.

(Before Lord Hewart, C.J., Humphreys and Singleton, JJ.)

Robey v. Vladinier. (*a*)

Alien — Stowaway on British ship in foreign harbour—Arrest in England — Jurisdiction of magistrate to deal with offence—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 237, *sub-s.* (1), *s.* 684, *s.* 686.

By the Merchant Shipping Act, 1894, *s.* 237: "(1) *If a person secretes himself and goes to sea in a ship without the consent of either the owner . . . or of the person in charge of the ship, or of any other person entitled to give that consent, he shall be liable* [*to a penalty.*]"

By sect. 686 *jurisdiction is given to a magistrate to deal with an alien* "*charged with having committed any offence on board a British ship on the high seas,*" *if such person* "*is found within the jurisdiction of any court in Her Majesty's dominions, which would have had cognisance of the offence it it had been committed on board a British ship within the limits of its ordinary jurisdiction.*"

An alien secreted himself in a British ship which was lying moored to the quay of a foreign port and disclosed himself for the first time on the day after the ship had sailed. Subsequently, on the arrival of the ship at Millwall Docks, London, he was arrested and brought before a metropolitan magistrate on a charge under sect. 237, *sub-sect.* (1), *of the above Act. The magistrate held that, as the person charged was an alien, he had no jurisdiction to deal with it.*

(*a*) Reported by T. R. F. Butler, Esq., Barrister-at-Law

Held, as the offence of secreting and going to sea which is prohibited by the sub-section is a continuing offence, the magistrate had, under sect. 686 of the Act, jurisdiction to deal with it, even though the person charged was an alien.

Case stated by a metropolitan police magistrate.

An information was preferred by the appellant Robey, under sect. 237, sub-sect. (1), of the Merchant Shipping Act, 1894, against the respondent Vladinier, charging that the respondent, on the 14th Oct., 1934, at Oran, unlawfully secreted himself and proceeded to sea on board the British steamship *Rio Azul*, without the consent of either the owners, master, or any other person entitled to give such consent.

On the hearing of the information the following facts were proved or admitted:

On the 14th Oct., 1934, the respondent, a national of Yugoslavia, boarded the ship when it was lying moored to the quay at Oran, Algeria, and there secreted himself without the consent of either the owners, master, or any other person entitled to give such consent.

The ship left Oran and proceeded to sea on the 14th Oct., 1934, on her voyage to London *via* Capetown. On the following day, the respondent disclosed himself for the first time and was afterwards treated as a member of the crew until the ship arrived at Millwall Docks, London, on the 12th Dec., 1934. The respondent was there arrested pursuant to a warrant issued from the Thames Police Court.

On the part of the appellant it was contended that the court had jurisdiction to determine the information; that the offence defined in sect. 237, sub-sect. (1), of the Merchant Shipping Act, 1894, contained two necessary ingredients: (*a*) secreting; and (*b*) going to sea; that the respondent committed an act of secretion not only by concealing himself on board the ship at Oran, but also throughout the time when he remained concealed; that, in any event, as part of the offence consisted in going to sea, there was jurisdiction to determine the matter; that by reason of sect. 686 of the Merchant Shipping Act, 1894, there was jurisdiction in respect of offences committed on board a British ship on the high seas; that the port of Oran must be regarded for the present purpose as being situated on the high seas; and that sect. 684 of the Act gave jurisdiction to the court.

On the part of the respondent it was contended that a court of summary jurisdiction had no jurisdiction to try offences committed by any person, not being a British subject, on board a British ship in a foreign port or harbour; that sect. 237, sub-sect. (1), of the Merchant Shipping Act, 1894, did not make it an offence for an alien to secrete himself in a ship in a foreign port or harbour; that the offence under that section, if any, was completed within the port of Oran; that sect. 684 dealt only with venue and pre-supposed an offence committed within the jurisdiction of an English court.

The magistrate accepted the contentions urged on the part of the respondent, and held that he had no jurisdiction in the matter. He accordingly dismissed the information.

The appellant Robey appealed to the Divisional Court.

The Merchant Shipping Act, 1894, provides:

Sect. 237: "(1) If a person secretes himself and goes to sea in a ship without the consent of either the owner, consignee, or master, or of a mate, or of the person in charge of the ship, or of any other person entitled to give that consent, he shall be liable [to a penalty]."

Sect 684: "For the purpose of giving jurisdiction under this Act, every offence shall be deemed to have been committed and every cause of complaint to have arisen either in the place in which the same actually was committed or arose, or in any place in which the offender or person complained against may be."

Sect 686: "(1) Where any person, being a British subject, is charged with having committed any offence on board any British ship on the high seas or in any foreign port or harbour or on board any foreign ship to which he does not belong, or, not being a British subject, is charged with having committed any offence on board any British ship on the high seas, and that person is found within the jurisdiction of any court in Her Majesty's dominions, which would have had cognizance of the offence if it had been committed on board a British ship within the limits of its ordinary jurisdiction, that court shall have jurisdiction to try the offence as if it had been so committed."

Lord *Erleigh*, K.C. and *G. S. Harvie Watt* for the appellant.

A. H. Armstrong for the respondent.

Lord Hewart, C.J.—I am clearly of opinion that this appeal must be allowed. The magistrate, in his very proper zeal for the interests of an alien, has allowed himself to be misled as to the true construction of the relevant sections of the Merchant Shipping Act, 1894. Those sections appear to be reasonably plain. [His Lordship read sect. 237, sub-sect. (1), and continued:] The offence created by that section does not consist in secreting only, nor in going to sea only. The words "secretes himself and goes to sea" are a compound term, the two elements making one whole, and the offence consists in secreting and going to sea without the consent of any person entitled to give consent.

When one turns to the sections relating to jurisdiction, sect. 684 provides as follows: [His Lordship read the section, and continued:] The respondent came to Millwall Docks, London, and at the material time, namely, that of his arrest, he was, therefore, within the jurisdiction of the magistrate, but he was within that jurisdiction only for the purpose of being tried for an offence which the magistrate had jurisdiction to try. Had he jurisdiction to try the offence with which the respondent was charged? Sect. 686 is obviously divided into two parts, and as the respondent was not a British subject he could be tried for "any offence on board any British ship on the high seas."

I am of opinion that the offence with which the respondent was charged is plainly a continuing offence and that the contentions urged on behalf of the appellant were right. If the construction which the magistrate was induced to put on these sections were right, it seems to me that it would be difficult ever to say that the offence had been committed; because, on the one hand, at the inception of the matter, when the first step in the secreting took place, the answer of the person accused would be that he was not on the high seas, and later, when he was on the high seas, he would say that he was not secreting himself and that he had done that at the beginning. At no moment, therefore, would he be liable except, perhaps, if circumstances permitted, at a time when he both secreted himself and was on the high seas.

On the interpretation of the relevant parts of the statute the contentions of the appellant were, in my opinion, clearly right and the magistrate had the jurisdiction which he declined.

Humphreys, J.—I am of the same opinion, and have nothing to add except that I think this was a very plain case.

Singleton, J.—I agree.

Appeal allowed.

Solicitors for the appellant, *Botterill* and *Roche*.

Solicitors for the respondent, *Edward Fail*.

February 14–19, *March* 5, 1935.

(Before Sir BOYD MERRIMAN, P., sitting with Trinity Masters.)

The Kate. (*a*)

Damage to ship lying alongside quay — Foul berth — Negligence — Respective duties of harbour authority having control of adjacent river bed and of occupiers of quay—Lease by harbour authority to wharfinger of premises abutting as to part only on to quayside—Right "to berth and moor vessels for the purpose of loading and discharging and taking in cargoes and goods on the said premises, and to use the mooring posts and the said quay for the like purposes" — Whether constituted "occupation" of quay—Breach by lessors of covenant to keep berth in good order and condition—Effect on shipowners' rights of master's knowledge of condition of berth—Indemnity against lessors for damage incurred by lessees—Remoteness of damage—Whether necessary to plead reliance on covenant—Damages to include solicitor and client costs.

The claim was brought by the owners of the wooden motor vessel K. *against the Corporation of* B. *and Messrs.* S. *and Son Limited in respect of damage sustained by the* K. *whilst alongside Rolle Quay, Barnstaple, on the 7th September,* 1933. *The second defendants were the lessees, under a lease entered into between the tenant for life of the Rolle Estates and the predecessor in title of the second defendants on the* 1st *May,* 1900, *for a term expiring the 25th March,* 1998, *of a flour mill and premises on the landward side of a railway siding running along Rolle Quay, and of a grain elevator and offices situated between the siding and the river, of which one portion only, which included the elevator, was on the edge of the quay. By deed of gift dated the 12th May,* 1930, *and made between Lord Clinton and the Clinton Devon Estates Company, owners in fee simple, of the one part, and the Corporation of* B. *of the other part, all material parts of Rolle Quay were granted to the Corporation in fee simple, together with that half of the bed of the River Yeo adjoining the said quay, and by a lease dated the 29th February,* 1932, *the Corporation demised to Messrs.* S. *and Son, for a term coinciding with the expiration of the lease already referred to, the remainder of the quay frontage between the offices and the edge of the quay and a site upon which a crane was to be, and was later, erected a few feet to the west of the offices and from the edge of the quay. The demise included "the right (in common with all other persons entitled to the like or any other rights) to berth and moor vessels for the purpose of loading and discharging and taking in cargoes and goods at the said premises, and to use the mooring posts and Rolle Quay for the like purposes on a frontage on the River Yeo corresponding with the frontage of the lessees' flour mills . . ." The lessees covenanted to comply with the reasonable requirements of the lessors' harbour-master with respect to the berthing of vessels loading or discharging at the premises of the lessees. The lessors, for their part, covenanted to keep the quay, quay wall, mooring posts and river berths in good order and condition during the said term.*

It was contended on behalf of the second defendants that they were only lessees or occupiers of the quay frontage corresponding to the offices, or, at the most, occupiers of the quay up to a point opposite the western end of the crane, with or without the inclusion of the quay frontage between the eastern side of the crane and the western edge of the land in front of the offices. On this basis their minimum frontage would be about 40ft., and their maximum frontage about 68ft., and they maintained that when a ship of 81ft. long, like the K., *was lying alongside their premises they only had the duties of occupiers with regard to her berth over part, or, alternatively, over disconnected parts of the ship's length, and had no responsibility for the rest, notwithstanding the fact that the whole frontage of the quay alongside which such a ship was lying was well within the frontage on the River Yeo corresponding with the flour mills, as distinct from the offices and crane.*

Held, on this point, that to the extent to which the second defendants had the right to berth and moor ships alongside Rolle Quay, to swing their crane across the quay, to have access to the crane and to the ships thus moored and berthed alongside the quay, "all of which rights are either expressed in, or are necessarily incidental to, the demise in question," they were just as much occupiers of the relevant part of the quay frontage while in actual exercise of such rights as they were at all times during the term occupiers of the land actually demised, and that they were consequently liable to perform the duties co-extensive with such occupation. (Vaughan-Williams, L.J. in Brown v. Peto, 83 *L. T. Rep.* 303; (1900) 2 *Q. B.* 653, *at pp.* 664–5.)

Held, further, that on the facts as found, the K. *was lying at the material time with her main hatch under the crane, and that the damage occurred by reason of the vessel lying on an uneven berth, one-third of the ship's length from her stern being on more or less level ground, her bow being buried in soft sand and mud, and there*

(*a*) Reported by J. A. PETRIE, Esq., Barrister-at-Law.

being a marked depression of the ground immediately forward of the place where the damage to her bottom was discovered with consequent lack of support under that part of her.

In par. 4 of the defence, the first defendants pleaded, both as against the plaintiffs and the second defendants, that if the K. *was damaged whilst lying off the quay (which they did not admit), the damage was due to her being improperly placed on the morning of the 7th September, without the knowledge and permission of the first defendants or their servants, in a position abreast of a water pipe from which the exhaust from the steam engine of the elevator was discharged and partly in one berth and partly in another berth.*

Held, that this amounted to a contention that the K. *had been placed on what was not a berth at all, but that the contention failed, as the whole situation changed, as the first defendants well knew, with the erection of the crane.*

Held, further, that the first defendants knew perfectly well that the ground opposite the crane was not safe for vessels to lie on, but took no steps to put matters right or to warn the vessel of the danger. As to the second defendants, that they knew the condition of the berth, but gave no sort of warning to the owners or master of the K., *and that accordingly both the first and the second defendants were liable*: (The Bearn, 10 *Asp. Mar. Law Cas.* 208; 94 *L. T. Rep.* 265; (1906) *P.* 46 ; The Moorcock, 6 *Asp. Mar. Law Cas. pp.* 357, 373 *;* 60 *L. T. Rep.* 654; 14 *Prob. Div.* 64).

Both defendants had pleaded that the master of the K. *himself knew of the condition of the berth. If, knowing the actual state of things, the master had deliberately put his ship into danger, he could not recover against either of the defendants* (The Grit, 16 *Asp. Mar. Law Cases,* 467 *;* 132 *L. T. Rep.* 638; (1924) *P.* 246, *per Hill, J. at p.* 253), *but in the present case the master neither knew nor suspected the dangerous condition of things which was the actual cause of the damage.*

Judgment entered for the plaintiffs against both defendants with costs.

In a third party claim by the second defendants against the first defendants for an indemnity in respect of the damages and costs for which they were liable :

Held, that although the second defendants had been guilty of a breach of their duty to the plaintiffs, this involved no breach of duty to the first defendants, and that the second defendants were entitled, as against the first defendants, to rely on the latter's covenant to keep the river berths in good order and condition; that the damage to the K. *for which the second defendants were liable was the natural consequence of the breach of the said covenant; that (following the judgment of Lord Esher, M.R. in the Court of Appeal in* Mowbray *v.* Merryweather, 7 *Asp. Mar. Law Cas.* 590*;* 73 *L. T. Rep.* 459; (1895) 2 *Q. B.* 640) *approving the decision of Martin, B. in* Burrows *v.* March Gas and Coke Company (1870, *L. Rep.* 5, *Ex.* 67) *and* Scott *v.* Foley, Aikman and Co., 5 *Com. Cas.* 53), *the damages were not too remote; further, on the authority of the same cases, that the second defendants having relied on the first defendants' covenant, the fact that the second defendants had not pleaded such reliance was immaterial; and that, accordingly, notwithstanding their negligence towards the plaintiffs, the second defendants were entitled to be indemnified by the first defendants for the damages, such damages to include the solicitor and client costs incurred by the second defendants in defending the action.*

THE plaintiffs, the owners of the motor vessel *Kate*, of 75 tons net register, 81ft. 6in. in length and 21ft. in beam, and fitted with an engine of 40 h.p., sued the first defendants as owners, and the second defendants as occupiers, of that part of Rolle Quay, at Barnstaple, where the *Kate* was lying to discharge a cargo of grain consigned to the second defendants, for damage sustained by the *Kate* on the 7th September, 1933, as the result of her lying on an uneven berth at the place in question. The evidence and the facts as found by the learned judge as well as the contentions of counsel appear sufficiently from the judgment.

R. E. Gething for the plaintiffs.

R. F. Hayward and *Vere Hunt* for first defendants.

Cyril Miller for second defendants.

Sir Boyd Merriman, P.—In this case the owners of the *Kate*, a wooden motor vessel of 75 tons net register, 81ft. 6in. in length, and 21ft. in beam, sue the Corporation of Barnstaple (originally described in error as the Urban District Council of Barnstaple) and Messrs. Stanbury and Son Limited, in respect of injuries sustained by the *Kate* on the 7th September, 1933, while lying aground alongside Rolle Quay in the River Yeo at Barnstaple.

There is also a third-party claim by the latter defendants against the former. This present judgment, however, deals only with the claim of the plaintiffs against the two defendants.

The owners allege, and I find as a fact, that between 10 a.m. and 12 noon on that date the hog piece and keelson of the *Kate* cracked and broke at a point about 2ft. forward of the main mast, with the result that her bottom was set up and considerable damage was sustained; and I find that this damage was caused by the condition of the bed of the river where she was then lying aground. She had taken the ground between 9 a.m. and 10 a.m. The occurrence of the damage was signalised by a series of loud reports, which drove the men engaged in unloading out of the hold in alarm.

The corporation are the harbour authority at Barnstaple. It is not disputed that they own Rolle Quay and have control of the adjacent bed of the river. It is conceded that, in relation to vessels trading at the port of Barnstaple, and using Rolle Quay, they owe the duty of taking reasonable care to see that the harbour is in a fit condition for the reception of such ships: (see *The Bearn*, 10 Asp. Mar. Law Cas. 208; 94 L. T. Rep. 265; (1906) P. 48).

Against the second defendants it is alleged that they are lessees from the corporation and occupiers of that portion of the quay where the *Kate* was lying, with the right to berth and moor vessels thereat, and that they are under the duty imposed upon the occupiers of a wharf who have no control over the adjacent river bed: (see *The Moorcock*, 6 Asp Mar. Law Cas. pp. 357, 373; 60 L. T. Rep. 654; 14 Prob. Div. 64, and *The Bearn* (*sup.*)). On behalf of these defendants, however, it is urged that they were neither lessees nor occupiers of that part of the quay alongside which the actual damage occurred; and that in law, therefore, there is no claim against them. It would be convenient to dispose of this point before proceeding to consider in detail the facts upon which I am invited to find negligence against both defendants.

By a lease dated the 1st May, 1900, granted by the tenant for life of the Rolle Estates, the predecessors in title of Messrs. Stanbury and Son Limited (whom I will hereafter call the company) became lessees for a term expiring on the 25th March, 1998, of a flour mill and premises on the landward side of a railway siding running along Rolle Quay, and of a grain elevator and offices situated between the siding and the river, of which one portion, including the elevator, was, though the remainder was not, on the edge of the quay. In that lease the lessees covenanted not to make any addition to the mill, elevator, offices or buildings without the consent in writing of the lessor. By deed of gift dated the 12th May, 1930, made between Lord Clinton and a company known as the Clinton Devon Estates Company (who together, I was informed, constitute the owner in fee simple) and the corporation, all material parts of Rolle Quay were, among other things, granted to the corporation in fee simple, together with that half of the bed of the river which adjoins the said quay. By lease dated the 29th February, 1932, between the corporation and the company, the corporation demised to the company, for a term which coincides with the expiration of the lease already referred to, the remainder of the quay frontage between the offices and the edge of the quay, and the site of a crane which it was proposed to erect 2ft. 8in. to the west of the offices, and 2ft. 6in. from the edge of the quay. The company covenanted not to erect any other erections on the demised premises except a crane and bridges for use in connection with the business carried on by the company at their mills.

I ought, in passing, to observe that the crane erected in pursuance of that lease was, in fact, erected some 4ft. farther westward and a trifle farther from the edge of the quay than was indicated in the plan. I understand that, since the accident the subject of this action, attention has been called by the corporation to this deviation from the plan. But at no material time had exception been taken to this variation, and it is not suggested that anything turns upon it.

It is however important to notice that the demise includes in the second place "the right (in common with all other persons entitled to the like or any other rights) to berth and moor vessels for the purpose of loading and discharging and taking in cargoes and goods at the said premises first described [that is to say, the pieces of land already mentioned] and to use the mooring posts and Rolle Quay for the like purpose on a frontage on the River Yeo corresponding with the frontage of the lessees' flour mills (subject nevertheless to all rights (if any) of the Southern Railway Company and any other persons in or over Rolle Quay aforesaid or otherwise in connection with the premises hereby demised or any part thereof)."

The lease also contains a covenant on the part of the company to comply with the reasonable requirements of the corporation's harbour-master with respect to the berthing of vessels loading or discharging at the premises of the lessees; and a covenant by the lessors to keep the quay, quay wall, mooring posts and river berths in good order and condition during the said term.

Now, in order that the point made by the company may be appreciated, it is necessary to add that the point in the river bed at which the damage to the ship was caused is a few feet still farther to the west of the offices than the crane itself. It is said that the company are only lessees and occupiers of the quay frontage corresponding to the offices; or, alternatively, seeing that the crane is not on the quay frontage, that, though they are not lessees of any other part of the quay, they are at the most occupiers up to a point opposite the western end of the crane, with or without the inclusion of the quay frontage between the eastern side of the crane and the western edge of the land in front of the offices. The minimum frontage on this basis would be about 40ft., the maximum about 68ft.

Assuming that occupation, at least, of the quay, is necessary to impose any duties in respect of the adjacent berths, the company argue that there can be no responsibility upon them outside these limits. In other words, when a ship 81ft. long is lying alongside the company's offices, they maintain that they have the duties of occupiers with regard to her berth over part, or alternatively, over disconnected parts of the ship's length only, and have no responsibility for the rest, notwithstanding the fact that the whole frontage of the quay alongside which such a ship is lying is well within the frontage on the River Yeo corresponding with the flour mills, as distinct from the offices and crane.

This argument seems to me to be based on a misconception. As I have already pointed out, the company have the right to use the mooring posts and Rolle Quay on a frontage corresponding with the frontage of the flour mills, which admittedly includes the material spot, for the purpose of loading and discharging, &c. Moreover, they have the right to erect and use the crane in connection with the business carried on by them at their mills. I hold that to the extent to which they have the right to berth and moor ships alongside the quay, to swing their crane across the quay, to have access to the crane and to the ships thus moored and berthed alongside the quay, all of which rights are either expressed in, or are necessarily incidental to, the demise in question, they are just as much occupiers of the relevant part of the quay frontage, while in actual exercise of such rights, as they are, at all times during the term, occupiers of the land actually demised, and that they are consequently liable to perform the duties co-extensive with such occupation.

If authority is necessary for the proposition that rights such as these are the subject of occupation, see *Brown* v. *Peto* (83 L. T. Rep. 303; (1900) 2 Q. B. 653). At p. 664 of (1900) 2 Q. B. in discussing whether a lease which included certain shooting rights could properly be described as an occupation lease within sect. 18 of the Conveyancing Act, 1881, Vaughan Williams, L.J. said: "Occupy is a word which, in one form and another, is not infrequently used of an incorporeal hereditament." Again, on p. 665, he says: "I am by no means prepared to say that if the best rent can only be obtained by letting land

in parts and giving the lessee of one part a right which constitutes in a sense a servitude over another part—such as a right of access or rights of drainage, or rights of shooting—that this is not within the power."

It is to be observed that, in relation to occupation, the learned Lord Justice treats a right of access as in the same category as shooting rights.

On the basis that the corporation and the company, in relation to a ship which is loading or discharging at the quay alongside the elevator or crane, but within the frontage of the flour mills, are under the respective duties laid down in *The Bearn* (*sup.*) and many similar cases, I now proceed to consider whether they or either of them have been guilty of a breach of duty.

It was stated that in round figures the trade to the company's flour mills represented about nine-tenths of the shipping of the port of Barnstaple. The *Kate* has been trading regularly to this port at spring tides, both before and after the crane, the erection of which was contemplated by the lease of the 29th February, 1932, came into use. The crane, in fact, was erected about two years ago.

On this particular voyage the *Kate* arrived on the 2nd September, and made fast opposite the company's elevator. That same night, however, she was told she would have to make way for two other vessels. Accordingly, she dropped astern some two or three lengths below the mill to allow these other vessels to discharge, but returned to the elevator at 6 p.m. on the 5th September. The whole of the 6th September was occupied in discharging the grain. For this purpose her main hatch was, of course, opposite the elevator. In the early morning of the 7th September she dropped astern in order to discharge the rest of her cargo, which consisted of millers' produce in bags, and tied up with her main hatch opposite the crane, with her head towards the elevator. She was in this position at the time of the accident.

In the quay wall at a point practically corresponding with the western edge of the land, there is a water pipe, from which is discharged the exhaust from the steam engine of the elevator. As the *Kate* lay, this pipe would be opposite a point a little forward of her main hatch. This pipe had been in use for its present purpose ever since the building of the elevator.

Shortly after the damage occurred, and on the same afternoon, a survey was made by Mr. Clarke, on behalf of the owners, of the ground alongside the starboard or outer side of the vessel. I accept the plan reproducing the result of this survey as representing, not unfavourably to the defendants, the state of the berth under the *Kate's* keel. I say this because there has been no substantial challenge of the soundings thus taken, and Mr. Clarke says that a day or two later, when the *Kate* had been moved to Appledore, he satisfied himself that the condition of the ground immediately under the keel was, if anything, rather worse than the soundings indicated. Looking at this plan, it will be seen that for rather more than a third of the ship's length from the stern, the soundings, which were taken at low water on a spring tide, vary between 6in. and 10in. It is conceded that the more forward of the two 10in. soundings corresponds approximately with the point of the break. It will be observed that the next three soundings forward are, respectively, 18in., 22in., and 20in. The soundings are about 5ft. apart. The break, therefore, occurred at the point where there was a considerable drop in the level below the more or less level ground by which the *Kate* was supported aft. I ought to add that Mr. Clarke found, and I accept his evidence, that her bow was buried in soft sand or mud. There is no real dispute, and I find as a fact, that the damage occurred by reason of the marked depression of the ground between the foremost 8in. sounding and the aftermost 17in. sounding, with the consequent lack of support under that part of the vessel.

It is common ground that immediately under the water outfall there was a heap of stones extending about 4ft. from the quay wall and 6ft. or 8ft. up and down river. I find, however, that those stones have no connection with the accident, first, because they are too far forward, and, secondly, because the ship was lying outside them. I shall, however, have to consider to what extent, if any, the water outfall itself was responsible for the damage.

Having now ascertained where the *Kate* was lying, I must next consider the issue which is raised by par. 4 of the defence of the corporation to the plaintiffs' claim, and incidentally, though I am not now dealing with this, as a defence to the third-party claim of the defendant company. The corporation plead that "if the *Kate* was damaged while lying off the quay (which is not admitted) the damage was due to her being improperly placed on the morning of the 7th September without the knowledge and permission of the defendants or their servants in a position abreast of the water discharge from the flour mills and partly in one berth and partly in another berth." In other words, the corporation say that the *Kate* had been placed on what was not a berth at all.

I may say, in passing, that at one time I was given to understand that the only point at issue between the two defendants was the effect of the covenant by the corporation to keep the berths in good order and condition. But as the evidence in connection with the point with which I am now dealing developed, it became apparent that this appearance of solidarity and concord was more nominal than real.

I have very little doubt that before the erection of the crane the *Kate* generally lay alongside this quay with her main hatch opposite the elevator. This would bring the extreme end of her stern a little below the water outfall, and it may very well be that neither for her nor for any other vessel was there in the ordinary course any object in mooring farther to the westward. But equally I have no doubt that the whole situation changed with the erection of the crane. I can scarcely be wrong in assuming that this crane was erected for the purpose of loading and unloading goods, as indeed seems to be indicated by the lease granted by the corporation to the company in 1932. And I think that I might have concluded, unaided, that the most convenient position for a ship to lie would be with her main hatch opposite the crane. I am glad to be supported in this conclusion by all the evidence in the case, and by the advice of the Elder Brethren.

Nevertheless, the corporation maintain that it was entirely improper for this ship to lie in this position opposite the crane. Mr. Prowse, the harbour-master, says that never to his knowledge has he seen a ship berthed as the *Kate* was; indeed, he went so far as to say that he has never seen a vessel berthed opposite the crane; that he has never authorised one to do so; and that they are not allowed to lie there. He added "because it was dangerous to do so." He stated that he was always about, if indeed he was not actually on the quay, and said that if he had ever seen a vessel there he would have had her moved. He admitted

that vessels usually discharged with the crane opposite the main hatch, but said that they never did so at that particular spot. He admitted that it was very odd that the crane should have been placed there, as he always thought that it was a dangerous spot.

In support of this proposition, Mr. Adams, the borough surveyor, was also called. He said that the general condition of the berths belonging to the corporation was good, but that he also did not consider that the point opposite the crane was a berth. In fact, the point of this evidence was that there always had been, and still were, two distinct berths, one above and one below the water outfall, known respectively as the "elevator berth" and "Carder's berth."

James Passmore, a labourer and fisherman employed by the corporation, said, in chief, that he had never seen vessels berthed opposite the crane before. In cross-examination, however, he made it clear that he was speaking of the time before the crane was erected. He said that vessels would not go there before then because it was a bad berth. But he said that he had seen "scores of them" under the crane since the crane was put there.

I ought to add that Mr. Prowse made the alternative point that any vessel lying opposite the crane should lie with her stern into the river to avoid the danger. He admitted that there was no line of demarcation between the berths; that no notice was put up to distinguish between them; and in particular he admitted that, though he said he had discussed the berth opposite the crane with the master of the *Kate* and they were in general agreement that it was a dangerous berth, he had never on any particular occasion warned him not to drop back alongside the crane.

The master of the *Kate* said that ever since the erection of the crane they had been in the habit of unloading grain at the elevator and if they had bags to unload, as on the present occasion, they shifted about half a length back to the crane; that on this occasion he was given instructions to move back; he said that the company's manager had sent out a man with a message to that effect; he maintained that the water-pipe had nothing to do with him; and that all he knew was that they always lay alongside the crane if they had bags to discharge.

It was at this point that the concord of which I have spoken first broke down, for the master was cross-examined by counsel for the company to the effect that he had not dropped astern to the crane on the 7th September by reason of any express orders, but of his own accord, because he knew that bags could only be discharged at the crane, and he would therefore have to go there. And this, in effect, was the evidence given by Mr. Baker, foreman of the company, who said that a ship had to shift from the elevator to the crane, so that the main hatch was nearly opposite the crane. He "did not order her to shift or tell any of his men to do so"; and later he added "she had to go to the crane without waiting to be told." Mr. Baker also said, and I find that this is a fact, that ships opposite the crane have never been accustomed to haul their sterns off unless there was another vessel ahead which obliged them to lie with the head close in to the quay. But he said that they did sometimes haul off their sterns opposite the elevator to enable another vessel to get opposite the crane.

I find that since the crane was erected vessels, including the *Kate*, frequently lay alongside the crane as the *Kate* was doing on this occasion, and I do not accept the evidence of Mr. Prowse as regards vessels lying with their sterns hauled off the quay on what he represents as the exceptional occasions when vessels lay at the crane. In fact, I reject the evidence of Mr. Prowse, the harbour-master, on this part of the case; and I am sorry that I feel obliged to say that in one respect or another he has not treated the court with complete candour. Either he has been regularly attending to the berthing of vessels, including the *Kate*, as he says he has, in which case I am afraid I cannot accept that he believes that vessels have never berthed as the *Kate* was berthed, opposite the crane; or else he has been a great deal less attentive to his duties than he would have me believe, and has not, in fact, seen what, in fact, has been going on ever since the crane was erected, and what would obviously be the normal consequence of the erection of the crane.

I think that it is immaterial whether, in dropping back from the berth alongside the elevator to the berth alongside the crane, as the *Kate* did in the early morning of the 7th September, her master was acting on any express instructions from the company. I think that it is very likely that a message to this effect was sent, but I am satisfied that, even if it was sent, it was the merest matter of routine, and that with or without any definite instructions the *Kate* was expected to be in position opposite the crane in time for the unloading to begin at about eight o'clock, at which hour the company's crane man had been ordered to be ready and the unloading, in fact, began.

I have next to consider what the defendants respectively knew about the condition of this berth. In addition to the passages in his evidence to which I have already referred, Mr. Prowse said that the ground between what he called the elevator and the Carder berths was rough and unsafe. He referred to the stones which extended within 6ft. or 8ft. above and below the outfall respectively, but was unable to say how far out they went or whether there were any stones at all except immediately under where the water fell. He added that at the time of the accident it was almost impossible to see anything because of the sand and silt that had accumulated.

In cross-examination by Mr. Miller, on behalf of the company, having admitted that the *Kate* generally moved astern to get nearer the crane to unload bags, and that he had not objected or ever complained to the company of the position in which she lay, he said that he had on occasion conferred with the master to see that his stern was clear of the bad patch. He admitted that it had been brought to his notice that the company were complaining of the state of the berth opposite their mill, and perhaps the complaint was brought to his notice about the time of the accident. To Mr. Gething he said that the space between the elevator and the crane was dangerous; he had always had an idea of it, and was always of that opinion; but, as I have already mentioned, he had put up no notice to that effect or given any warning to the master of the *Kate*, though he said he had discussed it with him and they had agreed generally that it was so. He added, however, that there was no difficulty in making the berth opposite the crane safe, but said that he had never had occasion to suggest it. He then admitted that he had suggested to the company's manager that it would be of no use for the corporation to do anything to that berth until the water outfall had been removed. This, he said, was in a private and unofficial conversation with Mr. Burn, the company's general manager. He had, he said, discussed with him the

possibility of doing something to make the berth safe and convenient for use if the company could do something about the water outfall.

The effect of this evidence was, and I so find, that the harbour-master knew perfectly well that the ground opposite the crane was not safe for a vessel to lie on, and that he took no steps whatever to put matters right at that point or to warn vessels of their danger, but that, on the contrary, he had allowed things to get gradually worse in spite of the added need for care which was imposed by the fact that ships had to lie alongside the crane.

I now turn to the position of the company. For some time before the accident the company had been uneasy about the condition of these berths. The earliest complaint of which I have been informed was on the 28th April, 1932, when the company wrote to the corporation, saying that the captains of small vessels which brought supplies of grain and other goods to the mills at Rolle Quay were complaining that the river bed was in rather a dangerous condition for the safe lying of their vessels, and calling upon the corporation to have an examination made and the necessary work put in hand to put the river bed quite safe. This was acknowledged, and it was stated that the matter would be brought before the next meeting of the Ports and Quays Committee. I have not seen any record of that body's decisions or deliberations.

On the 17th August, that is to say, less than three weeks before the accident, the company wrote another letter. It was, in fact, addressed by mistake to the Devon County Council, but at the Castle, Barnstaple, where the offices of the corporation are. I was informed that there was no trace of its receipt by the corporation, but, on the other hand, it had never been returned to the company. I think it is more than probable that, in one way or another, the letter, in fact, came to the knowledge of the corporation, and I say so for this reason, that it is common ground that about two days after it was sent the corporation put men to work on the bed alongside Rolle Quay, and the borough surveyor did not really deny that this was the result of some complaint by the company. In this letter the company said: "We must take exception to the condition in which you keep the berth for the vessels discharging at our mills. The sand is allowed to silt up very unevenly in places, and there is a danger of damage to each vessel and its cargo which has to lie there. We should be glad if you would give this matter your prompt attention."

On the 19th August, the company wrote to their head office in Cardiff, to report that they had written to the harbour authorities regarding the condition of the berths; that they had had no reply, but saying that there were men at work clearing the uneven places which were giving trouble, and adding, "when they have finished, the berths will be in good condition."

On the 7th September, immediately after the damage, Mr. Macpherson, the company's manager at Barnstaple, wrote again to the head office as follows: "This confirms telephone message of this afternoon, advising you that the motor vessel *Kate* had damaged the back of the vessel very badly owing to lying on a poor berth"; and on the 13th September the same correspondent wrote to his head office: "The berths for vessels alongside the mills are still in an extremely bad condition, and no attempt has been made this week to improve them. Measurements we took to-day show that at three points there are pits to the depth of 2ft., 18in., and 2ft. 6in. It is not in a fit state for any vessel to lie there"; while on the same day Mr. Baker, the sales manager at Braunton, wrote to Mr. Burn, the general manager at Cardiff: "With reference to the condition of the river bed, I have had actual soundings taken to-day. These are being reported from the office. So far as the conditions of the berths are concerned, I have never seen them so much out of the level since taking over the mill. I asked Usher [the company's millwright at Barnstaple] to deal with the overflow water outlet at the quayside, so as to make it drop on to the flat stone at the bottom, quite a small thing, but necessary."

There is one other letter, dated the 9th October, to which I should refer, again from the manager at Barnstaple to the head office. This reads as follows: "Mr. Baker and the writer called at the Town Clerk's office on Friday morning. The borough surveyor was not in the office, but we interviewed the foreman and pointed out that the berths were not in a fit condition for vessels, and he promised to give them immediate attention."

Mr. Macpherson admitted to me that the group of letters to which I have just referred correctly represented his view of the berth at which the *Kate* was lying in the early part of September, 1933. It was admitted, and I find it to be a fact, that the company had given no sort of warning to the owners or master of the *Kate* that this was, to their knowledge, the existing condition of things.

As regards the condition of the berth, this evidence of Mr. Macpherson is, of course, evidence against both defendants, though, of course, I do not treat the letters themselves as evidence against the corporation of the knowledge which was in Mr. Macpherson's mind, notwithstanding the fact that it was Mr. Hayward who insisted that the whole of this correspondence should be read. Whether or not the letter of the 17th August came to the knowledge of the corporation, they were, in fact, engaged in work upon the berths alongside Rolle Quay between that date and the date of the accident; but I find, as indeed I think follows from the evidence given by the harbour-master and Mr. Adams, that, whatever else was done at the end of August and the beginning of September, no particular attention was paid to the ground in the immediate neighbourhood of the crane. Having regard, however, to the harbour-master's own evidence as to his knowledge of its condition, it is unnecessary to consider further the question of the corporation's knowledge of the insecurity of the berth.

To complete this part of the matter, I may say that there were several further complaints in writing by the company to the corporation at the end of 1933 and the beginning of 1934, and that there was evidence that in January, 1935, the corporation were laying down a mixture of clay and clinkers with a view to improving the condition of these berths, and incidentally were removing some stones to which I will refer more particularly hereafter. I am bound to say that I think this was a somewhat tardy recognition of their obligations.

Once it has been ascertained that the cause of the damage was that the vessel was supported by solid ground aft of the point of the break, while unsupported for some distance forward of this point, it is perhaps unnecessary to inquire further what was the cause of the unevenness. It is enough to say that Mr. Gullett, who was called on behalf of the corporation, admitted that the measurements shown in Mr. Clarke's soundings would account for the break, particularly if part of the higher ground consisted of solid stone. He added that he thought the thing that did the damage, whatever it was, was between the most forward

of the two 6in. soundings and not farther forward than the foremost 10in. sounding. Mr. Prowse attributed the damage almost entirely to the water outfall; but I have already mentioned the finding of some stones in January, 1935. These were coping stones, apparently from the quay wall. There were at least two, one of which was a foot square and the other 2ft. by 1ft. They lay 8ft. out from the quay, and in spite of the fact that the corporation witnesses swear that these stones lay 29ft. below the centre of the crane, I accept the evidence on behalf of the plaintiffs, which is corroborated by Mr. Macpherson for the company, that the spot at which they were found was 15ft. below the centre of the crane, and that they extended for a foot or so above that point. I am sorry to say that, here again, I was not impressed by the candour of the corporation witnesses. At that point these coping stones would be some 6ft. or 7ft. below the point of the break; that is to say, somewhere between the foremost 6in. sounding and the 8in. sounding next forward. It is clear that at the time of the accident these stones were not exposed, but they would tend to make a solid base round which silt would collect; particularly would this be so if the tide, or the water outfall, or both, gradually scooped out a hollow space above this point. It may be that the fact that the water was not falling on the subjacent flat stone contributed (see the letter from Mr. Baker to Mr. Burn quoted above). Thus a ridge would tend to form of a more solid character than the general layer of the surrounding mud, though on a superficial inspection —and I use the adjective both literally and metaphorically—the appearance would be more or less the same as that of the surrounding mud and silt. It was actually stated that an employee of the corporation, named Badcock, knew of the existence of one of these stones, but I do not attach any importance to this fact, having regard to Mr. Prowse's own evidence as to the state of the berth.

That brings me to a question which requires some consideration. Both defendants plead that the master of the *Kate* himself knew the condition of the berth. In other words, that he was the author of his own injury. He himself says that if he had known of the danger he would not have put his ship there, however much he had been ordered to do so; and I think that it goes without saying that if, knowing of the actual state of things which caused the damage, he had deliberately put his ship into danger, he could not recover against either defendant. In particular he could not recover against the company, since the duty based on *The Moorcock* and *The Bearn* (*sup.*), is a duty to warn.

As Lord Collins, M.R., says in *The Bearn* 10 Asp. Mar. Law Cas. 208; (94 L. T Rep. 265; (1906) P., at p. 76): "There is an implication on the part of the wharf owner that he has taken reasonable care to ascertain that the condition of the berth is safe, and if it turns out to be unsafe he cannot shelter himself by saying that he did not know it. He could shelter himself by showing that he did take reasonable care to find out; and, knowing himself how much care he has taken, if that care is not reasonable, and he has not reasonable ground for thinking the berth safe, he is fixed with the obligation of telling the person coming in that he does not know what is the condition of the berth. His liability cannot be put lower than that. It is the low-water mark."

But, as Hill, J. said in *The Grit*, 16 Asp. Mar. Law Cas. 467; (132 L. T. Rep. 638; (1924) P. 246, at p. 253): "When the negligence alleged is a failure to give information, the knowledge or absence of knowledge on the part of the shipowners must be a material circumstance."

Now, as I have already said, the *Kate* lay two or three lengths below this berth for about three days on this very voyage. I do not attach very much importance to this fact. There was a certain amount of controversy as to whether the berth opposite the crane actually dried out at low tide. I think there was always a certain amount of surface mud, or mud and water, but I am satisfied, as I have already said, that a superficial inspection would not have shown the real state of the ground under the surface. What is more important is that while the *Kate* was lying at the elevator on the 6th September an accumulation of sand, projecting above the surface, was observed by the master.

Again, there is some conflict of evidence. The master did not admit, though he did not expressly deny, that this had been the subject of a complaint to the company, which in turn was passed on to the corporation by telephone. I think that this was so and that, though too late to do anything on the 6th, Mr. Bradford, assistant borough surveyor, was sent to look into it, and that he probably spoke to Mr. Macpherson about it, though Mr. Macpherson does not recall the circumstance. I am satisfied, however, that this complaint was of a heap of sand immediately under the stern of the *Kate* as she lay at the elevator, and was probably the result of three vessels having lain there in succession. That it was this heap of sand which was the subject of the complaint was admitted in cross-examination by Mr. Gething, both by Mr. Bradford for the corporation and by another, Mr. Baker, the foreman for the company. But this heap of sand would be about 15ft. forward of the point where the *Kate* broke, and I am satisfied that it had nothing whatever to do with the damage she actually sustained. That this was so was shown by the evidence of Mr. Prigg, the surveyor, who was called by the company. After saying that if there was a hard lump in the neighbourhood where the stones were ultimately found that might cause the damage, he admitted, in answer to questions which I put to him, that a soft sand bank under the stern of the *Kate* as she lay at the elevator, which would correspond with a point under the forward part of the main hatch as she lay at the crane, could not be the cause of the damage. "Neither," he added, "if the bank had been hard could it have accounted for the actual damage, though it might well have caused some other damage." And he agreed that the inference was that whatever was under the *Kate's* stern when she was at the elevator must have been soft.

But, on behalf of the company, it is argued that even if it is true that that particular hump was not the cause of the damage, it shows that the master knew, or, at the very least that he had reason to suspect, that the berth was uneven, and, therefore, knew as much as the company did, and took the risk. The company, on the other hand, had called upon the corporation to put the berths in order. What more, it is said, could they do?

Now certainly, if the master knew of the actual danger, and put his ship on it, and even, I think, if he had reason to suspect the actual danger, and deliberately turned a blind eye to it, he could not throw the risk on the company, or, indeed, on the corporation. But that, in my opinion, is not this case. Equally, if the company had actually known of this particular danger, they could not have allowed the use of the berth until the danger had been removed, without at the very least making it

clear that the *Kate* could only lie there at her own risk with full knowledge of the danger. In fact, I find that the master neither knew nor suspected the dangerous condition of things which was the actual cause of the damage. It is true that the company had not informed themselves, by obtaining leave, for example, to take soundings, of the exact details of the defects ; but they knew that the berth was defective and unsafe ; they knew that there had been complaints from other masters ; they knew that the corporation had been doing some work in response to their own representations ; yet they took no reasonable care to assure themselves that the work had been efficiently done, or that the result was satisfactory as regards the berth alongside the crane. At the very least they owed a duty to the plaintiffs to tell their master that this was the extent of their knowledge about the berth. The action that they took about the heap of sand which was seen under the stern of the *Kate*, so far from putting the master on his guard as to the real danger, must, to some extent, have led him to think that this was the worst he might have to expect. That risk (such as it was) he certainly took, but it turned out that he was justified in taking it. I am not prepared to hold that his knowledge of that particular risk absolves the company from their duty in respect of the berth as a whole, and I find that the company failed to perform that duty.

I find that the corporation failed to take reasonable care to see that the berth in question was in a fit condition ; and, having failed in that duty, I also find, though I do not know that this carries the matter any further, that they neglected to warn the master of the *Kate* that the berth was, to their knowledge, unsafe.

I, therefore, give judgment against both defendants, with costs.

March 15 *and April* 5, 1935.

Claim for an indemnity : By their defence the second defendants had claimed that in the event of their being held liable to the plaintiffs they should be indemnified by the first defendants for damages and costs. This claim was dealt with separately, and the arguments were heard before the President, Sir Boyd Merriman, on the 15th March, 1935. The following further judgment was delivered on the 5th April, 1935.

Sir Boyd Merriman, P.—I have already delivered judgment in this case as between the plaintiffs and the two defendants, but I have now to decide the third-party claim by the company against the corporation.

At the conclusion of the arguments in connection with the plaintiffs' claim, an attempt was made to argue the third-party claim ; but it soon became apparent that it was impossible to deal with this satisfactorily until I had expressed my reasons for holding that the plaintiffs were entitled to recover against both defendants. The case was therefore argued after the parties had had time to consider my first judgment, and upon the basis that that judgment was accepted for the purpose of the argument. I should like, in passing, to express my obligations to counsel for the admirable way in which this case has been argued throughout.

This present judgment, therefore, is to be read in light of my earlier judgment which is to be taken to be incorporated herein at length, though it may be necessary to summarise the effect of it for the purpose of making my present judgment plain.

Both defendants have been found guilty of negligence towards the plaintiffs, but I need scarcely say that the third-party claim is not based on any attempt to obtain contribution as between one tortfeasor and another, but is based upon the covenant in the lease dated the 29th February, 1932, whereby the corporation covenanted with the company to keep the quay, quay wall, mooring posts and river berths (including the berth at which the *Kate* was injured) in good order and condition during the said term. The company allege that the damages they have sustained were occasioned solely by the breach of this covenant. The corporation, on the other hand, deny that they committed any breach of covenant, and they incorporate in their defence the allegation made in par. 4 of their defence to the plaintiffs' claim, that the damage was due to the *Kate* being improperly placed on the morning of the 7th September, 1933, without the knowledge and permission of the defendants or their servants, in a position abreast of the water discharge from the flour mills and partly in one berth and partly in another berth. On the question of damage the corporation also argue, as they are entitled to do, although there is no specific pleading with regard to damages, that, even assuming there was a breach of covenant, the damages claimed are too remote.

In my former judgment I have already disposed, adversely to the corporation, of the issue raised by par. 4 of their defence to the plaintiffs' claim, and have found that the place where the *Kate* was lying was a recognised berth and that it was not in a reasonably safe condition owing to the negligence of the defendants. It follows, therefore, that I have already found that they were guilty of a breach of the covenant in respect of this very berth ; and I do not propose to say anything further on that point. The real substance of the argument of the corporation is that the liability of the company for the damage sustained by the *Kate* is the result of the independent tort of which they have been found guilty, and that, regarded as a consequence of the corporation's breach of covenant, the damages are too remote ; and, secondly, that, in any event, the damages ought not to include costs incurred by the company in fighting the action. This argument was put in several ways, but it always came back to the question of remoteness of damage.

Now, I have found that the corporation knew perfectly well that the berth was unsafe and had allowed things to get gradually worse. On the other hand, I have found that in the middle of August the company were uneasy about the state of the berths generally, and had called upon the corporation to put them in order ; but as the letter from their Barnstaple office to the head office of the 19th August shows, they were reassured by the fact that, whether in response to the wrongly directed letter of the 17th August or not, the corporation were doing work upon the berths, and, to quote their own words, " when they have finished, the berths will be in good condition." That remained, so far as any written record is concerned, the state of mind of the company's representatives at Barnstaple until the master of the *Kate* complained on the 6th September. That complaint, however, related to a particular heap of sand under the *Kate's* stern as she lay alongside the elevator, which I have found had nothing whatever to do with the damage.

In other words, though the company did not know of the actual defect which caused the damage to the *Kate*, they knew that there had been grounds for complaint that the berths were defective and unsafe ; they knew that the corporation had been doing some repair work as the result of their own representations to this effect ; but I found, never-

theless, that the company took no care to assure themselves that the results were satisfactory, or to inform the plaintiffs, in these circumstances, that they had not done so; and I have held them guilty of negligence in respect of this failure to warn the plaintiffs.

Mr. Hayward argues for the corporation that the damage to the *Kate* resulted solely from this negligence on the part of the company. He says that it is impossible that it should have been in the contemplation of the parties that the company would put a ship on the berth opposite the crane without warning the master of the extent of their own knowledge, or lack of knowledge, as the case might be, of the state of the berths. In particular, he argued that this could not be so, since the corporation had promised the company to remove the heap of sand on the morning of the 7th September, a thing which it was impossible to do if the *Kate* was moved to the crane.

I will deal with this latter argument first. It would be a formidable argument if there were any ground for supposing that such delay in moving the *Kate* as would have enabled the corporation to remove what I have found to be the irrelevant heap of sand, would have prevented the damage which actually occurred. But I am satisfied that this would not have been so. At most it could only have postponed the damage; though, as the *Kate* did not take the ground until well after nine o'clock, this heap could easily have been removed in time to allow her to be moved on the same tide. The actual removal of the heap of sand would have had no effect whatever in minimising the real danger, though it might possibly have aggravated it by giving her even less support forward than she had. I think Mr. Miller is right in arguing that the failure to wait for the corporation to clear the heap of sand may have been a *causa sine qua non*, but was not a *causa causans*. It amounts to no more than this: that it enables the corporation to say that the *Kate* might not have been placed upon the point of danger at the exact moment when she was so placed, but otherwise it would have had no effect upon the matter whatever.

But it remains to deal with the main point, that it was the company's negligence in allowing the *Kate* to move to the dangerous berth, without warning, which was the cause of the damage. In my opinion, this argument is disposed of by the case of *Mowbray* v. *Merryweather*, 7 Asp. Mar. Law Cas. 590 (73 L. T. Rep. 459; (1895) 2 Q. B. 640). In that case the defendant, the owner of a steamship, had undertaken to provide the plaintiffs, a firm of stevedores, with the gear reasonably fit for the purpose of discharging a cargo. Instead, he supplied a chain so defective that it broke while being used in discharging the cargo, whereby a workman of the plaintiffs was seriously injured. That workman recovered damages against the stevedores under the Employers' Liability Act, 1880, by reason of their negligence in failing to discover the defect as it was held they might have done by the exercise of reasonable care. The very argument used in this case, *mutatis mutandis*, was addressed to the Court of Appeal. In the course of his judgment Lord Esher said that there was a contract, a breach of it, and, therefore, a cause of action for which, at any rate, nominal damages would be recoverable. He added that the workman could not have recovered unless, as between himself and the stevedores, the stevedores had been guilty of want of care, but that the stevedores argued that they were not bound to examine the chain because the defendant had warranted it sound, and that they had a right to rely on the warranty and did rely on it; and that the defendant could not rely on a duty to use due care which was owed not to him but to the plaintiff workman; and Lord Esher held that this contention was correct, and that the plaintiffs owed no duty to the defendant to examine the chain before allowing it to be used by their workmen, the only duty they owed in that respect being to the workman. He also approved expressly the judgment of Martin, B. in the case of *Burrows* v. *March Gas and Coke Company* (L. Rep. 5 Ex. 67; affirmed L. Rep. 7 Ex. 96), which judgment seems to me to be in point in the present case. One of the reasons given in support of this decision of the Court of Appeal was that, as in this case, the circumstances were such that the original plaintiff could have recovered direct against the then defendant.

In the case of *Scott* v. *Foley* (5 Com. Cas. 53), the claim was founded on a breach by the owner of a warranty in a charter-party that the vessel was "in every way fitted for the voyage and service, and to be so maintained by the owners." The breach alleged was the defective condition of an iron ladder leading to the hold, and it was held that the plaintiff charterer's liability to the stevedore was the natural consequence of the defendant's breach of warranty, notwithstanding that his own negligence in failing to inspect the ladder gave rise to the claim of the stevedore. It will be observed that the warranty was a warranty both that the ship was fit for the service and that it would be so maintained.

Now, as regards both these cases, there is, of course, a difference between a covenant to keep a thing in repair and a warranty that the thing is at a given time in a particular state of fitness or repair; but it seems to me that there is no distinction in principle. The question in either case is whether the damage sustained is the natural consequence of the breach of contract, notwithstanding some independent negligence on the part of the plaintiff.

I ought, however, to add that Mr. Hayward also took the point that, even assuming that the present case was governed by the cases I have mentioned, the company had nowhere pleaded or proved that they put the *Kate* on the berth in reliance on the covenant. With regard to this, I need only say that the identical argument was used and rejected in *Mowbray* v. *Merryweather*, and that in *Scott* v. *Foley* Bigham, J. as he then was, found no difficulty in holding, apart from any specific evidence, that the warranty was obviously relied upon. I so hold in this case. The company had actually called on the corporation to fulfil their covenant and were obviously reassured to some extent by the work which they had seen the corporation doing. In my opinion, the fact that the company did not fulfil their duty to the plaintiffs involved no breach of duty to the corporation; and I hold that, notwithstanding their negligence towards the plaintiffs, they are entitled to say as against the corporation that the resulting damage to the *Kate* flowed from the breach of covenant.

There remains the question of the costs. It seems to me that when the corporation had pleaded, not only as against the plaintiffs, but as against the company, that the *Kate* had been permitted to lie at a place which was wholly unauthorised as a berth, it was practically impossible for the company to submit to judgment. There is abundant authority, including the case of *Scott* v. *Foley* and the cases there cited, that costs reasonably incurred in defending a claim should be included in the damages. I hold that these costs were reasonably incurred in the circumstances, and if costs are

recoverable at all Mr. Hayward very rightly admitted that there was no distinction to be drawn between the party and party costs, and the solicitor and client costs.

For these reasons I give judgment for the indemnity claimed, with costs.

Solicitors: for the plaintiffs, *W. and W. Stocken*; for the first defendants, *Vandercom, Stanton, and Co.*, agents for the Town Clerk of Barnstaple; for the second defendants, *Richards, Butler, Stokes, and Woodham Smith.*

January 25, *May* 8, 9, 10, 13, 15 *and* 16, 1935.

(Before Sir BOYD MERRIMAN, P., assisted by Trinity Masters.)

The Aeneas (*a*)

Collision — Suez Canal Regulations — Breach — Lights—Test as to whether lights displayed misleading or not — Burden of proof—Costs.

Whilst tying up to the bank on the African side of the Suez Canal to allow plaintiffs' vessel B. *to pass, the defendants' vessel* A. *was exhibiting three clusters of lights. Under the Canal Regulations these clusters should only be exhibited when the operation of tying up has been completed. The* A. *was still exhibiting an arc-lamp which, under the Regulations, ought not to be extinguished until the operation of tying up is completed. She was also displaying her masthead lights and until shortly before the collision her green light. The plaintiffs alleged that they were misled by the lights of the* A. *The defendants contended that those on board the* B. *would not have been misled if they had kept a better lookout.*

Held, that the defendants could not exonerate themselves from blame by the mere fact that if the B. *had been keeping a better lookout she might have appreciated the position sooner; that the defendants were guilty of a breach of a rule of an accepted code laid down for Canal pilots, and that there was no essential difference in the principles to be applied to a breach of this code and to a breach of the International Regulations for Preventing Collisions at Sea; that the onus lay upon the defendants to prove not only that the breach ought not to have misled the* B. *but that it did not in fact mislead her; that the* B. *came down the Canal too fast and that her drastic helm and engine action caused her to sheer into the* A.; *further that the* B. *was to some extent misled. Blame apportioned as to one-fifth on the* A. *and four-fifths on the* B.

ACTION for damage by collision.

The plaintiffs were the owners of the Norwegian tank motor-vessel *Belita.*

The defendants were the owners of the twin-screw steamship *Aeneas.*

The claim was brought in respect of damage occasioned by a collision which took place on the early morning of the 3rd July, 1934, in the Suez Canal abreast of Kilometre Post 62. The *Belita* (6323 tons gross) was proceeding southwards. The *Aeneas* (10,058 tons gross) was proceeding northwards, bound to London with passengers and cargo, and it was her duty to tie up and allow the *Belita* to pass. Both vessels were in charge of Canal pilots.

Art. 23 (6) of the Rules of Navigation for the Suez Canal: Ships going through the Canal by night must be provided with a projector (searchlight) and overhead lights to light up a circular area around the ship.

Art. 26 (3): When a ship . . . is about to tie up . . . she must at once extinguish her projector and turn on her overhead lights. When she has completed tying up she must extinguish her overhead lights and her navigating lights and hoist the lights prescribed in the Special Book of Signals.

According to the translation from the French, the instructions as to these lights are as follows: "At night, extinguish searchlight and light arc-lamp at the moment of commencing mooring manœuvres. Extinguish the lamp and put two or three white lights along the side of the vessel when the mooring is completely finished."—(*Signals*, 1928 edition.)

The facts and contentions of counsel fully appear from the judgment.

Willmer and *Radcliffe* for the plaintiffs.

Digby, K.C. and *Bateson* for the defendants.

The President (Sir Boyd Merriman): This was a collision in the Suez Canal between a Norwegian vessel going south, the *Belita*, and a Blue Funnel liner, the *Aeneas*, which was going north. The collision occurred in the neighbourhood of kilometre No. 62, on a bend of the Canal which occurs at that point. I was told quite early in the case by the Elder Brethren, and it has been accepted as accurate—sufficiently accurate for our purposes—that the bend was one of 38 deg. in one-and-three quarter miles, more or less upon a uniform arc.

It is unnecessary, perhaps, to say that, as the Canal Regulations require, both ships were in charge of a Suez Canal pilot, and that in the circumstances of this case, though there is not an invariable rule on the subject, it was the duty of the *Aeneas* to tie up. This particular point in the Canal lies between a station named El Ferdane to the south and a station named Ballah to the north, and the material part of the story begins at a time when the *Aeneas* passed El Ferdane. There, it is common ground, a large station notice board is displayed on which appear the orders to the ships and, if they are upcoming vessels, as to which of them is to tie up. There is no doubt that when the *Aeneas* passed El Ferdane, though she did in fact know earlier that there were ships coming down, till that moment she had thought it was they who had to tie up, but at El Ferdane it was made clear to her that she was to be tied up and that the other vessels were to pass her. She was told at some time a few minutes before the moment of which I am speaking that the first, at any rate, of those vessels, namely, the *Belita*—the plaintiff ship—had already passed Ballah. These two stations are about five-and-a-half miles apart.

The *Aeneas* did not immediately tie up. In fact, the point at which she was engaged in tying up at the time of the collision is some one-and-a-half miles—not quite as much, but nearly one-and-a-half miles—north of El Ferdane. The reason why

(*a*) Reported by J. A. PETRIE, Esq., Barrister-at-Law.

she went to that point instead of tying up at once is that there had been a good deal of dredging in that neighbourhood, and although the spot selected had the disadvantage that it was on the bend of which I have spoken, there is nothing prohibitive to tying up on a bend, and it had the advantage, for the purpose of enabling two big vessels as they were to pass each other, that the canal had been deepened and widened at that bend. I say at once that I find nothing wrong in the fact itself, always provided that the other ship was not led into any difficulties by concealment of the fact, or anything of that sort—I see nothing wrong in the *Aeneas* proceeding to that point for the purpose of tying up.

I am now satisfied, although there was a certain amount of discussion about it, that those on board the *Belita* cannot have been under any misapprehension as to the fact that the *Aeneas* was coming on past El Ferdane, or at any rate were not inconvenienced in any way by that fact, because it is really common ground that these ships, or at any rate their lights, were in full view of each other for at least three miles, so that there is no element of surprise or anything of that sort which arises in connection with the *Aeneas* going farther north than perhaps she need have done in order to tie up.

Although I have had the benefit of hearing and seeing the witnesses from both ships, the two most important of all have not been here, namely, the pilots. Of course, one understands perfectly well the circumstances in which their evidence, by mutual consent, has been dispensed with, and needless to say I find no fault at all with that agreement, but it is a difficulty which is common to both sides, and also to the court. But when I state, as I propose to state now, the real conflict between these two ships, it will be seen that the absence of the pilots is a real handicap to the parties and to the tribunal.

The controversy is this: There is no doubt whatever that, so far as progress in the Canal itself is concerned, the *Aeneas* was stationary. In case I have not made that clear, let me explain that by that I mean that nobody suggests that at the time of the collision the *Aeneas* was still travelling in a northerly direction up the Canal. To that extent, at any rate, she was fast. Also, there is no dispute that in that condition she was struck by the *Belita* (who was unquestionably moving) somewhere about amidships—struck a very heavy blow—the precise details of which do not matter, but which kept the two ships in contact for a considerable number of feet and caused a heavy list, or substantial list, in one or both of them, with the result that there was a second underwater blow, doing damage farther aft on the *Aeneas* and setting off the forefoot of the *Belita*. The question is—the controversial question is—how did that collision come about?

The case presented by the plaintiffs is this: They say that they came down the Canal in a perfectly normal and proper way, and that quite a considerable distance away from the *Aeneas* they came to the conclusion, because of the lights that she was exhibiting or not exhibiting, as the case may be, that she was already properly tied up for them to pass, and that when they got within quite a close range of her (it is actually put at not more than one-and-a-half ships' lengths) they suddenly realised not merely that she was not tied up, but that her stern was coming out across the canal, blocking their passage, and at that moment—and not until that moment—was exhibited the light signal which would indicate that she was not yet properly tied up. In these circumstances they took, as they say was inevitable, desperate measures to reduce their speed and to avoid the collision which was almost bound to occur, but they were not able to avoid it, with the result that they struck the *Aeneas* in the way I have described.

I shall have to examine in a little detail the case about the exhibition of lights, but by way of emphasising the difficulties to which I have referred, let me say in passing that in the main the construction of that case with regard to the lights depends upon the absent pilot of the *Belita*, because, as we now know, his view of the matter, recorded as it was in a telegram which he sent shortly after the accident, the words of which I think I might read now, was transmitted into the logs of the ship, but it is by no means wholly supported by the oral evidence of the officers who were responsible for these logs. The pilot's telegram was in these words, if I may use the English words of it:

> "In entering into the bend of No. 64 sighted *Aeneas*, side lights extinguished; lamps along her side; and arc lamps extinguished. In making arrangements to cross her [that is, to pass her] we saw that the stern was coming into the middle of the channel and that they were re-lighting the arc lamps. Went astern but were unable to avoid the collision. Searchlight destroyed. Master asks to proceed to Ismailia."

Shortly before, the master sent a telegram to his owners:

> "Collided with English steamship *Aeneas* in the Canal. Our starboard bow damaged above maindeck, also forecastle deck. Having survey at Suez. Can no doubt continue. *Aeneas* was regarded as moored when she suddenly swung the after-part of the ship out in the middle of the Canal."

With certain variations of detail, that is the case that was presented here, supported by the log entries. That is perhaps putting it inaccurately, because, of course, the *Belita* herself could not put in the log entries in support, but these telegrams having been put in, were said to be supported by the log entries. But, as I have already said, it turns out at the end of it all that, at any rate with regard to the material fact about the extinction of the arc light, there is not a single witness who has spoken in the witness-box to that effect, and it all depends upon this telegram of the pilot and the fact that he doubtless communicated to the officers at the time what his view of the matter was.

It will be seen that the gist of the case was that by appearance, by the appropriate light signals (appropriate to tie up at night, as this was) the *Belita* was led into believing that the *Aeneas* was tied up, and came up in that belief, when suddenly she discovered her mistake, the mistake being not that she had misjudged the actual position of the *Aeneas*, but had misjudged that she was tied up, and suddenly found her moving across the Canal at her, across her course.

To quote one more document, the master, in the letter in which he supplemented the telegram and when he enclosed the log entries, wrote to his owners:

> "It is, of course, easy to understand the whole, because it cannot be anything else than that the rope on the *Aeneas* had parted or not been properly made fast, and as there is not much space to turn in, it was fortunate it happened as it did."

Then I must add one other fact about which there is now no real dispute, and that is this, that the angle of the blow was approximately three points—not quite as much as three points, but not very much less—and about that there is no controversy. In other words, the case presented by the *Belita* was that there was the whole of the Canal for them in which to go by a ship which was properly tied up, when suddenly the *Aeneas*, by breaking her rope or in some other unexplained way, came out three points into the Canal, blocked their passage and thereby caused the collision, while at the same time inviting the *Belita*, by misleading signals, to come on and pass her.

On the other hand, the *Aeneas* says that they never invited the *Belita* to come on at all; that they are bound to admit in one particular—which I shall have to discuss more fully—that they did exhibit a misleading signal, but there really was nothing which could possibly have led those on board the *Belita* to think that the *Aeneas* was really completely tied up, and that, although they admit they were not fully tied up and that they were angled out into the Canal, they say that they were only angled about one-and-a-half points—which would barely bring their stern into the navigable part of the channel, leaving plenty of deep water for a big vessel to pass, and that, it being agreed that the blow was just less than three points, the difference between their angle, which remains constant, and the angle of the blow, was caused solely by the manœuvres of the *Belita*. They say that she was coming on at much too great a speed at the material time, and that although in fact there was plenty of room for her to pass reasonably clear at that point, she lost her head, reversed her engines at a time when it was most dangerous to do so, because it would inevitably cant her head to starboard—that the *Belita*, in other words, threw herself on to the *Aeneas* by a combination of excessive speed, postponed action and wrong action—and they point out, moreover, that on any view this story about her stern coming out will not do when what has got to be explained is not hitting the *Aeneas* by the stern but hitting her amidships—whether just before or just abaft amidships is neither here nor there—and that that shows, if nothing else shows, that at any rate part of this angle of impact must have been caused by the *Belita's* head coming across the Canal off her true course.

I find that the *Aeneas* having deliberately elected, as I have said, to tie up at this particular position, carried out that operation in a perfectly normal way. She gradually reduced her speed as soon as she received the order that she was the tie-up ship, and ultimately at the bend indicated she was ready to go into the bank. She went into the bank, as is usual and proper, head first, at an angle which I should think was probably about 1½ points. Very likely, as is usual, she brought her head quite close into the bank, even possibly allowing her port bow to touch the soft mud, and she proceeded to put ashore first the bow rope. The two mooring boats were both carried forward. They were launched at substantially the same time. The bow rope was got away first and the after rope second, and it follows from that that the bow rope would be made fast, as I find as a fact, an appreciable time—very likely a matter of minutes—before the stern rope was made fast, and, certainly, before the stern rope began to be hove in.

I accept the evidence which those on board the *Aeneas* have given that in these circumstances all that happened, as far as the bow rope was concerned, was this, that they began to heave in on the bow rope until it was taut and then stopped heaving in. The result was that from the position in which her head had come in process of navigation—it may have moved in 20ft. or 30ft., not more, with the result that they still had an angle—her head was lying about 40ft. or 50ft. from the bank. When I say the bank I mean the extreme of the waterline as portrayed on the plan with which we have been supplied. While that was being done the other boat went aft, picked up the stern rope from the port quarter, put it out rather farther to the shore, got it ashore, and they had begun to haul in on that.

But I find as a fact that at no time was the angle of the *Aeneas* appreciably altered in the Canal. I say "appreciably" because I agree that probably to the extent of the operation of which I have spoken a certain amount of momentum must have been applied to the bow, and it is possible, though not necessarily so, that a corresponding amount of momentum would be applied at the stern. It is not absolutely necessary, but I find that that is the extent, the full extent, if any, that the stern moved from the point at which she began to move from the bank, including, as I say, about 1½ points, and I reject absolutely the theory that from that moment, from that position, there was any movement of the sort which I have described as part of the *Belita's* case.

So much for the position of the *Aeneas*.

What was she displaying in the way of signals? I am satisfied, and I find as a fact, that up to the moment when she began to tie up she was exhibiting her navigation lights and her projector searchlight—the searchlight prescribed by the Canal Regulations—and I find, as I have already said, that certainly two masthead lights, and still more certainly the projector, and I think also, from their own evidence, the red light, had, for a distance of not less than three miles, been in full view of those on board the *Belita*. It follows as night the day that if inferences are to be drawn from the exhibition of lights, and on the assumption that the correct lights for a given state of things are being shown—it follows, as I have said, that so long as that projector was showing, the *Aeneas* was a ship which had not yet begun to tie up. Nobody disputes that. It is equally certain that so long as her masthead lights were exhibited—and still more so, so long as the prescribed arc lamp was exhibited—she was a ship which, though she had begun to tie up, had not yet completed the operation, and I find as a fact that those on board the *Belita* saw the projector extinguished, and I find that they saw the projector extinguished at a time before the collision which could not reasonably be supposed to give the *Aeneas* full time to tie up, or, at any rate, to make it doubtful whether there was full time for her to tie up. I find as a fact that at the moment when the projector was switched off the arc light was switched on. I further find—and I may say that it is frankly admitted by Mr. Willmer that there is no oral evidence to the contrary—that that arc light was never switched off at the time of the collision. The suggestion that that occurred depends, as I say it really does, upon the pilot's cable and the various repetitions of that in one form or another which occurred in documents from the time of the first log entry down to the preliminary act and pleadings in this case, and I reject it. I do not believe that the arc light was ever extinguished up to the time of the collision, and the theory that it had been extinguished at the last moment

when those on board the *Aeneas* saw what had happened is a myth.

Next I must deal with the other light signals, about which again now there is no controversy, though here again the facts as we now know them are not wholly reconcilable with the facts as pleaded on the side of the *Aeneas*. I find as a fact that from Suez onwards, at the request of the pilot on the *Aeneas*, there had been exhibited amidships on both sides of the vessel one cluster of lights disposed to shine more or less horizontally on to the banks of the canal. The master of the *Aeneas* said he had never seen this arrangement before, but it was one that the pilot wanted to enable him to see the sides of the canal. So far as I can see there is no reason why he should not have such lights if he wanted to have them. I thought at first, owing to a confusion of the words which were used, that these lights on either side were not exhibited in the way that the signal which I am going to describe was exhibited. But I find that, as she was by no means a vessel which had completed the operation of tying up, the lamp trimmer on board the *Aeneas*, without waiting for orders from anybody, uncontrolled by his own officer or by the pilot, took upon himself to turn this cluster, which I have mentioned, on the starboard side—to turn it downwards so that it shone upon the water, and to put out (I am not pretending to give the exact sequence of the lights—of course, that is not quite correct) at or about the same time a light forward, I think I am right in saying, at the break of the forecastle head, and a light at the after-end of the well deck. In other words, he took upon himself, at a time when this vessel was only beginning to tie up, to exhibit the lights prescribed by the Canal Book of Signals as being the lights which are to be exhibited concurrently with the extinction of the arc lamp when the mooring is completely finished.

As regards the navigation lights, I am not going to discuss the question whether this vessel ceased to be a vessel under way when she was moored forward or only when she was moored both forward and aft. On either view the Blue Funnel liner ignored the regulations. They never extinguished the masthead lights at all, and I think I am right in saying that it was at the last minute, after both ropes were ashore, and I think five minutes after the first rope was ashore, before it occurred to the officer on the bridge to order that the sidelights should be taken in. In fact, the starboard light was taken in—this is common ground—a matter of seconds before the collision. But still, however that may be, the fact remains that as soon as the cluster lights would be in view it follows that the starboard light would be in view, and even if that were removed a short while before the collision nobody pretends that the masthead part of the navigation lights was not alight the whole of the time. So that the position is really this, that in so far as any suggestion of a signal that the *Aeneas* was completely tied up was concerned, it depends entirely upon the exhibition of the cluster lights, because everything else was more consistent with her not being tied up than with her being tied up.

It is now necessary to consider the question of the *Belita*. The *Belita* is coming south with the knowledge that in this stage between El Ferdane and Ballah is this north-coming vessel. She knows, of course, that she is a big ship, a passenger ship, and as I have already said she can see her three miles away. Of course, in fact, certainly as she got closer and closer, the seeing of her does not depend by any means on this projector and the masthead lights alone, because being a passenger ship and it not being very late at night—certainly after midnight—she was a blaze of light, as has been described—both sides said the same. There were lights from the portholes and a lot of lights on the deck, and all the rest of it. It is only fair to say with regard to that, that those lights would be bound to throw a certain amount of radiance all round the ship on a dark Eastern night. So far as the actual observation of the hull is concerned, I do not think until she came well on her way round the bend that those on board the *Belita* would really see any great part of the hull or any great display of deck lights on the *Aeneas*, for this reason, that at a point a mile or so between El Ferdane and the point where the bend begins there is a range of sandbanks. I do not know how high they are. Nobody suggests that they would screen the projector or masthead lights, but they would, to some extent, screen the view of the hull.

The first thing to consider is how the *Belita* was proceeding in the circumstances. Mr. Willmer says she was entitled to come on on the assumption that the *Aeneas* would be tied up at the earliest possible moment and would be fully tied up by the time she came there, assuming that she came at a normal pace through the Canal. I think that is putting it too high. I think that when one ship can see another three miles away she has got to proceed on the assumption of what she can see and not on what she supposes may happen. Nobody on board the *Belita* has suggested that until quite a short time before the collision the projector of the *Aeneas* was extinguished. Whether they could see the precise extent to which these lights of the *Aeneas* were moving forward seems to me to be immaterial so long as her projector was alight. Therefore they had no right to assume that she had tied up. That seems to me to be elementary. Whatever their theoretical rights may be, or whatever they may have a right to suppose theoretically, they have no right to act contrary to the known facts, and that fact was staring them in the face.

I quite agree with what Mr. Willmer said, that the speed at which the *Belita* was coming (and equally for that matter, the speed at which the *Aeneas* was coming while they were miles apart) has got nothing to do with this case, except this, that what does matter is the speed at which the *Belita* was proceeding in what I may call the danger zone. When once you get her within the danger zone then her speed matters enormously, and the decision as to whether her speed was or was not too great within the danger zone is, of course, to some extent affected—or at any rate an estimate of her speed is affected—by her last immaterial or irrelevant speed; or, putting it the other way round, the speed at which she entered the danger zone is not of the slightest interest, but it is of interest to know how, when she got close to this ship, she was proceeding, and what happened after that while she was within the danger zone.

I have no doubt on the facts taken from the Canal times that this ship had been proceeding at more than the regulation limits in the Canal, and I find that when she was on the bend—when she was rounding the bend—and at a time when they were within a relevant distance of each other, she was not going at less than about seven knots. What is not less significant is this, though I am not going to hit the *Belita* for a definite speed; there is a calculation which I suspect really has to be modified. There is a calculation that she did one-and-a-half miles after the collision to El Ferdane at eight knots. I do not think it was a higher figure than that, but, at any rate, it was at some figure which was a great deal higher than could be achieved at slow and dead

slow by a vessel which says that she approached the collision at a speed not exceeding three knots, and suffered a collision which must have taken off an appreciable part of her way.

I am not going to examine all the evidence about speed, but let it not be assumed that because I do not go into it in detail I have not considered very carefully the various factors, the various assumptions, made by one witness and another on both sides. I have come to the conclusion that entering what I call the danger zone at something like seven knots the *Belita* had run off very little of that speed by the time she had got within four lengths of the *Aeneas*, and, indeed, I am satisfied that she had run off very little, if any more, by the time she hit her. And on any view of this case—on any assumption as to what the *Aeneas's* position was—I am satisfied that at the material time and place the *Belita* was proceeding much too fast for a ship which was about to pass another ship, even on the assumption that she was already properly moored. If, on the other hand, she ought to have realised —or did realise—that the *Aeneas* was not properly moored, and that her stern was still projecting into the canal at an unknown angle, the speed at which the *Belita* was coming was still more improper.

I find that the actual cause of the collision was this, that much too late the *Belita* tried to correct the speed at which she was travelling; did so by reversing her engines, which, as she has a right-handed propeller, had the usual effect of canting her head to starboard, notwithstanding the fact that she put her wheel a-port, and I am satisfied beyond any shadow of doubt in my own mind that assuming the *Aeneas's* angle to be about a point and a half, as I have already said, the balance of the angle was made up by the *Belita's* head cutting away to starboard as the result of this action. I cannot see any justification whatever on the facts of this case for her coming down on the *Aeneas* at that speed, and I am satisfied, on any view of the case, that blame—and a very large share of the blame—must be attached to the *Belita*. But that does not dispose of the whole matter.

As I have said already, this case is unlike many collision cases at sea where both sides are in view of each other ten minutes before the accident happens and where the details can be described minute by minute. Here nobody thought anything was going to happen until they were within one-and-a-half lengths of each other—nobody thought there was going to be a collision here. One has to view the evidence in that light, and I am not imputing dishonesty when I say that the facts as presented by the pilots are really a distorted version of the facts. I have to try to picture to myself what it was that they really saw.

Now, let it be remembered that this ship is coming round a bend which represents about a point in half-a-mile—a bend to starboard of about a point in half-a-mile. It is very easy to understand how, when first they came within view of the hull and deck lights, seeing, of course, the port bow of the *Aeneas*, and then looking at her straight ahead, and then coming in view of these clusters of lights on the starboard bow on a dark night, with their centre of vision, they might easily think on the bend that the ship was lying, in fact, more closely parallel to the bank than she really was. They had only got to put two models down on the plan, as Mr. Willmer did when I suggested it to them, and look at them carefully to see that that was a perfectly natural thing to imagine. There was a light on the Asiatic bank, but in the absence of a second light close to, there was nothing to indicate the exact line of the bank. I do not know that that really helps very much. Therefore, one can understand what it is they are seeing when as the result of their own movements they first of all discover that she is not parallel with the bank top. The manœuvre which I have indicated—the cut away to starboard—suggested to them that she was coming away from the bank. One can quite understand how that conception arose. But I think there is no doubt at all that, at any rate at a distance which is not less than 4000ft. (which in turn is not much less than ten lengths of the *Belita*) she would come to a point at which, on the assumption that the *Aeneas* is angled out at about one-and-a-half points, this set of clusters of lights, on the illuminated side of the ship, would come into her view.

Now, just let us see what is the position at that time. The projector, of course, was gone out. I am not going to pin the officer who gave the evidence too closely to an estimate of time, but he said it had been extinguished only two minutes before that set of cluster lights came into view. He made it clear that what he meant was that in a time that would be too short for the tying up to be completely finished the projector had been put out. Therefore, they knew that the tying up was begun. I am satisfied that, although they say the arc light was not on, it was in fact on. They said they did not see it; that was faulty look-out. It was there for them to see, the arc light 50ft. up on the cross-tree. They are coming on then at about ten lengths—over half-a-mile—at a ship which at any rate they think (and may reasonably think), as was the fact, has begun to tie up. Now, even if tying up is not completed, she may very well be nearly in a position where they may very well judge her to be more closely parallel to the bank than in fact she was. In those circumstances, in spite of the indications which they have—and I have mentioned the navigation lights and so on—that she was not a completely tied up vessel, they suddenly see these clusters of lights. I have got to decide what the legal result of the improper exhibition of lights is in the circumstances.

Now this, as I say, is the matter which has given me the most difficulty in this case. I have come to a definite conclusion about it, and I proceed to express it. In my view of the law on the subject —about which there is really no dispute—the law is this: Though this code about the lights in the Canal is not part of the international code of rules for navigation at sea, it is, nevertheless, so clearly the accepted code in the Canal laid down for the guidance of the compulsory pilots that nobody really suggests that I should accept it as anything but the proper rule of conduct. It is not disputed that, in this particular respect, there has been a very definite breach of the rules, and I cannot myself see how there can be any essential difference between the principle to be applied to these rules and any one of the international code of rules. I think that the principle to be applied here is this: when you get a breach of a rule which is definitely asserted to have contributed to a collision it is for those who have been guilty of the breach of the rule to exonerate themselves, and to show affirmatively that their default did not contribute in any degree to the collision actively, or to the result of the damage. I think that that is the result of cases like *The Fenham* (3 Mar. Law Cas. (O.S.) 484; L. R. 3 P. C. 212), which was before the Maritime Conventions Act, 1911. I think that is the real effect of the judgment of the Lords in *The Karamea*

(1922, 15 Asp. Mar. Law Cas. 430; 1 A. C. 68; 9 Ll. L. Rep. 375), which was a decision after the rule was modified by the Maritime Conventions Act. I do not think that anybody disputes that that is the proper method of approach.

That being so, it is obvious that with every yard, speaking figuratively, that the *Belita* approached the *Aeneas* without taking palliative or immediate measures to diminish the effect of her speed, the danger was increased, and unless I can say not only that she ought not to have been coming so quickly but that she cannot possibly say that she was misled into delaying her action or in judging what action should be appropriate, I do not think that it is possible to say affirmatively that the *Aeneas* has exonerated herself. I think that the test is not whether it ought to have misled the *Belita*, but whether, in fact, she was misled. I think the analogy which Mr. Willmer used to cases of deceit is quite apt, and my recollection of those cases is this, that what the plaintiff has got to prove is that he was deceived—not that a reasonable man might have been deceived, but that he was deceived. The relevance of the consideration of whether a reasonable man would have been deceived is the assistance which it affords in arriving at a conclusion whether you believe or disbelieve the plaintiff who says that he was deceived, because if you get a state of facts which, so to speak, would not deceive a child, you do not believe, or you may not believe, a grown man who says that he was deceived by those circumstances. Similarly, here, I do not think that the question of whether they ought to have been deceived is the decisive test. I agree with Mr. Willmer that, if that is all it leads nowhere, except to the question of the attribution of blame on the one side or the other. I think the real importance of the question of whether they ought to have been deceived consists in the bearing it has on the question of whether they were in fact deceived.

Now, giving the best consideration I can to this matter, and bearing in mind where the onus is, I find it impossible to hold that the sudden appearance into view of this set of clusters at a time when the ships are about ten lengths apart could have had no effect in misleading those on board the *Belita* in the action which they took. I find that in fact (and I am satisfied that this is so) they did delay action which ought to have been taken; or rather they did not take, at the time that they should have done, the action which should have been taken, and they drifted into a position in which, in their mistaken idea of the facts, they thought it was necessary to take action which was the most dangerous which could be taken in the circumstances. But I am satisfied that to some extent, notwithstanding the indications to the contrary which I have already mentioned, and which I will not repeat, they were misled into thinking when they were about ten lengths apart, and as they approached her from that distance for some time, that the *Aeneas* was a ship that, at any rate to all intents and purposes, was tied up, and then quite close (it might not be so close as one-and-a-half lengths as they say but, at any rate, within a very short distance) they suddenly saw that she was angled out into the canal. They exaggerated the angle; they need not have taken the action which they did—they could have passed, although, in fact, I have found that it would have been a very dangerous passing; it would have broken the ropes, but it would not have cut into the *Aeneas*—and in that position they took what was in effect the one action which drove them into the *Aeneas*.

But I cannot acquit the *Aeneas* of her share, however small it may be, of the blame for that. I think that a very careful look-out on board the *Belita* was certainly demanded, having regard to the speed at which she was approaching. I think that a more careful look-out would probably have enabled them to appreciate the situation better and to act accordingly, but I think that their duty of minimising the consequences of the negligence implied in the speed at which they approached the *Aeneas* was made more difficult by the *Aeneas's* exhibition of the wrong lights.

In these circumstances I find that both vessels were to blame, but, as I have already indicated, I think that the fault of the *Belita* was much the greater and had much the greater effect in causing the collision and on the extent of the damage inflicted. I find that the *Belita* was four-fifths and the *Aeneas* one-fifth to blame.

With regard to the costs, I have sometimes divided the costs in the same proportion as the damage. But I have considered that matter very carefully in this case, and having regard to the circumstances—particularly of the broken trial and so forth and the difficulty of certain facts—I think it will be fair if I make no order as to costs and each side pay their own costs.

Costs specially applicable to the provision of bail on either side can be left to the registrar.

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

Solicitors for the defendants, *Stokes* and *Stokes*, agents for *Alsop, Stevens*, and *Collins Robinson*, Liverpool.

May 2, 3, 7, and June 7, 1935.

(Before LANGTON, J.)

The Skarp. (*a*)

Damage to Cargo — Charter-party (Chamber of Shipping British North American (Atlantic) Wood Charter-party, 1914) prescribing the form of the bills of lading to be signed by master—Bills of lading—"Shipped in good order and condition"—Cargo "to be delivered in like good order and condition"—"Condition" inserted by master before "quality, description, and measurement unknown"—Log entry by master that "cargo was in a very bad state"—Contract—Estoppel—Admissibility of evidence as to contents of contract (c.i.f.) between plaintiffs, consignees (buyers) and shippers (sellers)—Short delivery of part of cargo—Clause in charter-party that "bills of lading shall be conclusive evidence as against the owners as establishing the aggregate number of pieces delivered to the steamer"—Apportionment of costs.

A cargo of timber was shipped at Parrsboro (N. S.) on board the defendants' vessel S. for carriage to Manchester under bills of lading

(*a*) Reported by J. A. PETRIE, Esq., Barrister-at-Law.

the exact form of which was prescribed by the charter-party, the charter-party being in the common form of the Chamber of Shipping British North American (Atlantic) Wood Charter-party, 1914. The cargo was described in the bills of lading as " shipped in good order and condition." The bills of lading further contained the words " to be delivered in like good order and condition," and were claused " quality, description, and measurement unknown." The master had entered in his log the words " the cargo was in a very bad state," and he inserted the word " condition " in front of the words " quality . . . unknown " in the bills of lading, so that the clause read : " condition quality (&c.) unknown."

The plaintiffs bought the timber from the shippers on formal contracts. They received and took up the bills of lading before the timber arrived.

The action was brought by the plaintiffs against the shipowners in respect of 72,889 pieces of timber delivered in a damaged condition, and 1892 pieces short delivered, the claim being based on breach of contract and estoppel.

Held, (1) *that the claim in contract failed because, following the dictum of Channell, J. in* Compania Naviera Vasconzada *v.* Churchill and Sim (10 *Asp. Mar. Law Cas.* 177; 94 *L. T. Rep.* 59; (1906) 1 *K. B.* 237, *at* 247), *the words " shipped in good order and condition " are not words of contract, and because the words " to be delivered in like good order and condition," when reference cannot be had to any antecedent state to discover what was the order and condition to which " the like " can be compared, cannot stand alone so as to make a contract to deliver in good order and condition.*

(2) *That the insertion of the word " condition " in the way in which it was inserted by the master before the words "quality, description, measurement unknown " was not such a qualification of the original statement " shipped in good order and condition " as to convey to the mind of anybody reading the document that the goods were or even appeared to anyone who had seen them to be, as in fact they were, damaged goods. Had the plaintiffs acted on the statement to their detriment, the defendants would have been estopped from denying that the goods were shipped in good order and condition. But as the contract of sale (which, his Lordship decided, could be referred to for its terms and analysed, since it was the* res *out of which the complaint in this action arose) contained a clause that the buyers should not reject the goods but should refer any dispute to arbitration, the plaintiffs could not show that they had acted upon the statement to their detriment. [Reference was made to* Nippon Menkwa Kabushiki Kaisha (Japan Cotton Trading Company Limited *v.* Dawson's Bank Limited, 51 Ll. L. Rep. 147), *a case recently decided in the Privy Council, and to Lord Russell's exposition of the circumstances in which estoppel comes into operation, at p.* 150].

As to the two parcels of timber short delivered, one contained 1398 pieces and the other 494. The bills of lading were expressed to be subject to the terms of the charter-party, which provided that the bills of lading should afford conclusive evidence of the number of pieces delivered to the ship. Both parcels had been lost from a scow alongside the ship during a storm before shipment. The bill of lading in respect of the 1398 pieces made this clear, and as regards the second parcel as to which there was a shortage, the clause in the bill of lading was " 494 pieces of these lots not on board, being included in specification as being part of scow 5 lost from the ship."

Held, that as regards the 494 pieces the bill of lading was not so claused as to bring it to the notice of the plaintiffs that these pieces were not delivered to the ship ; that the defendants were bound by the " conclusive evidence " clause ; and that the plaintiffs succeeded as to 494 pieces, but failed as to the shortage of 1398 pieces.

Held, as regards the costs, that as the defendants has succeeded as to three-quarters and the plaintiffs as to one-quarter, the plaintiffs should pay their own and half of the defendants' costs.

DAMAGE and short delivery of cargo.

The plaintiffs, the owners of the cargo lately laden on board the Norwegian steamship *Skarp*, claimed damages from the defendants, the owners of the *Skarp*, in respect of 74,781 pieces of timber of which the plaintiffs alleged that the defendants acknowledged shipment in good order and condition for carriage from Parrsboro (N.S.) to Manchester, but delivered 72,889 pieces in a damaged condition and failed to deliver 1,892 pieces at all.

The facts and the contentions of counsel fully appear from the judgment of the learned judge.

Sir *Robert Aske*, K.C., and *Harry Atkins* for the plaintiffs.

David Davies, K.C., and *Cyril Miller* for the defendants.

Langton, J.—This case has given me no little amount of trouble, and I should like to have had an opportunity of putting my judgment into writing, but I have, unfortunately, been prevented from doing so.

The case arises out of a shipment of certain parcels of spruce deals and ends. These timber goods were shipped in the *Skarp* at Parrsboro, Nova Scotia, by George McKean and Co. for delivery at Manchester. So far as I am concerned with them the parcels were sold, and I will detail later the process of sale. The damage complained of was, as regards certain parcels, that they were delivered wet and mouldy, and, as regards two other parcels, that they were short delivered.

The main part of the case centres round the damaged goods. To deal first with the business of the matter, this was put before me by the cashier in the firm of one of the receivers or assignees of the bills of lading. His evidence was that the method of conducting the business (and I understand it was accepted on both sides that the business in all cases in this litigation was the same) was this : the receivers bought on a sale note ; there was then a formal contract, and much turns upon the

formal contract. Then the documents—that is to say the policy of insurance, and the bills of lading—were seen by the buyers. The sale was on the usual c.i.f. terms and the buyers, of course, were entitled to the policy of insurance and bill of lading. There were some ten bills of lading; nine of them were in one form and one of them was in another form. Owing to the conclusion to which I have been reluctantly forced it makes no difference which form of bill of lading one adopts. But the point of difference was that in nine bills of lading the document was qualified by the insertion of the word "condition" in type before the printed words "quality, description and measurement unknown, steamer not responsible for splits and shakes."

The plaintiffs' case was put in two or three ways, but the principal controversy as regards these damaged goods centres upon the question whether the shipowners were estopped by the statement in the bills of lading that the goods were "shipped in good order and condition" from asserting that they were shipped in a different condition, namely, a damaged and wet condition. For the purposes of that argument it is a matter of prime importance whether this quaification produced by the word "condition" appeared in the bills of lading or not. I mention this in passing to show that I have considered all the cases that were put before me, and have not omitted the single instance where the word "condition" did not appear in the bill of lading.

I will now consider the business from the other end. The shipowner carried these goods under the common form of charter-party of the Chamber of Shipping British North American (Atlantic) Wood Charter-party, 1914. Under clause 18 of the charter, "bills of lading in the form endorsed on this charter-party, shall be signed by the master: freight and all conditions, terms and exceptions as per this charter-party"; and then, curiously enough, the clause goes on to detail certain clauses that are to be in the bills of lading. It was a feature not much stressed in argument, but in this charter-party there are two clauses incorporated on the back of the bills of lading in the form prescribed, and it is interesting to note that the first of them is "quality, description, and measurement unknown. Steamer not responsible for splits and shakes." That actually appears in clause 18 of the charter-party, and it is a matter which, in another case, may be interesting as a subject for argument, whether with a charter-party of this kind in which all conditions are to be, "as per charter-party" the shipowner can have any right at all to alter the form set out in that charter-party, and introduce into the bill of lading terms for which there is no provision in the charter-party itself. However, that is not the line upon which the case was argued here.

To continue the history from the shipowners' point of view, when the master arrived at Parrsboro he found the cargo in anything but a good condition, and in fact he entered in his log "the cargo lay in lighters, so a tallyman had to be kept at each hatch to tally each sling. Moreover, the cargo was in a very bad state; very black, wet and partly musty." In that difficult state of affairs the master appears to have sought counsel from a gentleman who was connected with his insurance company, and between them they seem to have determined that they would deal sufficiently with the rights of parties who might ship, or receive, the goods, and at the same time protect the owners of the ship, by inserting the word "condition" in the place I have indicated, namely, in front of the qualification "quality, description and measurement unknown."

The goods arrived at Manchester preceded by the bills of lading, which, so far as the condition was concerned, had no other qualification upon them than the insertion of this typed word "condition." They were, in all cases, taken up by the buyers, and, now that the condition of the goods is known, the buyers claim against the shipowners and say "you, the shipowners, are estopped from saying that these goods were otherwise than in a good order and condition because you so asserted on bills of lading, and have led us to act to our detriment." That shortly is the contention upon which the first dispute is founded.

Sir Robert Aske, for the plaintiffs, oppressed by the difficulty which I shall have later to notice, put his case at first upon a different ground to that which I have indicated, and I do not wish to suggest that he ever retracted from his first point; on the contrary he emphasised it very much in his reply. He said: "I do not need any estoppel here, and I do not need to rely upon the doctrine of estoppel: further, I agree that the words 'shipped in good order and condition' are not words of contract." Indeed, that matter was made abundantly clear by Channell, J. in *Compania Naviera Vasconzada v. Churchill* and *Sim* (10 Asp. Mar. Law Cas. 177; 94 L. T. Rep. 59; (1906) 1 K. B. 237, at 247). In a judgment which, so far as I know, has never been criticised, and was never taken to the Court of Appeal, Channell, J. said: "The words 'shipped in good order and condition' are not words of contract in the sense of a promise or undertaking. The words are an affirmation of fact, or perhaps rather in the nature of an assent by the captain to an affirmation of fact which the shipper may be supposed to make as to his own goods. Sir Robert's contention, however, was that the words "to be delivered in like good order and condition" are words of contract, and that if the goods are not delivered in good order and condition there is a breach of contract. It is nothing against this point that it is an entirely novel one. I do not even know that it is a serious criticism of the point that, although it has been open for many years to be taken in cases of this class, it apparently never has been taken until this case. But for my part I cannot accept it. "To be delivered in the like good order and condition," if one is to base anything upon it at all, must refer to some antecedent state—one cannot cut out the words "the like," and give any sense to these words of contract. Unless one refers to some ascertainable antecedent state, there is no standard of comparison, and I am at a loss to understand how a shipowner can be said to be under a contractual obligation to deliver goods "in the like good order and condition" when regard cannot be had to any antecedent state to discover what was the order and condition to which "the like" is comparable. It is for that reason, therefore, upon its merits, and not because of any quality of novelty, that I have been driven to believe that this point is a false one.

The controversy then centred upon this main question of estoppel. The text-books do not show any case in which a shipowner has attempted to clause his bill of lading by the introduction of the word "condition" in these circumstances. For, be it observed, one is dealing here with timber goods, and there is no question that there are many classes of goods as to which there may be a distinction when one is speaking of their apparent condition and of their real condition. Potatoes

in sacks may be in apparent good order and condition because the outside of the sacks is dry and in good condition, although in fact the condition of the potatoes inside the sacks may be deplorable. But we are here dealing with goods as to which the condition must refer to real condition, and the bills of lading, as they stand, make two completely contradictory statements; (1) "shipped in good order and condition," and (2) "condition unknown." Mr. Davies, on behalf of the defendants, in an adroit argument said that this is the way in which a shipowner ought to deal with a matter of this kind. If he wants to say that he has not measured the goods he says "measurement unknown"; if he wants to say that he has not weighed them he says "weight unknown"; and, if he wants to say that he makes no representation as to condition, he puts in "condition unknown." It is the method sanctified by usage and time. I have considerable doubt as to the soundness of that contention. Still more have I doubt when in the charter-party itself the clauses to be incorporated in the bills of lading are in terms laid down. Furthermore, I think that it is profitable in this case to take account of how and why the master came to insert this word in the bills of lading.

The master was confronted with the fact that the goods were certainly damaged. The straight forward thing to do was surely to put upon the bills of lading, in the ample margin which is apparently provided for that purpose, a clause which would clearly advertise to any buyer of a particular bill of lading that the goods he was going to receive were not in good order and condition. It would not have been beyond the master's power to take the entry from his own log, and to put upon the bills of lading "very black, wet and partly musty." If he could see it for the purposes of his log, he could with the same eye have seen it for the purposes of the bills of lading. But in truth and in fact he was much worried about his own employers' interests, and it was for that reason that he took this circuitous route of putting the word "condition" in what is, to my mind, a most obscure place. That is the genesis of the matter.

One must look at it as a matter of construction. What would those words in a bill of lading convey to anybody who read them? What, in the first place, would "shipped in good order and condition" followed by "condition unknown" convey? Speaking for myself, they would have conveyed nothing at all to me. The only witness who was called (although I think he was an entirely honest man, I cannot place much dependence upon him, because he was the cashier and did not appear to have had any long experience of the business side of this class of transaction) said that he had regarded the bill of lading as "clean." To my mind, having regard to the well-known method which is always at the disposal of the masters of steamships to describe damaged goods, this is a wholly unsuitable method—a most ambiguous method—and does not convey at all that the goods are damaged or even may be damaged. If I had to speculate as to what was the most probable effect on the mind of anybody who read the bill of lading so phrased, I should say that the person reading it would think that this master had got some idea that he was responsible for the condition of the goods, whether it was ripe or overripe or something of that sort; but I cannot imagine that it would bring to the mind of the reader the fact that a man who had been at no pains to clause the bill of lading in the natural way meant to convey that the goods were or might be damaged. Another and, perhaps, clearer way of putting it is that it is difficult to understand why the affirmation or acceptance of one untruth should be cured by a deliberate statement of another untruth. It is true that the words "shipped in good order and condition," as Channell, J. pointed out, are not words of contract, but they are an affirmation or assent to an affirmation of fact, and in this case they were an affirmation of an untruth. They were words which to the plain knowledge of the master were totally untrue; the goods were not shipped in good order and condition, and well he knew it. It is argued that he escaped from any difficulties occasioned by this assent or affirmation of an untruth by making of his own free will another statement which he knows quite well to be untrue, namely, that "the condition was unknown." The condition was not unknown. The condition was stated clearly, forcibly and lucidly in his log, and, it would be deplorable that a person should be allowed to escape from the penalties, if any, attached to the first assent to one untruth by a deliberate statement of another.

Primarily, however, this is a matter of construction, and I hold that the insertion of the word "condition" in the way it was inserted here, is not such a qualification of the original statement "shipped in good order and condition" as to bring to the mind of anybody reading that document that the goods were, or even might be apparently, and to the knowledge of anyone who had seen them, damaged goods.

Sir Robert Aske further argued that there was another ground upon which he could claim estoppel. He said that, even assuming that Mr. Davies's argument would hold good as to the word "condition," there was still the word "order" in the bills of lading, and upon Lord Merrivale's judgment in *The Tromp* (15 Asp. Mar. Law Cas. 338; 125 L. T. Rep. 637; (1921) P. 337) —and indeed upon general principles—he could argue that the insertion of the word "condition" did not cover the whole of the area of a representation made by the words "shipped in good order and condition." It is only fair, in case this case goes higher, to say that Sir Robert was equally tenacious of this point as of the other points and that it was by no means a subsidiary point. I am afraid that it does not appeal to me. Mr. Davies was quick to rejoin that in the old form of bills of lading it was not unusual to find the word "condition" in one part of the document and "order and condition" in another. There is, too, the unfortunate feature that in this very judgment in *The Tromp* (*sup.*) Lord Merrivale goes out of his way—true, it is only *obiter*—to fasten upon the case of timber goods as an illustration of where the words "good order" and "good condition" may perhaps have the same meaning. There is another point which Mr. Davies was too chivalrous to press; the able and careful pleader had clearly not envisaged this subtle argument of his leader, because he also had fallen into the somewhat common fallacy, if Sir Robert is right, of regarding the two words as covering a similar area. I deprecate excursions into dictionaries or into philological matters which are beyond my ken, but I can see no ground on which one can stand to differentiate in this case between the words "order" and "condition." I am, therefore, against the plaintiffs upon that contention, though I go wholeheartedly with them when they say, as a matter of construction, that the bills of lading should be construed in the way for which they contend.

Now I come to the second part of this question

of estoppel. I called attention during the argument to Lord Russell's recent pronouncement in the Privy Council upon this subject, and because it is, so far as my knowledge goes, the most lucid statement of the matter in a small compass, I will quote it again here. The case is for the moment only reported, so far as I know, in Lloyd's List Law Reports (51 Ll. L. Rep. 147, at p. 150). Lord Russell says this: "Estoppel is not a cause of action. It may (if established) assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action, or (to put it in another way) by preventing a defendant from asserting the existence of some fact the existence of which would destroy the cause of action. It is a rule of evidence which comes into operation if (*a*) a statement of the existence of a fact has been made by the defendant or an authorised agent of his to the plaintiff or someone on his behalf, (*b*) with the intention that the plaintiff should act upon the faith of the statement, and (*c*) the plaintiff does act upon the faith of the statement." I have no difficulty here with regard to the first of the three conditions there laid down. I am satisfied that "a statement of the existence of a fact," namely, that the goods were shipped in good order and condition, has been made by the defendants, or an authorised agent of theirs, to the plaintiffs or to someone on their behalf. I have equally no difficulty with regard to the second, that it was made "with the intention that the plaintiff should act upon the faith of the statement." But the crux comes over this third condition, Did the plaintiffs act upon the faith of the statement? As to that, a consideration of the dicta of the Court of Appeal in *Silver* v. *Ocean Steamship Company* (*Sup.* p. 74; 142 L. T. Rep. 244; (1930) 1 K. B. 416, at pp. 428, 434, 441) is important. In that case all three judges of the Court of Appeal went further, I think, than anyone had gone up to that date in assisting plaintiffs placed in the difficult circumstances in which merchants are placed by these misstatements in bills of lading. Scrutton, L.J. said this: "The last objection was that the witness did not say he relied on the bill of lading being a clean bill of lading by reason of the statement as to good order and condition. The mercantile importance of clean bills of lading is so obvious and important that I think the fact that he took the bill of lading, which is in fact clean, without objection, is quite sufficient evidence that he relied on it." Greer, L.J. stated much the same doctrine, though with a little doubt. He said this: "I think, however, though with some doubt, that the court would be entitled to conclude on the grounds of high probability that he was influenced by the statement that the goods were shipped in apparent good order and condition, and that he must have believed that they were free from reasonably discoverable damage when shipped, and that in accepting the bill of lading and taking delivery he acted to his detriment, but I am not satisfied that all such damage would be apparent on any reasonable examination. On the other hand, I am satisfied that if there was any considerable damage when the goods were shipped, in excess of the fifty cases that were rejected, a substantial part of such damage would have been discovered on a reasonable examination." Slesser, L.J. said: "The appellant took the bill and may be assumed to have relied upon it to his detriment in the absence of any evidence to the contrary."

These observations certainly assist the plaintiffs in this case. The evidence was meagre and, indeed, so far as this matter was concerned, confined to the evidence of the cashier of one of the shippers, who went so far as to say for his part that, had the bill of lading notified to him that the goods were shipped in bad condition, his principals would have claimed total rejection. I have no reason to suppose that that is not a perfectly *bonâ fide* statement on the part of the cashier. But at this point Mr. Davies brought into play the contract upon which these goods had been bought, and I cannot see that he is not entitled to take the contract and analyse it for the purpose of this case. Sir Robert said, amongst other things, that this contract is *res inter alios acta.* That is a perfectly fair comment, but, on the other hand, it is the *res* out of which the complaint here springs. The plaintiffs say: "We acted to our detriment in the matter of this contract owing to your misstatement." The whole of their estoppel must be based upon this contract, and I cannot see that it is wrong to examine the features of this contract, or indeed that one could act otherwise, to test whether the plaintiffs are right in saying that they acted to their detriment. The doctrine laid down by the Court of Appeal in *Silver* v. *Ocean Steamship Company* (*sup.*) gets the plaintiffs so far that they are entitled to say that in the absence of evidence to the contrary the court must assume that the plaintiffs did act to their detriment in taking up the bills of lading. It cannot take them far enough to be able to say that no evidence to the contrary can be considered.

The contract says in the clearest possible terms: "Should any dispute arise respecting the fulfilment of this contract, or should the shipment be delayed beyond the time stipulated, the buyers"—I am leaving out the immaterial words—"shall not reject the goods, nor refuse immediate payment for same in manner stipulated. When due payment has been made, the dispute shall be referred to two arbitrators for settlement, one to be named by each party, with power to name a mercantile umpire. The decision of such arbitrators or of their umpire to be conclusive and binding upon all disputing parties, the expense of such arbitration to be equally divided, and the decision may, and shall, be made a rule of His Majesty's High Court of Justice, on the application of either party." Sir Robert Aske cited several cases which he says go to show that the courts would never allow such a clause to be weighed against the plaintiffs in these circumstances. He cited, amongst others, *Amis, Swain, and Co.* v. *Nippon Yusen Kabushiki Kaisha* (1 Ll. L. Rep. 51; the well-known decision of Bigham, J. (as he then was) in *Vigers Bros.* v. *Sanderson Brothers* (84 L. T. Rep. 464; (1901) 1 K. B. 608); and the dictum of Wright, J. in *Evans* v. *James Webster Brothers Limited* (34 Com. Cas. 177). I have looked through those cases with care and with sympathy with Sir Robert's contention, but I cannot see that any of them have any real bearing upon this point. The circumstances of those cases are widely different, and the only points of general doctrine to be collected were, first, the well-known doctrine that where goods were not of merchantable quality a buyer would be entitled to reject; and, secondly, that courts would not be astute to suppose that any merchant would be eager to break his contract. Sir Robert was bound to argue that he might have been in a better position if he had broken his contract. I cannot think that this is a tenable argument. It is difficult to see how courts of law are to prosecute their business if they are to speculate upon what the rights and duties of persons are, not upon the

theory that they keep their contracts, but on the theory that they break them. That is introducing, to my mind, a novel and most unwelcome class of speculation.

I think I must assume that the plaintiffs would have kept their contracts and, if so, in view of these wide words "should any dispute arise respecting the fulfilment of this contract," and in view of the undisputed fact that these goods were goods within the contract description, I fail to see how they could have acted otherwise than as they did, even if the bills of lading had been what I prefer to call honestly claused rather than ambiguously claused. If they had been honestly and clearly claused as appertaining to damaged goods, so long as they did not suggest that the goods were unmerchantable or of different quality, and of different sizes to the contract goods, so far as I can see the plaintiffs would have been obliged to do what they have done, namely, take up the documents, pay for the goods, and then seek an allowance by way of arbitration.

I am sorry to have had to come to this conclusion, but since the days when Channell, J. gave his decision in *Companía Naviera Vasconzada* v. *Churchill and Sim* (*sup.*) it is common knowledge that there has been a great advance in this matter of commercial arbitration. It is not for me to say whether that is wise or unwise, but I cannot shut my eyes to it, and merchants cannot have it both ways. If they prefer to submit their disputes to commercial arbitration and to put clauses of this character into their contracts, I do not think that they can be heard to say that their position has been in any way altered by the fact that the bill of lading fails to give them information which would not have enabled them, in the circumstances, to act in a different way.

That, I think, disposes of what is really the main dispute, the question of these damaged goods. Because they cannot fulfil the third condition, showing that they have acted to their detriment, the plaintiffs cannot, I think, rely upon this question of estoppel. If they have not got estoppel and they have not got the ground of contract there is nothing left of their case upon the question of damage.

The second point—the question of shortage—can, I think, be dealt with much more quickly. Here again there is really a question of construction. The point arises as regards two bills of lading only, one of them as regards a comparatively large parcel of 1398 pieces. The bill of lading in that case stated the full number as being on board, but as to these 1398 pieces it was claused in this way: "Being our order II. and not on board of ship being lost from scow 5 during storm alongside": the description of the pieces was quite clear upon that bill of lading, 1320 deals and 78 ends, making 1398. The second parcel as to which there was a shortage was as regards 494 pieces, and there the clause is "494 pieces of these lots not on board, being included in specification as being part of scow five lost from the ship." The question of construction as to what would be conveyed to persons reading these documents seems to me to be largely a question of first impression. Indeed, I am not sure that first impression is not really the safest guide—the natural and ordinary reading when the document is presented to a merchant in the course of business. Applying this test, the two cases seem to me to fall upon different sides of the line. As regards the 1398 pieces, I, personally, would, I think, have been perfectly clear as to what was intended, namely, that they never were on board the ship and were lost from the scow during a storm alongside. As regards the second, the 494 pieces, I am quite certain that my first feeling upon reading that clause would have been one of complete bewilderment, and I cannot imagine that that bewilderment would have been resolved if I had read further or studied more, and, therefore, I do not think, as regards the 494 pieces, that the bill of lading has been so claused as to bring to the mind of the person reading it that the 494 pieces were not shipped on board at some time. The importance of this ruling is that the charter-party contains a conclusive evidence clause, and there is, therefore, no doubt at all that the shipowner is bound by the quantity in the bills of lading, unless the bills make it perfectly clear that some portion of what is there stated as shipped on board was not delivered to the ship at all, and the undisputed effect of that conclusive evidence clause was to put the burden on the shipowner when once the number of pieces shipped has been stated in the bill of lading. There is no burden until then, that he is bound by the number he stated unless he gets rid of the burden by showing quite clearly on his bill of lading that certain of those parcels were not shipped.

My decision, therefore, on this matter of shortage is that the plaintiffs succeed as to the 494 pieces but fail as to the shortage of 1398 pieces.

After argument the plaintiffs were ordered to pay half the defendants' costs.

Solicitors for the plaintiffs, *Waltons and Co.*

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

Supreme Court of Judicature.

COURT OF APPEAL.

Oct. 25, 28, 29, 30 *and Nov.* 15, 1935.

(Before Lord WRIGHT, M.R., SLESSER and GREENE, L.JJ.)

Carras v. London and Scottish Assurance Corporation Limited. (*a*)

ON APPEAL FROM THE KING'S BENCH DIVISION.

Insurance (Marine)—Charter-party—Ship chartered to go to Valparaiso and carry a cargo thence to Europe—Insurance of freight to be earned by carriage of the cargo—Stranding of ship on way to Valparaiso—Contemplated voyage abandoned—Claim under policy for loss of anticipated freight.

The appellants were plaintiffs and sued as owners of the Greek steamship Yero Carras *on a policy underwritten by the defendants for 4000l., part of 9000l. upon freight and (or) chartered freight and (or) anticipated freight. This appeal was from a judgment of Porter, J. who dismissed the action. The steamer, while proceeding from Monte Video to Valparaiso*

(*a*) Reported by GEOFFREY P. LANGWORTHY, Esq., Barrister-at-Law.

through the Straits of Magellan, stranded on the 13th Nov., 1930. *She was eventually refloated and brought by salvors to Megallanes. On the 17th Nov.,* 1930, *the vessel was abandoned to the hull underwriters. On the 17th June,* 1931, *while she still lay at Megallanes, the hull underwriters compromised for a total loss by paying* 100 *per cent. and a proportion of sue and labour charges, the owners retaining the vessel, but remaining liable to the salvors. Eventually the vessel was surrendered to the salvors in discharge of their claim, and was by them sold, and was repaired in* 1932. *At the time of the stranding the steamer was proceeding to Valparaiso to load under a charter-party dated the 16th Sept.,* 1930, *between the agents for the plaintiffs and the Chilean Nitrate Producers' Association (Overseas) Limited, as charterers. The cancelling date specified was the 20th Nov.,* 1930. *The charter-party contained the usual exceptions, including perils of the seas. The policy on freight on which the action was brought was against the usual marine risks and was for* 4000*l., part of* 9000*l. on freight and (or) chartered freight and (or) anticipated freight valued at* 9000*l. subject to reduction, after loading, to the actual freight at risk as per bills of lading, less advances. The policy was subject to the Institute of Freight (Voyage) Clauses, of which clauses* 4, 5, *and* 7 *were particularly material. Clause* 4 *: "In the event of the total loss, whether absolute or constructive, of the vessel, the amount underwritten by this policy shall be paid in full, whether the vessel be fully or only partly loaded or in ballast, chartered or unchartered." Clause* 5 *: "In ascertaining whether the vessel is a constructive total loss the insured value in the policies on ship shall be taken as the repaired value and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account." Clause* 7 *: "Warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise." The damage was such that the steamer could not be tendered to the charterers by the cancelling date, so that it was not questioned that the particular adventure was frustrated by the casualty. Clause* 7 *was a sufficient answer to that, but the plaintiffs based their claim on the doctrine that the contract of affreightment was discharged between themselves and the charterers by perils of the sea by which the vessel was lost to the owners because it had become impossible to repair her in a commercial sense. They also alleged that, by the dissolution of the freight contract, on which depended the chartered freight within the meaning of the policy, there was a total loss of freight, and no notice of abandonment was given as there was nothing to abandon.*

Held, that there was an actual total loss of freight because the charter-party under which it was to be earned was destroyed by the perils of the seas and the shipowner prevented from performing the freight contract so that the freight was lost. Clause 5 *of the Institute of Freight Clauses could not be applied to the facts of this case because the freight policy did not require that there should be a constructive total loss of the ship within the true meaning of that phrase in clause* 5. *The decision of Porter, J. involved a serious limitation of the shipowner's right under the policy. It was not correct to say that it was necessary to prove on a freight policy that the vessel was a constructive total loss. The facts necessary to discharge the contract contained in the charter-party could not be in any way affected by the statutory provisions from time to time in force with regard to constructive total loss. The decision in this case depended on the true effect of clauses* 4 *and* 5 *incorporated in the freight policy.*

Decision of Porter, J. (April 30, 1935) *reversed.*

APPEAL from the judgment of Porter, J.

The facts are shortly stated in the headnote, and are more fully set out in the judgment of the Master of the Rolls.

The arguments which were put before the court on the 25th, 28th, 29th and 30th Oct. sufficiently appear from the judgments.

Sir *Robert Aske*, K.C. and *H. U. Willink*, K.C., for the appellants.

David Davies, K.C. and *Charles Stevenson*, for the respondents.

Cur adv. vult.

Lord Wright, M.R.—The appellants were plaintiffs in the court below; they sued as owners of the Greek steamship *Yero Carras* on a policy underwritten by the defendants for 4000*l.*, part of 9000*l.* upon freight and (or) chartered freight and (or) anticipated freight. The appeal is from the judgment of Porter, J., who dismissed the action.

The steamer, while proceeding from Monte Video to Valparaiso through the Straits of Magellan stranded on the 13th Nov., 1930. She was eventually refloated and brought by salvors to Megallanes. On the 17th Nov., 1930, the vessel was abandoned to the hull underwriters. On the 17th June, 1931, while she still lay at Megallanes the hull underwriters compromised for a total loss by paying 100 per cent., and a proportion of sue and labour charges, the owners retaining the vessel, but remaining liable to the salvors. Eventually the vessel was surrendered to the salvors in discharge of their claim and was by them sold and was repaired in 1932. At the time of the casualty the steamer, as already stated, was proceeding to Valparaiso to load under a charter-party dated the 16th Sept., 1930, between the agents for the plaintiffs and the Chilean Nitrate Producers' Association (Overseas) Limited as charterers. The cancelling date specified was the 20th Nov., 1930. The charter-party contained the usual exceptions including perils of the seas. The policy on freight on which the action was brought was against the usual marine risks and was for 4000*l.*, part of 9000*l.* on freight and (or) chartered freight and (or) anticipated freight valued at 9000*l.* subject to reduction, after loading, to the actual freight at risk as per bills of lading less advances. The policy was subject to the Institute of Freight (Voyage) Clauses. Of these the following are particularly material in this case. Clause 4 reads as follows : "In the event of the total loss, whether absolute or constructive, of the vessel, the amount underwritten by this policy shall be paid in full,

whether the vessel be fully or only partly loaded or in ballast, chartered or unchartered." 5. "In ascertaining whether the vessel is a constructive total loss the insured value in the policies on ship shall be taken as the repaired value and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account." Clause 7 reads as follows: "Warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise." Except in clauses 4 and 5 the words "constructive total loss" do not appear in the policy. It was clear that the damage was such that in any case the steamer could not be tendered to the charterers by the cancelling date or at any time consistent with the commercial adventure, and, accordingly, it was not questioned that the particular adventure was frustrated by the casualty which, by reason of the inevitable delay consequent upon it, made it impossible to carry out the freight contract. It was, however, conceded by the plaintiffs that to a claim formulated on the ground of that frustration, clause 7 of the policy was a sufficient answer since the case was governed by the authority of *Bensaude* v. *Thames and Mersey Marine Insurance Company Limited* (8 Asp. Mar. Law Cas. 315; 77 L.T. Rep. 282; (1897) A. C. 609). But the plaintiffs based their claim on the doctrine that the contract of affreightment was discharged between themselves and the charterers by perils of the sea, which had rendered the ship unnavigable, and had damaged her to such an extent that she could not be repaired save at an expense exceeding her value (by which was meant her actual value of 13,000*l.*) when repaired; hence for purposes of the adventure she was lost to the owners, because it was impossible in a commercial sense to repair her. They relied on the well-known principles illustrated in *Assicurazioni Generali and Schenker and Co.* v. *The steamship "Bessie Morris" Company Limited and Browne* (7 Asp. Mar. Law Cas. 217; 67 L. T. Rep. 218; (1892) 2 Q. B. 652) (hereinafter referred to as the "*Bessie Morris*" case), and they went on to contend that by the dissolution of the freight contract, on which depended the chartered freight within the meaning of the policy, there was a total loss of freight within the principles expounded in *Moss* v. *Smith* (1850, 9 C. B. 94). It is true that no notice of abandonment on the freight policy was given, but it was contended that there was nothing to abandon. The ship had at the date of the casualty no cargo on board; she could not make her cancelling date or be tendered according to contract to the charterers at Valparaiso. No substituted employment was possible; hence there existed all the conditions postulated in *Rankin* v. *Potter* (2 Asp. Mar. Law Cas. 65; 29 L. T. Rep. 142; L. Rep. 6 H. L. 83) as rendering unnecessary in a case like the present a notice of abandonment on a freight policy. In my judgment there was here an actual total loss of freight. The freight was lost because the charter-party under which it was to be earned was destroyed by the perils of the seas. The judge, however, has decided against this claim on the ground that there cannot be a loss of freight (at least on the ground of the cost of repairing sea damage to the ship) unless there is either an actual or a constructive total loss of the ship in such a sense as to bring into operation the terms of clause 5 of the policy with the consequence that there could not be in this case a constructive total loss of the ship save on the basis of a repaired value of 30,000*l.*, an actual loss of the ship not being in question.

It will be convenient to examine the legal position so far as relevant to this case apart from the specific effect of clause 5 of the freight policy. I shall disregard the numerous and difficult questions which arise in regard to freight insurances under circumstances different from those here in question, as, for instance, where there is at the date of the casualty cargo on board which may be transhipped so that freight can be earned in whole or in part, or where a substituted cargo may be procured though the contract cargo is lost. These and other like problems are not relevant in this case. The earning of freight under a charter-party of a specific vessel depends on the continued existence of that vessel as a cargo carrying vessel, at least in a case like the present where no cargo is on board and the vessel is on her way to the port where she should be tendered to the charterers. If, therefore, in such a case the ship is lost or destroyed, the performance of the charter-party and the earning of the freight is prevented: if that is due to perils of the seas the shipowner is relieved from liability in damages to the charterers by the usual exception of perils of the seas in the charter-party. But apart from the loss or destruction of the vessel the freight may be lost and the shipowner may be relieved as against the charterers if the vessel is so damaged and disabled as to be incapable of being repaired save at an expense exceeding her value when repaired. Such a case is covered by the reasoning in the *Bessie Morris* case, though it was held that in the facts of that case the ship could, and ought, to have been repaired, and hence the freight was not lost. Lord Esher, in that case, said (7 Asp. Mar. Law Cas at p. 218; 67 L. T. Rep. at p. 219; (1892) 2 Q. B. at p. 657): "If it is possible in a business sense of the word to repair the ship, the shipowner is bound to repair her. If the cost of the repairs necessary to enable her to complete the voyage contracted for would be more than the benefit which the owner would derive from them, then it would be impossible in a business sense to repair her." Similarly, Bowen, L.J. said (67 L. T. Rep. at p. 220; (1892) 2 Q. B. at p. 659): "The ship went aground, but in order to show that she was prevented from performing the voyage agreed upon by the perils of the sea she must have become unnavigable for that voyage, either on the ground that it was impossible to get her afloat again, or that, on account of the extraordinary expenditure necessary for that purpose, it would be unreasonable to require the shipowners to incur it." Then Bowen, L.J. quotes from the judgment of Maule, J. in *Moss* v. *Smith* (9 C. B., at p. 103), and from the judgment of Cresswell, J. in the same case at p. 105 (67 L. T. Rep. at p. 220; (1892) 2 Q. B. at p. 660): "When is the shipowner said to be prevented by perils of the sea from fulfilling the contract he has entered into? When the ship is, by a peril of the sea, rendered incapable of performing the voyage. A ship is not rendered incapable of performing the voyage when she is merely damaged to an extent which renders some repairs necessary; if that were so, the most inconsiderable damage, such as the loss of her rudder, without which she could not proceed, would render her incapable of fulfilling the contract contained in the bill of lading. But if a ship sustains so much sea damage that she cannot be repaired so as to be rendered competent to continue the adventure, then the owner is prevented by a peril of the sea from fulfilling his contract. If the ship is totally destroyed or sunk, the performance of the contract is obviously prevented by a peril of the sea. The courts of law have also engrafted this qualification upon the contract—that, if the damage which results from a peril of the

sea is so great that it cannot be repaired at all, or only at a cost so ruinously large that no prudent owner would undertake the repairs, the owner may treat the loss as total, and say that he is prevented by a peril of the sea from performing his contract."

Moss v. *Smith* (*ubi sup.*) involved an application of these principles to a claim on a freight policy. It was contended there on behalf of the shipowner that there was such commercial prevention as to cause a total loss under a freight policy by insured perils, if the sea damage could not be repaired save at a cost exceeding the value of the freight though less than the value of the ship; that contention was rejected, and the same conditions were held to be necessary to justify a claim on the freight policy as to relieve the shipowner under the charter-party. I need not repeat the passages I have just quoted from the judgment of Maule, J. and Cresswell, J. as adopted by Lord Esher, M.R. and Bowen, L.J. The test is the same under the freight policy and under the charter-party, namely, whether the shipowner has been prevented, either in a physical sense or in a business sense, from performing the freight contract, so that the freight is lost.

In this way a question has to be solved analogous to that which arises when it is claimed on a hull policy on the ground of cost of repairs that there has been a constructive total loss of ship. But the three contracts—the charter-party, the freight insurance and the hull insurance—are completely different; as Lord Chelmsford said in *Rankin* v. *Potter* (2 Asp. Mar. Law Cas. at p. 85; 29 L. T. Rep. 142, at pp. 161, 162; L. Rep. 6 H. L. 83, at pp. 154, 155), dealing with the policies. "In the arguments the counsel for the appellant complicated the question by introducing the consideration of the conduct of the plaintiffs with reference to the policy on the ship, as bearing upon their rights under the policy on freight." And he adds later, in view of the admission, "that the amount of damage was such that a prudent, uninsured owner would not have incurred the expense of repairing the ship." "No prudent man would, in such a state of things, incur the expense of repairing the ship; and the shipowners electing not to repair were entitled to consider the charter at an end, and the chartered freight as totally lost by a peril of the sea."

Porter, J. I think, treats these decisions as meaning that in order to constitute a claim for total loss on a freight policy the ship must be an actual or constructive total loss within the only proper meaning of that term, that is, in insurance law, and under the actual or notional hull policy. Reliance was placed on what was said by Collins, J. in the *Bessie Morris* case (1892, 1 Q. B. 571, at p. 580): "In other words, where the freight is said to be lost through damage to the ship, it must be shown that the ship itself to which the freight is an accessory was actually or constructively lost." But these words are, I think, explained by what precedes them. Collins, J. had said (p. 580): "It is clear from *Moss* v. *Smith* (9 C. B. 94) and *Philpot* v. *Swann* (1 Mar. Law Cas. (O.S.) 151; 5 L. T. Rep. 183; 11 C. B. (N.S.) 270) that unless the ship is either irreparable or repair practically impossible, the shipowner cannot show as against his underwriter that he was prevented from earning the freight through damage to the ship, and the standard of what is practically impossible is the same as that of a constructive total loss." It was, it seems, with reference to these observations that in the Court of Appeal in the same case (7 Asp. Mar. Law Cas. 218; 67 L. T. Rep. at p. 219; (1892) 2 Q. B. at p. 658) Lord Esher said: "The only colour for it"—(for the argument addressed on behalf of the appellants)—"is to be found in the suggestion that the case is governed by the rules applicable to what is known as 'constructive loss.' But the doctrine of constructive loss can arise only between an underwriter and his assured. There is no underwriter concerned in the present case, and the doctrine of constructive loss has no application to it." It is to be observed that in *Moss* v. *Smith* (*ubi sup.*) the term "Constructive total loss" does not appear in the judgments. The rule is similarly stated in *De Cuadra* v. *Swan* (16 C. B. (N.S.) 772) without these words, "constructive total loss," occurring in the judgments, though they do occur in *Philpot* v. *Swann* (1 Mar. Law Cas. (O.S.) 5 L. T. Rep. 183, at p. 184; 11 C. B. (N.S.), p. 270, at p. 282) as being a paraphrase of what Maule, J. said in *Moss* v. *Smith* (*ubi sup.*), but as, I think, merely a convenient mode (not strictly correct) of describing the position as between shipowner and charterer. In many cases it would not be necessary to distinguish between the two positions—that is, on the one hand, the position as between shipowner and charterer, upon which depends the claim under the freight policy, and, on the other hand, the position as between the shipowner and the hull underwriter on the policy on hull. Here it is important, because of clause 5 of the institute freight clauses, to be more precise. Can it then be truly said that the essential condition for recovery on the freight policy is the constructive total loss of the ship as that term would be used correctly under the hull policy? It is certainly not true that there is a total loss on a freight policy by the constructive total loss of the ship. A ship may be a constructive total loss and duly abandoned to the hull underwriters; if, after the property in her has passed to the hull underwriters under the abandonment, she earns the freight, the shipowner has no claim for loss of freight (apart from clause 4 of the Institute Freight Clauses); the freight has not been lost at all, though the shipowner does not get it, but that is only because the freight belongs to the hull underwriters as owners of the ship when the freight, which is incident to the property in the ship, is earned. In such a case the freight assured cannot recover from the goods owners who are bound to pay the hull underwriters, nor from the freight underwriters, who are entitled to refuse to pay on their policy because the freight is not lost. This was held by the House of Lords in *Scottish Marine Insurance Company* v. *Turner* (1 MacQ., H. L. 334). Conversely, if the ship has been actually lost, but the cargo she was carrying at the time of the casualty has been recovered by the shipowners, there may be no loss of freight if it is (for instance) a lump sum freight and some of the cargo is delivered in specie. The same may be true in the case of a constructive total loss of ship if the cargo has been separated from the ship and has remained in the possession of the shipowners before the date at which the property passed to the abandonees of the ship. Again, in such a case as *Jackson* v. *Union Marine Insurance Company Limited* (2 Asp. Mar. Law Cas. 435; 31 L. T. Rep. 789; L. Rep. 10 C. P. 125), the freight may be a constructive total loss though the damage to the ship is comparatively slight; for example, a broken shaft, provided only that the delay necessary to effect repairs is such as by frustration of the adventure to dissolve the freight contract and thereby cause a total loss of freight. This would be the case unless the freight policy contained an express clause such as clause 7 of the Institute Freight Clauses. It is not necessary

to multiply illustrations of the fact that the freight policy and the hull policy are independent contracts in the absence of a provision in the freight policy whereby the former is governed by the latter. But it may be observed again that a constructive total loss of ship in a case such as the present is an actual total loss of freight; there is no *spes recuperandi*; the assured is irretrievably deprived of any possibility of earning the insured freight. What is insured under the freight policy is not a chattel like a ship or a cargo; it is, even in the case of chartered freight, as in the present case, which is the most definite type of insurable interest in freight, merely a chose in action, a right of earning freight under the charter, *a fortiori* where there is merely an expectancy of earning freight, though enough to constitute an insurable interest. Thus, apart from express terms in the freight policy, the freight underwriter has no concern in the hull policy; it is a separate and independent contract, probably with different underwriters; on the freight policy the assured may not even be the shipowner. Thus, for instance, chartered freight may be insured by a charterer by demise; the chartered owner may have no general interest in the ship, while the shipowner in such a case has no interest in that chartered freight, though he may have a separate insurable interest in the freight under the head charter. In any case the freight underwriter is not interested in the fate of the ship, except in so far as sea or other perils have so affected the ship as to cause a loss of freight. Whether this is so in fact is a matter which will be exactly the same whether the ship is insured or not; the determination of that question in an issue as between shipowner and charterer will settle whether the freight contract is destroyed by sea or other perils, so that the freight is lost. As between these parties, questions of insurance are irrelevant, as Lord Esher, M.R. pointed out in the *Bessie Morris* case (7 Asp. Mar. Law Cas. 218; 67 L. T. Rep. at p. 220; (1892) 2 Q. B. at p. 658) in the passage last quoted above. But it follows logically that *qua* the ship they are, in the absence of special terms, equally irrelevant in this connection between the shipowner and the freight underwriter. Further, in the absence of special terms a different test will apply in reference to the freight contract in order to ascertain if the ship is too damaged to be capable of being repaired by the shipowner, the test which will determine whether the ship is a constructive total loss under the hull policy. It is clear that the definition of a constructive total loss of ship in sect. 60, sub-sect. (2) (i.), of the Marine Insurance Act, 1906, is only dealing with the position under the hull policy; it does not qualify the common law rules according to which it is to be decided if the ship is lost in a commercial sense as between shipowners and charterer as laid down in the *Bessie Morris* case (*ubi sup.*). These common law rules are not affected by the Marine Insurance Act, which, by sect. 91, sub-sect. (2), says: "The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance." It may, indeed, be that the shipowner in this issue as between himself and the charterer may be entitled to bring in as part of the expense of repairing the ship a sum which represents what the wreck would be worth to him as a wreck if he does not repair. This was the common law rule as laid down by the House of Lords in *Macbeth and Co. Limited* v. *Maritime Insurance Company Limited* (11 Asp. Mar. Law Cas. 52; 98 L. T. Rep. 594; (1908) A. C. 144), reversing the decision of the Court of Appeal in *Angel* v. *Merchants' Marine Insurance Company* (9 Asp. Mar. Law Cas. 406; 88 L. T. Rep. 717; (1903) 1 K. B. 811). Sect. 60, sub-sect. (2) (ii.), of the Act gave effect to the more technical rules which the Court of Appeal had approved; and, therefore, superseded (as it was held in *Hall* v. *Hayman* (12 Asp. Mar. Law Cas. 158; 106 L. T. Rep. 142; (1912) 2 K. B. 5) for purposes of a constructive total loss claim on the ship the more elastic rules adopted in *Macbeth's* case; but, as the section only applies to an insurance on hull, it would seem that the rules laid down by the House of Lords in *Macbeth's* case would still apply in a question between shipowner and charterer in which the test is still what course the prudent uninsured owner would adopt; as already explained, the question between freight underwriter and shipowner must follow the same lines in the absence of special terms as those between shipowner and charterer in the matter now in question. There is then a further objection to assimilating the claim for loss of freight to the claim for a constructive total loss of hull. It is well known that the Act did not deal expressly with the subject of freight insurance except in sect. 16, sub-sect. (2), where it defined the insurable value of an interest in freight as the gross amount of the freight at the risk of the assured plus the charges of insurance, and in sect. 70, where it gave the rules for adjusting a partial loss on freight. It may, indeed, be that part of the definition of actual total loss in sect. 57, sub-sect. (1), that is, the words "where the assured is irretrievably deprived" of the subject-matter insured, may apply to an actual total loss of freight such as the present; similarly, the relevant words of sect. 60, sub-sect. (1), may apply to a constructive total loss of freight in a case like *Jackson* v. *Union Marine Insurance Company Limited* (*ubi sup.*), or a case where cargo is on board which might be transhipped. But I do not think that section can apply to a case like the present which, in my judgment, is an actual total loss of freight.

The reasoning by which the learned judge meets these contentions is, as I understand, that since he holds that the assured have to prove a constructive total loss of ship in order to recover, clause 5 of the Institute Freight Clauses is brought into operation, with the result that the repaired value is deemed for purposes of the freight policy to be not 13,000*l.*, the actual value, but 30,000*l.*, the insured value under the hull policy. Whether that is so must depend on whether clause 5 applies. In substance the learned judge treats the freight policy as if it provided expressly or by implication or by intendment of law that a total loss of freight should only be recoverable in the event of an actual or constructive total loss of ship under the hull policies. An express clause to this effect is not uncommon in freight policies. A policy on the chartered freight on the very voyage in question was produced, with the terms: "To pay only in the event of the total and (or) constructive and (or) arranged total loss of steamer." I merely refer to this as an illustration of a common clause. But there is certainly no such clause in this policy. For reasons already explained, I do not think that apart from express terms the right to claim a total or constructive total loss under this policy can depend upon whether there is a constructive total loss under the hull policies. Certainly clause 5 contains no such condition. Clause 5 by its terms can only apply when it is the constructive total loss of the ship that is an essential condition of recovery under the freight policy. The first part of clause 4 deals with the case referred to above,

where the shipowner, but for the clause, would lose his freight on the ground that it has been earned by the ship after it had been abandoned to underwriters, and the clause in such an event gives an added right of recovery of the full freight. Its effect was explained in this sense by Hamilton, J. in *Coker* v. *Bolton* (12 Asp. Mar. Law Cas. 231; 107 L. T. Rep. 54; (1912) 3 K. B. 315). But there is no other condition of the freight policy which postulates or refers to constructive total loss of the ship; the term is nowhere else than in clauses 4 and 5 used in the policy. Clause 5 gives no added right and imposes no new condition save when it is necessary to establish a constructive total loss of the ship. The clause, if more correctly expressed, would read: "Whenever it is necessary to prove the total loss, actual or constructive, of the ship," &c. But that can only apply where the contract of insurance requires the ascertainment of that fact as a condition of recovering. Clause 5 does not import any such condition. The answer made by the defendants' counsel to that proposition was that if it is decided that by the general law an actual or constructive total loss of the vessel in the technical insurance sense is not an essential condition to the recovery of a total loss under the freight policy, still in ordinary commercial parlance the state of irreparability of the ship which is discussed in the *Bessie Morris* case is spoken of as a constructive total loss because it is a total loss in a commercial, and not physical, sense. But I cannot accept that view of the position. I do not know if such ideas or language are common among business men, but in any case the two legal concepts appear to me, for reasons already explained, to be essentially different. I do not, indeed, think that clause 5 is necessarily limited to a constructive total loss for purposes of clause 4. I think it might apply to any term in the policy which refers, as clause 4 does, to a constructive total loss of the ship under the hull policy. Such a policy must, if the clause is to apply, contain an insured value. The clause is, therefore, inapplicable to a notional constructive total loss of ship under a notional hull policy such as is illustrated by the case of *Roura and Forgas* v. *Townend* (14 Asp. Mar. Law Cas. 397; 120 L. T. Rep. 116; (1919) 1 K. B. 189). As clause 4 can only become effective if applied to a case of abandonment of the ship to hull underwriters under a hull policy containing the insured value clause, the expression "constructive total loss" must there be used in its technical and correct sense. The defendants here seek to construe the same expression in clause 5 as not only applicable, as it properly is, to such a case, but also as equally applicable to what, in my opinion, is the entirely different case, which is in question here, where the question is primarily as between the shipowner and the charterers, and only as a consequential issue between the shipowner and freight underwriters. But I do not think the same words can properly be construed as having so widely different meanings in the same clause.

In the result I do not think that clause 5 can be applied to the facts of this case, because I do not think the freight policy required that there should be a constructive total loss of the ship within the true meaning of that phrase in clause 5 of the freight policy. But it might be a sufficient answer to the defendants' contention to say that the decision of the learned judge involves a serious limitation of the shipowner's right under the policy, though they lose the benefit of their freight contract *vis-à-vis* the charterers and hence the freight, because their ship is so damaged that she cannot be repaired (as I assume here to be the case) except at a cost exceeding her repaired value of 13,000*l.*, and they cannot, according to the judge's decision, recover on the freight policy because they cannot prove that the ship could not be repaired at a cost less than 30,000*l.* I think much clearer words are necessary to achieve the consequence that the assured is to be so limited in his rights under the policy, and the basis of his right to recover for a total loss of freight is to be radically changed. On that ground alone I should, with all deference, feel bound to come to a conclusion different from that of the learned judge.

In the result I think the appeal should be allowed, the judgment of the court below should be set aside, and it should be declared that the plaintiffs are entitled to succeed in the claim for a total loss of freight on the basis that the value of the ship for purposes of comparison with the cost of repairs is the actual value and no more. The judge has made no specific finding on that issue, but the facts that he has found seem to leave little doubt that the plaintiffs must succeed on that basis. If the defendants so desire, the case will be remitted to the judge for his finding on that basis for him to determine the precise amount recoverable. If the defendants do not so desire, judgment will be entered for the plaintiffs on the claim.

Slesser, L.J.—I have read the judgment of the Master of the Rolls in this case, with which I agree, and I have little to add thereto.

The critical question which arises in this case is whether the value of the ship should be taken to be 30,000*l.* or a far less sum, namely, 13,000*l.*, it is said. The former is the value stated to be the insured value in the policy on ship, and the latter to be the actual value as found by the learned judge before the casualty. If the insured value of 30,000*l.* be properly taken, the ship when repaired would be worth the sum which it is necessary to spend on her, and the failure to repair and consequent loss of freight would be practically possible, and there would be no case of total loss. If, on the other hand, the value of the ship is the less sum it may be, in the language of Maule, J. in *Moss* v. *Smith* (9 C. B. 94, at p. 103), that the ship would have sustained "Such extensive damage that it would not be reasonably practicable to repair her, seeing that the question of the repairs would be such that no man of common sense will incur the outlay," and the freight would be lost by perils of the sea and so the freight insurers would be liable.

The ground upon which it could be said that the value of the ship was 30,000*l.* can only be supported by invoking clause 5 of the freight policy, which provides that: "In ascertaining whether the vessel is a constructive total loss the insured value in the policies on ship shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account."

The learned judge has come to the conclusion that it is necessary for the plaintiffs in this case, in order that they may recover, to show that the ship is a constructive total loss, and he, therefore, comes to the conclusion that such a finding being necessary, clause 5, which I have quoted, must apply when the test, whether the reparation is or is not commercially feasible is considered, and 30,000*l.*, the insured value in the policy on ship, be taken as the basis of that inquiry.

While it may be true to say, subject to qualifications which I mention hereafter, that the test

in fact to be applied in the case of loss of freight may be substantially the same as that to be applied in ascertaining whether there is a total constructive loss of the ship, namely, that laid down in *Moss* v. *Smith* (*ubi sup.*), and now in sect. 60, sub-sect. (2) (ii.), of the Marine Insurance Act, 1906, to the effect that there is "a constructive total loss in the case of damage to a ship where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired," yet it is not right to say, because the facts which have to be considered may be to some extent similar, and similar conclusions on like facts may be arrived at, that constructive total loss of the ship, as such, has to be proved in the case of a claim for loss of freight. The words "constructive total loss of the ship" in clause 5 of the freight policy are words of art and cannot properly be employed in the case where the question for determination is whether the freight has been lost by perils of the sea. It is this assumption that it is necessary actually to prove constructive total loss of the ship in order to recover upon a claim for loss of freight by perils of the sea which, in my opinion, invalidates the judgment against which this appeal lies: if there be wreck value to be taken into account it is not even accurate to say that the same facts will support a finding of loss of freight by perils of the sea and a finding of constructive total loss of the vessel by the same perils or that the standards are comparable for the following reason.

In *Macbeth and Co. Limited* v. *Maritime Insurance Company Limited* (11 Asp. Mar. Law Cas. 52; 98 L. T. Rep. 594; (1908) A. C. 144) it was held before the passing of the Marine Insurance Act, 1906, s. 60, that, in estimating the value of a ship as worth repairing, the value of the damaged ship as a wreck was taken into account. Now, by that section, the value of the wreck cannot any longer be added by the assured to the cost of repairs (*Hall* v. *Hayman* (12 Asp. Mar. Law Cas. 158; 106 L. T. Rep. 142; (1912) 2 K. B. 5), but in so far as sect. 60 is not dealing, in my view, with loss of freight in such a case as this, in considering the problem whether loss of freight is due to perils of the sea, the value of the wreck in applying the test of whether a prudent insured owner would sell the ship where she lies or repair her may still be relevant (see sect. 91, sub-sect. (2), of the Act preserving the common law when not disturbed), so that the criteria in any given case of disputed causation by perils of the sea in the case of constructive total loss of ship and loss of freight may in certain cases differ.

There remains for consideration the question for what purpose it was necessary to insert a provision determining the basis of ascertainment of constructive total loss in clause 5 of the freight policy. To understand this it is first necessary to quote clause 4 of the same policy, which is to the effect that: "In the event of the total loss, whether absolute or constructive, of the vessel, the amount underwritten by this policy shall be paid in full, whether the vessel be fully or only partly loaded or in ballast, chartered or unchartered."

In *Coker* v. *Bolton* (12 Asp. Mar. Law Cas. 231; 107 L. T. Rep. 54; (1912) 3 K. B. 315) it was held that what is here this clause 4 prevented the operation of the ordinary rule of law by which, in the event of a constructive total loss, the right to the freight earned subsequently to the loss passes to the underwriters on hull, and for such a purpose it may have been considered necessary to consider a matter not generally material in the case of a claim to loss under the freight policy, namely, what constitutes constructive total loss of the ship, and the contracting parties have thought fit for such a purpose to fix as the ship's value the insured value of the ship in the hull policy. It is to be noted that such a clause is in favour of the assured; here clauses 4 and 5 read together are sought to be used to his detriment.

I am not prepared to say that the operation of clause 5 is necessarily limited to cases coming under clause 4, and whenever the question whether there has been a total constructive loss of the ship is raised on the freight policy, clause 5 may well operate, though I find it difficult to imagine such a case under this contract. But, for the reasons I have stated, that question should not have been propounded in that form in the present case, and there is no reason, therefore, for invoking clause 5, which produces an artificial enhancement of the value of the ship.

It is true that in the books there are certain dicta which seem to support the view of the learned judge in this case, that "there can be no total loss of freight unless there be a total or constructive total loss of the ship" (Porter, J.'s judgment, 40 Com Cas. at p. 293), such as the words of Collins, J. in the *Bessie Morris* case (1892, 1 Q. B. at p. 580) to the effect that: "When the freight is said to be lost through damage to the ship, it must be shown that the ship itself to which the freight is an accessory was actually or constructively lost." But these and similar statements really mean no more than that the standard to be applied in the case of freight is that which would be appropriate to the case of constructive total loss if the claim were upon a hull policy, though, for reasons which I have stated, since the passing of the Marine Insurance Act even this may not now be entirely accurate. The test whether the expense is one which a prudent uninsured owner would incur may, or may not, be precisely the same in the case of a claim on freight or on hull policy. But to say *simpliciter* that it is necessary to prove on a freight policy that the vessel is a constructive total loss is, to my mind, not correct.

As I have said, on the actual value of 13,000*l.*, there can be no question but that this freight was lost by perils of the sea, and I agree, therefore, that the assured succeeds, and this appeal should be allowed, and the case remitted on the terms stated by my Lord.

Greene, L.J.—I agree. There are three contracts to be considered in this case, and it is important to keep them distinct. They are: (1) the charter-party, (2) the hull policy, (3) the freight policy.

(1) The charter-party regulates the rights and obligations of the shipowners and the charterers. It contains the usual exception of perils of the sea the effect of which is to excuse the parties from performing the contract if performance is prevented by a peril of the sea. The rights and obligations of the parties under the charter-party are not affected by the existence or the terms of either the hull policy or the freight policy. In considering those rights and obligations it is, in my opinion, important to avoid the introduction of the expression "constructive total loss." This is a technical expression relating to the rights and liabilities of assured and underwriters under marine policies, and is not proper to be employed in dealing with the position as between owner and charterer under a charter-party. So far as regards owner and charterer the relevant question in the present

case is, what is the state of facts arising from a peril of the sea which will entitle the shipowner or the charterer to treat the contract as discharged? Where such a state of facts exists and either party properly elects not to proceed with the contract, the contract is discharged and the shipowner loses his right to receive the unpaid freight.

A lengthy discussion took place before us as to what state of facts arising from a peril of the sea would justify a determination of the charter-party. It was said on behalf of the respondents that, apart from actual total loss of the vessel, there must be a constructive total loss of the vessel. As I have already pointed out, constructive total loss is a conception with which, as such, the charter-party has nothing to do. The misleading nature of the proposition appears in a striking manner when the question, what is meant by constructive total loss as therein used, is investigated. If it means constructive total loss in the sense prescribed by sect. 60 of the Marine Insurance Act, 1906, the result will be that the rights and liabilities of the parties under the charter-party are governed in this respect by a statute which is concerned only with marine insurance; and it would appear to follow that they would be affected by an amendment of that section which altered the statutory definition of constructive total loss. It is to be observed that the section itself altered the law as to what is necessary to constitute constructive total loss as laid down by the House of Lords in *Macbeth and Co. Limited* v. *Maritime Insurance Company Limited* (11 Asp. Mar. Law Cas. 52; 98 L. T. Rep. 594; (1908) A. C. 144). I am unable to accept the view that the facts necessary to discharge the contract contained in the charter-party can, in any way, be affected by the statutory provisions from time to time in force with regard to constructive total loss.

If, on the other hand, the expression means "constructive total loss" as it was before the statute, under the decision in *Macbeth's* case, the argument fails to secure that correspondence between the position under the charter-party and the position under the hull policy which it aims at establishing.

In truth, as I have already said, the proposition is a misleading one. The question what facts will constitute constructive total loss under a hull policy, where the vessel is damaged by a peril of the sea, appears to me to be fundamentally different from the question what facts will discharge the contract contained in the charter-party when the vessel has been damaged by a peril of the sea. In each case the amount of expenditure required to repair the vessel (if she is reparable) is a vital consideration; and, ignoring for the moment the complication introduced by the Marine Insurance Act above referred to, it may be that no damage will discharge the contract contained in the charter-party, which would not be sufficient to constitute a case of constructive total loss under an actual or imaginary policy on hull; any conventional value agreed upon in a hull policy being for this purpose of course ignored. For the purposes of my judgment in this case I am prepared to proceed upon this hypothesis, although it must not be assumed that I accept it as correct or that I accept the view that the amount of damage requisite to discharge the contract contained in the charter-party is in any way affected by statutory provisions for the time being in force in relation to what constitutes constructive total loss for the purposes of a policy on hull. I must also make it clear that the acceptance of this hypothesis is a different thing to the acceptance of the proposition that "constructive total loss" is a proper way of describing the state of the vessel when the question is one between owner and charterer or between assured and underwriter on freight. The importance of this distinction for the present case will appear when I come to consider the Institute Clauses which are incorporated in the freight policy.

It was said on behalf of the appellants that the true test is in principle that performance of the charter-party is excused if the expenditure necessary to make the vessel navigable for the voyage in question is such that it would be unreasonable to require the shipowner to incur it. The effect of this contention, if correct, would be to introduce a standard of damage different from that required to constitute a constructive total loss under a policy on hull, and accordingly to make it impossible to say that clause 5 of the Institute Clauses applied. For the purposes of this judgment it is unnecessary to consider whether or not this contention is correct.

(2) The position of the parties under the hull policy presents no difficulties. It only comes into consideration in this case for the purpose of seeing to what extent its existence or its terms may affect the mutual rights and liabilities under the freight policy.

(3) By the freight policy the shipowner effected an insurance of the freight payable under the charter-party against the risk of loss by perils of the sea. The subject-matter of the insurance is a chose in action, namely, the contractual right to receive the freight frim the charterer under the charter-party. If that right is lost through a peril of the sea the underwriters are liable as on a total loss.

In considering whether or not there has been such a loss of the right to receive freight through a peril of the sea, it is necessary to determine in the first place whether or not as between charterer and shipowner the right to receive the freight has been lost by peril of the sea. Upon principle and apart from any special provisions in a freight policy (such as, *e.g.*, clause 7 in the Institute Clauses), this would, in my opinion, be the relevant question to determine in deciding what are the liabilities of the freight underwriter, and, in deciding this question, the same principles must apply as between assured and underwriter on freight as apply as between owner and charterer.

The question was discussed before us as to the state of facts necessary to enable the assured on a freight policy, apart from special provisions, to recover where the ship is damaged. This question is similar to that discussed in the case of charterer and owner, and similar contentions were made on behalf of the parties. Here, again, I do not find it necessary to decide whether or not the appellants' contention is correct, and in particular I refrain from expressing any opinion as to the correctness or otherwise of certain observations of Blackburn, J. when advising the House of Lords in *Rankin* v. *Potter* (2 Asp. Mar. Law Cas. at p. 71; 29 L. T. Rep. 142, at p. 149; L. Rep. 6, H. L. 83, at p. 117) which were discussed at length before us. I am content, without deciding the question, for the purpose of this judgment to accept in the case of the freight policy a hypothesis corresponding to that which I have for the like purpose accepted in the case of the charter-party.

Apart from certain special clauses in the freight policy, it could not have been contended that the right of the assured in the circumstances to recover from the freight underwriters would have been affected in any way by the valuation clause in the hull policy, the effect of which on the facts of the present case was to prevent the case being one of

constructive total loss as between the owners and the hull underwriters. Apart from the special clauses in the freight policy, the existence and the terms of the hull policy appear to me to be irrelevant for the purpose of determining the rights and liabilities of the parties under the freight policy. The fact that the parties to the hull policy have for the purposes of that policy agreed on a conventional value for the vessel cannot in the absence of special provision to that effect in the freight policy prevent the assured under the freight policy from asserting that he has lost the right to receive the freight from the charterer by a peril of the sea.

Upon the hypothesis referred to above the decision of the present case, in my opinion, turns entirely on the true effect of clauses 4 and 5 of the Institute Voyage Clauses—Freight which are incorporated in the freight policy. The terms of these clauses have already been stated, and I need not repeat them. A clause similar to clause 4 has already been judicially considered by Lord Sumner (Hamilton, J., as he then was) in *Coker* v. *Bolton* (12 Asp. Mar. Law Cas. 23 (107 L. T. Rep. 54; (1912) 3 K. B. 315). The form of Institute Freight Clauses which fell for consideration in that case did not, as we were informed by counsel, contain a clause corresponding to what is now clause 5, that clause having been introduced into the form at a later date. Lord Sumner held that what is now clause 4 was introduced to meet the hardship caused by the rule that a shipowner who, by giving notice of abandonment, has lost his right to any freight subsequently earned is precluded from suing on the policy on freight. I do not read this judgment as meaning that this is necessarily the only effect of the clause; indeed, the words "whether the vessel be fully or only partly loaded or in ballast, chartered or unchartered," seem to show it has a wider operation. The object of the clause, however, was I think clearly to confer additional rights upon the assured, not to cut down rights which he already enjoyed.

I turn now to a consideration of clause 5. One argument advanced on behalf of the respondents with regard to this clause may be stated as follows: In order to entitle the assured to recover on the freight policy there must be a constructive total loss of the vessel; apart from clause 5 it might be doubtful whether the real value of the vessel or its conventional value as stated in the hull policy should be taken for this purpose; clause 5 removes this doubt by providing that the conventional value is to be taken, and, as on the basis of that value, there was no constructive total loss of the vessel, the assured is not entitled to recover.

On the other hand, it is said on behalf of the appellants that clause 5 is merely a definition of the expression constructive total loss in clause 4, an expression which does not appear elsewhere in the freight policy.

It is right to observe that if the sole object of clause 4 was to afford a remedy for the injustice referred to by Lord Sumner, clause 5 would appear to be in part, at any rate, otiose, since that injustice could not arise unless there had in fact been abandonment of the vessel to the underwriters and abandonment as on a constructive total loss could only take place in accordance with the terms of the hull policy and on the basis of the conventional value appearing therein.

But this does not dispose of the matter. The argument is necessarily based upon the assumption that constructive total loss of the vessel is as such essential to the right of the assured to recover under the freight policy, since it is only upon this assumption that the formula laid down in clause 5 for ascertaining when a constructive total loss has taken place is relevant. If I am right in my view that this assumption is incorrect, the whole argument appears to me to fall to the ground. The formula can, in my opinion, only be applied where constructive total loss as such is relevant for the purposes of the freight policy, and it can only become relevant if the parties have so agreed. The only matter in respect of which the parties have expressly so agreed are the matters dealt with in clause 4, and I think that the operation of clause 5 must in this policy be confined to those matters, although a similar clause in a different policy might have a wider effect, *e.g.*, if the policy itself contained other references to constructive total loss of the vessel. The other argument as to the operation of clause 5 was as follows:

It was said that, even if the phrase "constructive total loss" of the vessel is not in itself apt to be used in reference to the question between assured and underwriter on freight, yet the parties must be taken so to have used it in the present case; and in support of this argument it was said that what would be in strictness a misuse of a technical expression is intelligible if the relevant state of facts with regard to the condition of the vessel is the same both for the purpose of constituting a constructive total loss under a hull policy and for that of constituting a loss of freight by a peril of the sea under the freight policy. But I do not think that this argument should be accepted. The effect of accepting it would be to cut down the rights of the assured under the freight policy to a serious extent. If the parties had this object in mind it would have been natural to use clear language, and, in my opinion, the language of clause 5 has no such clear meaning. If the argument were accepted it would mean that the parties had in the first place tacitly assumed that the requisite state of facts with regard to the condition of the vessel was the same under the freight policy as under the hull policy—an assumption which leaves at large the question whether constructive total loss at common law or under the Marine Insurance Act is meant—and had then inaccurately used in clause 5 the expression "constructive total loss" to describe that state of facts.

If it had not been for the fact that we are differing from Porter, J., I should have been content to express my agreement with the judgments already delivered, but out of respect for the learned judge, I have thought it right to state my reasons, which I do with all deference.

Lord Wright, M.R.—Then the order will be that the judgment of the court below be set aside, and it is declared that the plaintiffs are entitled to succeed on the claim for total loss of freight on the basis that the value of the ship for the purposes of comparison with the cost of repairs is the actual value and no more. The result will be that the appeal will be allowed, with costs, the case will be remitted to the learned judge, who will deal with the general costs of the action, of the hearing before him, and of the further hearing.

David Davies.—I submit the costs of this appeal should be reserved until it is seen upon the new basis——

Lord Wright, M.R.—No, Mr. Davies.

Willink.—There is one small point I want to mention, my Lord. If my friend does agree, without going back to the learned judge, on considering the figures, that we are entitled to

payment on the basis of total loss—that is 4000*l.*—I do not know whether your Lordship——

Lord Wright, M.R.—If the parties agree the matter can be mentioned again here, and then this court will make a final order.

Willink.—If your Lordship pleases. I was only going to ask about the question of interest.

Lord Wright, M.R.—If the parties agree and do not go before the learned judge, the matter can be mentioned again here.

Willink.—If your Lordship pleases.

David Davies.—I take it, my Lord, that any question of leave to appeal to the House of Lords will stand over.

Lord Wright, M.R.—You can ask for leave to appeal now, if you want to. The question of an appeal is a matter standing by itself.

David Davies.—If your Lordship pleases. Then I do ask for leave to appeal.

Lord Wright, M.R.—You may have leave to appeal.

Appeal allowed.

Solicitors for the appellants, *Holman, Fenwick* and *Willan.*

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

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

November 13 and 14, 1935.

(Before Branson, J.)

Marcelino Gonzalez y Compania v. Nourse (James) Limited. (*a*)

Bill of Lading—Undertaking to deliver cargo at wharf—Liberty to tranship — Discharge into lighters — Cargo lost through sinking of lighters.

A bill of lading, which provided for the discharge of cargo at a wharf, contained a provision as follows : "With liberty to tranship or land and re-ship on board the same or any other vessel or vessels," and an undertaking to deliver the goods from the ship's tackles. It also contained an exception for dangers and accidents of the seas and of navigation.

The goods were not discharged at a wharf, but into lighters. A hurricane arose, and the lighters were sunk and the goods lost.

Held, that by reason of the liberty to tranship, the ship was entitled to tranship into lighters, and that the goods were lost through an accident of the seas, and therefore that the ship was not responsible.

Action tried in the Commercial Court. The plaintiffs were the consignees of a shipment of 500 bags of Burma rice shipped at Rangoon for delivery at Havana in the defendants' ship *Tapti*, and were holders of a bill of lading, dated the 4th June, 1933, signed by the defendants in respect thereof. The bill of lading contained a provision as follows : "With liberty to tranship or land and re-ship on board the same or any other vessel or vessels," and also contained an undertaking by the defendants to deliver the goods "in like good order and condition from the ship's tackles (where the ship's responsibility shall cease)," subject (*inter alia*) to the following exception, "The act of God . . . and all and every other dangers and accidents of the seas . . . and of navigation of whatever nature or kind." The bill of lading contained a further clause providing that the cargo was to be discharged at a wharf to be designated by the ship's agent, and incorporating the terms of the Indian Carriage of Goods by Sea Act, 1925. One of those terms is that the carrier shall be bound to exercise due diligence in the performance of his duties.

During the voyage the ship struck a submerged object and was damaged. On arrival at Havana it was found necessary to put her in dry dock to effect repairs, and there was no such accommodation available at that port. She proceeded to a wharf and began to discharge, but before the plaintiffs' goods were discharged, she was obliged to stand off again in order to make room for a vessel belonging to the wharfowners. That was in accordance with a recognised practice of the port, giving precedence to the wharfowner's vessels over others. The plaintiffs' goods were then discharged into lighters for conveyance to the wharf. On the next day the lighters were sunk in a hurricane, and the plaintiffs' goods were totally lost.

The plaintiffs thereupon brought this action claiming damages for breach of the undertaking to deliver the goods contained in the bill of lading. They contended that the defendants had failed to deliver the goods at the wharf designated by the ship's agent ; that, in discharging into lighters, they had committed a breach of contract ; and that they had failed to deliver the goods from the ship's tackles.

The defendants contended that the loss was due to an excepted peril of the sea, and that they were entitled to discharge into lighters by reason of the proviso giving liberty to tranship.

David Davies, K.C. and *Stevenson* for the plaintiffs.

Willink, K.C. and *Holman* for the defendants.

Branson, J.—The plaintiffs allege that the contract contained in the bill of lading involves that the goods should be taken alongside the wharf and delivered from the ship's tackles, and that the placing of the goods on lighters was a breach of the contract. The defendants allege that the contract provided that they should take the goods to the port of Havana and discharge them there in any usual way, and that the practice there of discharging them into lighters was, in those circumstances, a usual way of discharge. It has been repeatedly held that where there is a custom of the port in regard to the discharge of the cargo, unless that custom is excluded by the contract, delivery in accordance with that custom is proper. Similarly, where, as in the present case, a well-known practice as to discharge of cargo has been followed by a line of steamers at a particular port to the knowledge of the receiver of the goods, then, unless there is something in the contract or elsewhere which excludes that practice, it is not open to the receiver to object to it.

It was said on behalf of the plaintiffs that there were matters here which did exclude the practice.

(*a*) Reported by V. R. Aronson, Esq., Barrister-at-Law.

In the first place it was said that the provision in the bill of lading that the defendants should have "liberty to tranship" applied only to transhipment to a steamer alongside, and not into lighters. There is nothing in the bill of lading which so restricts the meaning of the words, and it is not possible so to restrict it. Either practice is a usual performance of the contract. The expression "liberty to tranship" covers the putting of the goods into lighters in order to complete the voyage.

It is also said that the whole of the clause giving liberty to tranship is rendered null and void by art. III., r. 8, of the rules appended to the Indian Carriage of Goods by Sea Act, 1925. That is an article which provides that the carrier shall be bound to exercise due diligence in the performance of his duties, and I do not see how a clause giving liberty to tranship can come within that rule. It is further said that the expression in the bill of lading that the goods shall be delivered from the ship's tackles excludes delivery of the goods into lighters. The answer to that contention is to be found in the case of *Marzetti* v. *Smith and Son* (5 Asp. Mar. Law Cas. p. 166; 49 L. T. Rep. 580), where it was held that a custom of the port of London for ships to discharge goods on to the quay and thence into lighters was not inconsistent with an exactly similar provision in the bill of lading there in question. In the present case the contract, when fairly read in the light of the surrounding circumstances, was not broken by placing the goods in lighters as a step in the delivery of them, and the defendants are protected from liability for the loss of the goods by the exceptions in the bill of lading.

Judgment for the defendants.

Solicitors: for the plaintiffs, *Parker, Garrett, and Co.*; for the defendants, *Holman, Fenwick, and Willan.*

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Friday, November 15, 1935.

(Before Sir BOYD MERRIMAN, P.)

The Uranienborg. (a)

Collision—Towage contract—United Kingdom Standard Towage Conditions, clauses 1 and 3—"Whilst towing"—Meaning of "tug is in a position to receive orders direct from the hirer's vessel to pick up ropes or lines."

The defendants, owners of the Danish steamer U. *had, through their London agents, entered into a contract with the plaintiffs, on Saturday, the 2nd March, 1935, whereby it was agreed that the plaintiffs should supply two tugs to tow the* U.*, which was discharging at Bellamy's Wharf, River Thames, down-river to Swanscombe Buoys. No exact time had been stipulated for the commencement of the towage, but it had been intimated to the plaintiffs that the towage would commence on the afternoon tide of Monday, the 4th March, after the* U. *had discharged, and that the tugs had better be in attendance at about 11 a.m. on that day. On the Monday, the plaintiffs' tug* K.*, accordingly went to Bellamy's Wharf, but she approached the* U. *at such high speed that before she could take her way off she collided with the* U.*, doing her considerable damage. In an action brought by the owners of the* U. *against the tug-owners to recover the amount of that damage, the present plaintiffs admitted liability, and that admission was duly filed, and, therefore, had the effect of a judgment against the owners of the* K. *The present action was subsequently brought by the plaintiffs for an order to set aside the admission of liability on the ground that it had been made on the instructions of the plaintiffs' managing director, who was then out of London, and was not aware that a contract of towage had been entered into, having merely been informed by telephone that the* K. *had been in collision with the* U. *The plaintiffs now alleged that the tugs had been engaged on the terms of the United Kingdom Standard Towage Conditions, and that those conditions afforded them a complete defence to the action brought against them by the* U. *in respect of the collision damage. Clause 1 of the said conditions was as follows: "For the purpose of these conditions, the phrase 'whilst towing' shall be deemed to cover the period commencing when the tug is in a position to receive orders direct from the hirer's vessel to pick up ropes or lines or when the tow rope has been passed to or by the tug, whichever is the sooner. . . ." And by clause 3 it was provided that the tug-owner should not, "whilst towing, bear or be liable for damage done by . . . the tug or done . . . to the hirer's vessel arising from any cause including negligence at any time of the tug-owners' servants or agents." The plaintiffs contended that the collision happened "whilst towing." The defendants denied that they had engaged the tugs prior to the collision, and contended that in any event the terms of the towage conditions were irrelevant, and that the plaintiffs were not entitled to any relief because at the time of the collision the towage conditions had not begun to apply since the* U. *had not finished discharging, her pilot had not yet come on board, her boatmen were not in attendance, and the* U. *was consequently not in a position to give orders to the tug.*

Held, (1) *that the word "position" in clause 1 involves not only the physical situation of the tug, but the conception of the tug being in a condition to receive and act upon orders from the ship to pick up ropes or lines, and that that must have some reference not only to the readiness of those on board the tug to receive those orders, but to the intention of those on board the ship to give them;* (2) *that, although at the time of the collision the* K. *was within hailing distance of the* U.*, as the evidence showed that nobody on board the* U. *was preparing to give orders with regard to ropes and lines and that the* K.*, when she arrived,*

(a) Reported by J. A. PETRIE, Esq., Barrister-at-Law

was mainly engaged in trying to avoid the collision, the tug was not at the critical moment in a position to receive such orders, and that accordingly the period covered by the words "whilst towing," as defined by clause 1, had not commenced to run, and the plaintiffs were not protected.

Claim dismissed with costs, with the result that the original admission, having the effect of a judgment of the court, was left where it was.

TOWAGE.

In this action, the plaintiffs, William Watkins Limited, of London, owners of the steam tug *Kenia*, claimed as against the defendants, A/S D/S Danebrog, of Copenhagen, owners of the steamship *Uranienborg*, (*a*) a declaration that they were not liable to the defendants for damage resulting from a collision between the two vessels on the 4th March, 1936, because the United Kingdom Standard Towage Conditions upon the terms of which the tug was engaged afforded a complete defence to the plaintiffs in another action brought against them by the defendants; and (*b*) an order setting aside an admission of liability which the plaintiffs had filed in that other action under a mistake of fact.

The facts and contentions of counsel fully appear from the judgment.

Owen L. Bateson for the plaintiffs.

Cyril Miller for the defendants.

Sir Boyd Merriman, P.—This is an action by the owners of the steam tug *Kenia*, the substance of which, without setting out all the heads of claim, is a claim to be allowed to recall an admission of liability, and the consequent judgment thereunder—that is not putting it quite accurately because the filing of the admission of liability itself has the effect of a judgment—on the ground that the admission was made by mutual mistake of fact and that there is, once that mutual mistake is cleared away, a defence to the action.

Now, with the customary commonsense and candour with which these proceedings have been conducted, all the irrelevant points have been got out of the way, and it is conceded that there was a mutual mistake of fact, the mutual mistake being this, that both parties at the time when the admission of liability was called for and given were under the misapprehension that there had not been in fact a contract of towage.

The claim was a claim for damage by collision to a ship, the *Uranienborg*, lying alongside a wharf by a tug, the *Kenia*, which was going in the ordinary course of events to assist her, with another tug, in going down river. Of course, if there had been no contract of towage at the moment of collision no sort of exemption would apply, and it was under that misapprehension that the original admission was made. That is conceded, and I have allowed the pleadings to be amended so as to give full effect to that allegation and to the admission. On the assumption that the amendment has been made—because the pleadings in fact only show a unilateral mistake of fact—on the assumption that the amendment has been made (it must be put in in case the case goes farther), the point of substance then emerges. If there was a contract of towage, then it is conceded that the conditions, which are known as the United Kingdom Standard Towage Conditions, apply, and the question then is whether this collision occurred in circumstances which were covered by those conditions. If so, I do not think it is disputed that the *Kenia* would be exempt from liability. If, on the other hand, the towage conditions do not apply, I do not know whether I am expected to decide the question of liability or not, but at any rate I have not heard any argument to the effect that liability would not attach to the *Kenia*.

The circumstances are these. The steamship *Uranienborg* was lying alongside Bellamy's Wharf, starboard side to the wharf, and was discharging. She was expected not to put to sea but to leave the wharf and proceed to enter that part of the river which is at Swanscombe Buoys on Monday, March 4. On the Saturday, negotiations were entered into by telephone between the owners of the tug *Kenia* and another tug, and the agents of the ship, for the towing arrangements, and the matter was left in this way, that they were to provide two tugs and that the time would probably be 11 o'clock; that the time should be verified on Monday morning by a telephone conversation direct from the City office of the tugowners to Bellamy's Wharf, so that the tugs should have time to get to the ship in ample time to perform a towage operation when required.

It is not now disputed that there was a completed contract. I do not think that it is necessary to follow out all the details, but I do not think in fact that there really ever was an actually defined time at which the towage was to begin; but, on the other hand, I think it was made quite clear that the towage would start some time after the ship had finished discharging and on the afternoon tide of March 4, with, no doubt, an intimation that the tugs had better be in attendance at about 11 a.m. I think that is fairly what it comes to, but no point is made upon that, that it was not a completed contract; all that is said is that there was no exact time, and I think that is right. In fact, the ship did not finish discharging until about 11.30, and at the material time—that is the time when the collision occurred, which was two minutes, probably about five minutes, before 11 or thereabouts—the pilot had not come on board.

Now, I find the following facts. I find that the companion tug, whose name was the *Tanga*, arrived earlier at Bellamy's Wharf than the *Kenia*. The *Tanga* arrived there at about 10.30 a.m. and she came up to the ship, asked for orders, was told that they were waiting for the pilot and boatmen, and although I have not had any direct evidence about this—perhaps I ought to have asked the question, but I hope I shall be corrected if I am wrong in assuming that the boatmen would be men who would be connected with the getting of the ropes out to the tug——

Mr. Miller.—My learned friend thinks that the boatmen were probably there to cast off the ship's shore moorings and get the ship away and not to take the ropes out to the tug.

The President.—Be it so; for my part it is immaterial which of the two it is. All I was thinking was that they were boatmen connected with the unmooring of the ship.

Mr. Miller.—That they certainly were.

The President.—Connected with the unmooring and getting her away—I assumed that that was obvious and, perhaps, I ought to have asked the question when somebody was in the box. They were waiting for the pilot whose presence was

necessary before they could have moved at all, and for the boatmen who were concerned with the ropes. The master of the *Tanga* hung on to one of the buoys just over by the wharf, and he was already hanging on to that buoy when he saw the *Kenia* come up about a quarter of a mile off.

The *Kenia* came up in accordance with orders given by his owners as the result of a telephone conversation which was initiated at about 10.5 a.m., and as the result of his asking for orders, but strictly in accordance with the arrangement which had been made on the Saturday on the telephone. After he had telephoned about his orders, the man in the office telephoned to Bellamy's Wharf to find out whether the *Uranienborg* was shifting on Monday afternoon's tide, and her agents said she was shifting at 11 o'clock and that they had better hurry as there was not much time. That is what is said to have been said over the telephone. I have not had evidence about the other end of the conversation and I do not think really that the exact wording matters much. At any rate, the *Kenia* was going up undoubtedly as one of the two tugs which were going to perform this service.

She came up at what is admitted to be about six knots, or something between seven and eight knots over the ground, the tide being flood. There was outside the *Uranienborg* a line of buoys—a barge tier—and the *Kenia* had to make her way through those. I am quite satisfied—I am not going into the detail of this—that she came through much too fast, and as the result of her excessive speed, combined with the failure to give orders to reverse her engines in time (a failure which the master himself admits), she ran into the *Uranienborg* at approximately a four-point angle and did very severe damage. She broke her own anchor, knocked her own hawsepipe so severely that it was cracked all round and had to be taken out and replaced; she set in the side of the *Uranienborg* at a point over one of the most substantial frames no less than 4½in. and, without going into detail, did damage which showed that the blow was a very severe blow. I am quite satisfied that this was the direct result, without any interruption of any sort, of her turning out of the river through the barge tiers, as I say, at an entirely excessive speed and out of proper control. It is said that, in these circumstances, she is entirely exempt from all liability because she is covered by the towage conditions.

Perhaps just before I leave that question of her speed, I should like to say that, among the other reasons for believing that she was going much too fast, is her own master's report written on the very day, in which he says that he could not understand why he did not stop his way. He says in the box now that he was practically stopped, but in his report he said: "If I had been doubtful I would have rung my engines the second time astern, but I had no cause to, I thought, because every other time she has always done it but this time she did not." It is quite unimportant what was the particular fault or negligence or breakdown in the machinery, or whatever it may have been which caused her to fail to pull up and to be out of control. I am quite satisfied that she was going too fast and that it was her speed which caused the severity of the damage.

Now, it is said she is covered by these conditions, and the whole point is (and both sides agree) whether within the meaning of the phrasing of Clause 1 she was in collision "whilst towing." The meaning of the phrase "whilst towing" is given in Clause 1 in the following words:

"For the purpose of these conditions the phrase 'whilst towing' shall be deemed to cover the period commencing when the tug is in a position to receive orders direct from the hirer's vessel to pick up ropes or lines or when the tow rope has been passed to or by the tug, whichever is the sooner, and ending when the final orders from the hirer's vessel to cast off ropes or lines have been carried out, or the tow rope has been finally slipped and the tug is safely clear of the vessel, whichever is the later. Towing is any operation in connection with holding, pushing, pulling, or moving of the ship."

I need not pay any attention to that last sentence for the purpose of the present case, because nobody disputes that the operation if it had begun was one connected with the moving of the ship at any rate. The point is whether this period had commenced.

It is admitted (I do not want to put it on any admission, but I am clearly of opinion) that "the tug" means a tug under contract. It may be of course that the contract only begins by the acceptance of the offer of one among many tugs which are hovering round a ship, but the tug is assumed to be, I think, a tug which is there in pursuance of a contract of towage. The contract may, of course, be made at the moment when the towage is about to start, or it may be made days or weeks beforehand. The crucial words are "is in a position to receive orders direct from the hirer's vessel to pick up ropes or lines or when the tow rope has been passed to or by the tug, whichever is the sooner." Take the last words first and there ought to be no difficulty in ascertaining when that moment occurred. The rope either has or has not been passed to or by the tug. Once the rope has been passed there is to be no further room for argument as to whether the rope is taut so that the actual process of moving the ship has begun and the towing has begun.

I think those words which are the alternative to the crucial words are important in construing the crucial words, because in effect what Mr. Bateson is arguing is this: "Show that the tug was there because of a contract of towage; show that she is within reasonable hailing distance of the ship at a reasonable time in reference to the contract of towage, and the words are satisfied. Her physical position is within hail, and that is enough. She is there waiting the moment when somebody gives her the orders which she is prepared to receive. She will receive them direct because she is within hailing distance and there is no more to be said about it."

Now, I do not think that that is a reasonable interpretation. I do not think that is what the words mean. Of course, if that is the only possible meaning of the words, then even if they may appear to lead to an absurd conclusion that cannot be helped; one has to give effect to them. But I do not think that that is what is meant here. Whether you look at the alternative which I have just referred to, or whether you look at the corresponding point of time at which the towage ends, I think one is driven to the conclusion that something narrower than that is meant. I doubt myself whether the word "position" is only used in the sense of local situation. I think it involves also the conception of the tug being herself in a condition to receive and act upon the orders. But, however that may be, the orders which she is to be in a position to receive are orders to pick up ropes or

lines—not orders generally, but those specific orders—and I think that that must have some reference to the intention of those on board the ship to give those orders, and to the readiness of those on board the tug to receive such orders.

On the facts of this case I should be prepared to hold that, even if one were bound to hold that all that matters is the physical position of the tug, I do not think that the moment had arrived. I have already said that there was nobody on board the *Uranienborg* who, at the moment of the *Kenia's* arrival, was even thinking or preparing to give orders to take or receive, as between the ship and the tug, the ropes or lines. They had not got to that stage, they were not thinking of it. I have seen the officer whose duty it would be to superintend those operations. He had not got anybody standing by; they had not finished discharging; he had already told the other tug that neither the pilot nor the boatmen had come; and the other tug, as I have already said, was lying off some 300ft. away, at a buoy. Mr. Bateson says that she plainly, quite plainly, was in a position to receive orders to pick up ropes or lines—she was, in the sense that she was within 300ft. and within hailing distance, but in no other sense. She knew that the time was not ripe and was acting accordingly, nor is there a shadow or a tittle of evidence from the *Kenia* that anybody, from the master downwards, on board the *Kenia* was even thinking in terms of ropes and lines at the material time. Certainly, they had come there in order to be available for the towing whenever the towing began. At the moment that this collision occurred they were not thinking of—they had not begun to expect—an order to pick up ropes or lines at all. On the contrary, all that the master was thinking of at that moment was correcting his own errors in going through those barge tiers much too fast and trying to avoid this collision. I find it, whether as a matter of construction of the conditions or on the facts of this case, quite impossible to hold that at the critical moment this tug was in a position to receive orders with regard to ropes or lines.

But Mr. Bateson says that on his argument that does not matter. That may be so at that moment, but I have got to look at the very latest to the moment when she turned out of the river (and possibly earlier because she was within hailing distance before) but at any rate at the moment when she turned out of the river between these buoys in the barge roads, and at that moment she was in a position to receive orders. Therefore the towage had begun and therefore the fact that at some later moment she is not thinking about ropes or lines at all, she is only thinking of correcting her own carelessness, is irrelevant. The towing has begun, and the moment has not come when the tow ropes have been finally slipped and the tug is safely clear—therefore she is subject to all the exemptions.

I think that is simply making nonsense of these conditions. I think that the least that is involved in arriving at the moment when the period commences is that the tug herself, at any rate, should be able to show that she was in a position to receive and, having received, to comply with these orders in connection with ropes or lines at the material time. I am quite satisfied that that period had not come in the case of this tug *Kenia*, but I think also that this phrase has got to be read as if there were two parties involved in the matter and that until the reasonable moment has come at which orders may be expected to be given from the ship the tug cannot be said to be in a position to receive orders from the ship; but whichever way you look at it—even if you look at it, as I say, from the point of view of the tug alone—I am satisfied that on the facts of this case she was not in a position to receive orders and that the towing had not begun. That being so, I dismiss the claim with costs. That leaves the original admission, having the effect of a judgment of the Court, where it is.

Solicitors for the plaintiffs, *Godfrey Warr* and *Co*.

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

November 26 *and* 27, 1935.

(Before Sir BOYD MERRIMAN, P., assisted by Trinity Masters.)

The Tower Bridge. (*a*)

Salvage — Vessel going to assistance of other ship in icefield in response S O S —Damaged in so doing—Request to stand by not complied with — Advice given by wireless as to best course to clear icefield—Advice acknowledged and successfully acted upon—Whether services amounted to salvage—Merchant Shipping (Safety and Load Line Conventions) Act, 1932 (22 *&* 23 *Geo.* 5, *c.* 9), *s.* 26, *sub-ss.* (1) *and* (7)—*Maritime Conventions Act*, 1911 (1 *&* 2 *Geo.* 5, *c.* 57), *s.* 6, *sub-s.* (2)—*Award.*

Whilst bound for St. John, N.B., and steering a south-west course, the defendants' steamship T. B. *ran into an extensive icefield in the neighbourhood of the coast of Labrador on the 8th April*, 1935. *In order to work her way out, she altered her course to south-east; but, having got deeper into the ice for some fifty or sixty miles, she found herself, on the morning of the 9th April, surrounded by pack ice, and so seriously damaged as to be thought in danger of sinking. An S O S message sent out was picked up by the plaintiffs' steamship* N., *then thirty miles away in clear water to the southward and eastward, there being no other vessel nearer than 200 miles. The* N., *which was also making for St. John, had previously encountered the icefield, but had found her way out of it without undue difficulty. On receiving the S O S message from the* T. B., *the* N. *turned back to go to her assistance, and remained in wireless communication with her until about* 12.30 *p.m. when, having at considerable risk re-entered the icefield, she arrived at a position about seven miles from the* T. B. *and within sighting distance of her. The* T. B. *requested to* N. *to stand by and see her safely into St. John, but the master of the* N., *having ascertained after a discussion by wireless with the* T. B., *that that vessel was now in a clear patch of water and that the situation was not as dangerous as had at first been feared, sent the following message to the* T. B.: "*Recommend you steer due east to clear water about twelve miles which I am doing, and then south to about* 46 N. 47 W." *The* T. B. *replied as follows:* "*Will carry out course you*

(*a*) Reported by J. A. PETRIE, Esq., Barrister-at-Law.

suggest." The T. B. *then altered course, and following the course taken by the* N., *got clear of the icefield.*

The plaintiffs' case was that the defendants had acted upon their advice, and that thereby the T. B. *was able to and did reach clear water by travelling twelve miles only through the ice, whereas had she continued on her southerly course she would have had to plough her way for fifty or sixty miles before emerging from the icefield. In performing the said service, the* N. *sustained damage which the plaintiffs alleged amounted to* 4000*l.*

Under sect. 26, *sub-sect.* (1), *of the Merchant Shipping (Safety and Load Line Conventions) Act,* 1932: "*the master of a British ship registered in the United Kingdom on receiving on his ship a signal of distress by wireless telegraphy from any other ship shall proceed with all speed to the assistance of the persons in distress unless he is unable, or in the special circumstances of the case considers it unreasonable or unnecessary, to do so . . .*" *and by sub-sect.* (7) *it is provided that* "*Nothing in this section shall affect the provisions of sect.* 6 *of the Maritime Conventions Act,* 1911, *and compliance by the master of a ship with the provisions of this section shall not affect his right, or the right of any other person, to salvage.*" *The plaintiffs claimed salvage remuneration.*

The defendants denied that any salvage services had been rendered by the N., *which had done no more than perform a statutory duty imposed upon vessels picking up an S O S message by the Merchant Shipping (Safety and Load Line Conventions) Act,* 1932; *that the damage sustained by the* N. *was incurred whilst performing the said duty; that the only assistance requested by the* T. B. *was that the* N. *should stand by, and that the* N. *had failed to render that assistance; that when the* N. *advised the* T. B. *to alter course to the eastward to clear the icefield those on board the* T. B. *were already aware that the course recommended by the* N. *was the best for them to pursue.*

The total value of the N., *including cargo, was, according to the plaintiffs' evidence,* 225,566*l. The value of the* T. B. *was agreed at* 10,000*l.*

Held, (1) *that, in considering whether there was or was not a salvage service, the whole of the circumstances must be taken into consideration; each separate stage could not be isolated and regarded by itself.* (2) *That without quantifying the moral support afforded to the* T. B. *by the knowledge that the* N. *was making her way towards her through the ice at a time when the* T. B. *was in the gravest danger, the advice given by the* N., *and acted upon by the* T. B. *with the result that she reached clear water within twelve miles, was a very material service.* (3) *That considering all the circumstances, including the danger to the salvors, the great responsibility taken by the captain of the* N. *in going back into the icefield and the serious damage which the* N., *in fact, sustained thereby, the proper award was* 2000*l., of which* 1500*l. would go to the owners of the* N. *in view of the damage the ship had sustained,* 200*l. to the master and* 300*l. to the crew.*

SALVAGE.

This was a claim brought by the Warren Line Liverpool) Limited, owners of the steamship *Newfoundland* (6791 tons gross), her master and crew, against the Tower Steamship Company Limited, owners of the steamship *Tower Bridge* (5161 tons gross), her cargo and freight for remuneration for salvage services which the plaintiffs alleged they rendered to the defendants on the 9th April, 1935, in the North Atlantic.

The facts and the contentions of counsel fully appear from the judgment of the learned President.

F. A. Sellers, K.C. and *E. W. Brightman* for the plaintiffs.

K. S. Carpmael, K.C. and *H. G. Willmer* for the defendants.

Sir Boyd Merriman, P.—This is a salvage claim by the owners, master, and crew of the steamship *Newfoundland* against the owners of the steamship *Tower Bridge*. The services which it is alleged were rendered were given on the 9th April, 1935. in these circumstances. Both ships were westward bound in the North Atlantic and both were making for St. John, N.B. There was a very extensive icefield in the neighbourhood of the Labrador coast, and the *Tower Bridge* had got into this field. steering in a south-west direction, in the afternoon or evening of the 8th April. She had been on her course possibly, I think, for a great deal longer than otherwise would have been the case owing to the illness of her master. Be that as it may, she had gone deeper and deeper into this icefield, with the result that by the morning of the 9th April she was surrounded by heavy pack ice and was in a very dangerous position. Her No. 1 hold was making water, which could not be kept down. She had a 10 degree list to port and, generally speaking, was in a very bad way.

It is not necessary to go into any detail about this condition. The condition in the early morning of the 9th April is set out in a protest which her chief officer, acting as master, says correctly represents the situation. He said that at 6.45 a.m. water was entering No. 1 hold rapidly through a hole in the starboard side. "Commenced pumping ballast out of forepeak and No. 1 tanks." At 7.35 a.m. he gets the ship's position. "At 9.10 the ship listed 10 degrees to port, closely surrounded by pack ice and large growlers. Forehold rapidly filling. No. 2 bilges full. Sent S O S message, as vessel appeared to be in danger of sinking."

As it happened, the only ship at all near was the *Newfoundland*. No other vessel was within 200 miles or more, so that for all practical purposes she was the only vessel which could render assistance. The *Newfoundland* also had struck this icefield, and her captain, realising what the situation was, had contrived to get out of the icefield and was heading due south in clear water to the east of the field, and intended to continue on a southerly course until he was satisfied that he had got round the south-east corner of this icefield, where, of course, he would have turned west again and right for St. John.

In response to this S O S, and in acknowledgment of his duty as a seaman and his duty as a citizen under the statute of 1932—which, after all, does

not change the law or practice of seamen in answering calls of urgency; it may change the law, inasmuch as it becomes a statute, but it certainly does not change the long-established practice—he at once put his vessel into the icefield and, seeing that what he had received was an S O S and not a mere ordinary signal of distress, he regarded himself as under a duty to go as hard as he could put his ship through this icefield to the assistance of the *Tower Bridge*.

I am not going into the detail of wireless messages received and exchanged between these two ships, but it is quite impossible to ignore that the one vessel was eagerly expecting, and the other vessel was doing her very utmost to render, assistance which was most urgently required.

The *Newfoundland* was a valuable ship. Figures are given in the statement of claim that have not been challenged. She had recently undergone repairs and a thorough overhaul and, it is said, though it must not be taken that I assume these figures are absolutely correct, but it is sufficient to say that it is pleaded—that her own value was 115,000*l.* odd and, taken with her freight, passage money, and so forth and the value of the cargo, 225,000*l.* odd, so that it was a big thing for her master to decide to drive her as hard as he could, crushing her way through this icefield in the hope of being in time to save property certainly and, it might be, even life, because, to use his own phrase, he was not sure that the ship might not be down and they might not be on the ice themselves.

Mr. Carpmael says that all that must be disregarded, because it was his mere duty to do it under the statute. If all that he does is in response to the statute and nothing results—he never in fact renders any salvage service—I should agree with that argument, but I do not think that would be because he obeyed the statute but because there was no salvage service rendered. The statute itself, the Merchant Shipping Act, 1932, says, to quote the words of sect. 26, sub-sect. (7): "Nothing in this section shall affect the provisions of sect. 6 of the Maritime Conventions Act, 1911 [which impose upon the master or person in charge of the vessel the obligation 'so far as he can do so without serious danger to his own vessel or her cargo and passengers (if any) to render assistance to every person . . . he has found at sea in danger of being lost'], and compliance by the master of a ship with the provisions of this section shall not affect his right, or the right of any other person, to salvage."

But, as things turned out, the *Tower Bridge* was not in quite so desperate a situation as she had been, or as it was thought she was, and she gradually began to get things under control. When eventually somewhere between 12 and 1—perhaps nearer 1 o'clock than 12, though the exact time has never been precisely fixed—having worked towards her, edging here and there through the ice on a series of zig-zag courses, the *Newfoundland* came in sight, the *Tower Bridge* was found in comparatively clear water. At that time, again without reading the messages in detail, the request which was made to the *Newfoundland*, and the only request, was that she should stand by and see the *Tower Bridge* into St. John.

It is quite clear—Mr. Carpmael does not dispute it—that if in response to that request the *Newfoundland* had stood by, a very definite and important salvage service would have been rendered, and it would have been impossible to dispute it. But the master of the *Newfoundland* took the view, after discussion over the wireless with the *Tower Bridge* and having seen her, that the situation was not such as to require him to stand by, and he made it plain that he was not prepared to stand by indefinitely. Therefore that element, the element of stand ng by for two or three days from that time, which would otherwise have been involved, disappears from the case, and Mr. Carpmael says that is the beginning and end of the matter—that that request having been made and not complied with (it was not insisted on), there could not be any salvage service at all and there is none.

That is the point which has given me the most trouble in this case. I do not take that view. I think there was a perfectly definite service here, and I think that you have, in considering whether there was a service or not, to take the whole of the circumstances into consideration. I do not think that you can isolate each separate stage and say, "This must be regarded by itself, and that must be regarded by itself." One has to look at the thing as a whole and see whether there was a salvage service. Of course, it goes without saying that one has to be able to say that it was one particular thing, or that thing coupled with others, which was the service in question.

When these two ships were in contact, visible to each other—though as a matter of fact those on board the *Tower Bridge* never saw the *Newfoundland*, a discrepancy which is quite simply explained by the fact that the *Newfoundland* had a much more exact direction-finding equipment, and knew exactly where to look for the *Tower Bridge*—when the moment had come when it was decided that the *Newfoundland* was not going to stand by to see the *Tower Bridge* into St. John, these messages were exchanged from the *Newfoundland* to the *Tower Bridge*—two consecutive messages came at intervals of five minutes: "As you have ship well under control, I consider there is no necessity to stand by you. Suggest you ask patrol boat to accompany you. Reply immediately whether." Before the reply came the following further message was sent: "Recommend you steer due east to clear water, about twelve miles, which I am doing, and then south to about 46 N. 47 W." To which the answer was: "Will carry out course you suggest."

Observe: This gave perfectly definite information which was based on the experience of the *Newfoundland* herself. It gave the information that from the point where this ship was she could get into clear water in twelve miles by going in an easterly direction. That is what the *Newfoundland* was able to tell her, precisely because she had come through this twelve miles from the clear water to her assistance and had been engaged in going on a clear course south in the clear water at the time when she received the S O S.

Now, the chief officer, giving evidence before me, said: "Yes, I got that information and I acknowledged it in those terms, but that was out of the merest politeness. After all, that is exactly what I was going to do in any case. And I was merely thanking him for something which I knew already." I do not accept that. I am quite satisfied that that is not the case. Of these two ships, one (three or four hours before) had been in this clear water and had gone, as I have already said, through this twelve miles of ice to assist the other. The other had been blundering about in the ice for something like twenty-four hours, and I do not accept that he knew perfectly well which was the shortest way to clear water. On the contrary, his own log showed that he did not.

I am not going to examine in meticulous detail entries of courses—which are only at best occasional

notings-down of a series of courses, when he himself admits he was zig-zagging here and there—but this, I think, is indisputable, that having gone into this ice on a generally south-westerly course, and having become embedded in pack ice, he had then tried to work his way out by going through a right-about and going out on a south-easterly course, more or less. He had proceeded in that sort of direction for some fifty or sixty miles at the time when he sent this S O S, but he did not get out of the ice. He sends this S O S, and at that time he sends out to the world that he is trying to get free by going not in an easterly but in a southerly direction. He advertises that he is proceeding on a course of south true.

I come to the conclusion that so far from knowing all about getting out of the ice to the east, he thought that, having been going southerly and easterly for some time and not getting out of the ice, he would be more likely to strike the southern edge of the ice than the eastern. He, therefore, tried to get out that way, and, speaking generally, that was the way he had been working all the morning until the *Newfoundland* actually came up to him. When he tells me that this was merely a polite acknowledgment of information with which he was perfectly acquainted, I see what happened after it and I find recorded in his log that in fact he turned through 60 degrees, and in fact, though not visually, followed the *Newfoundland* out of the icefield.

I am now going to read the last four messages which passed between these two ships. At 8.2 p.m. the master of the *Newfoundland* sent this message to the *Tower Bridge*: "We are now clear of the icefield and steering S. true 47.08 N. 46.30 W." The answer said: "Heading towards your position making slow progress. Propeller damaged. Vessel down by head. Bulkhead between forward holds bulging. Pumps keeping down water in hold. Hope to keep going." At 10.5 p.m. there was a further message from the *Newfoundland*: "Suggest you keep in constant touch with ice patrol, giving your movements. Apart from three icebergs, well out of our track, we have had clear water since our last message." At 10.44 p.m. the last reply of the *Tower Bridge* is sent: "Now clearing ice. Thanks for messages. Will inform patrol."

I think that that not merely justifies me in finding, but compels me, to find that, so far from this being a polite exchange of compliments, what was actually happening was that the *Tower Bridge* was following the *Newfoundland* out into clear water and did by that means reach it.

I am advised by those who are qualified to advise me in this matter that there is not the slightest doubt that a very material service was rendered to the *Tower Bridge* by the *Newfoundland*. It is not necessary to define the precise moment at which the service began, but I think the substance of the matter is—although I am not prepared to quantify the moral support afforded her—that the only available ship in the North Atlantic came at a time when the salved vessel thought she was in the very greatest possible danger, came ploughing her way through the ice to her assistance, and that must have afforded some help and encouragement to those on board a vessel which was believed to be sinking. The substance of the thing is that having got there, and having been asked to go there, I am satisfied that the *Newfoundland* did give most valuable assistance in showing the *Tower Bridge* how to get out of this icefield, because, in fact, if the *Tower Bridge* had been left to herself, and had gone on to the southward, as she was doing at the time when this S O S was sent, she had got something like fifty or sixty miles of icefield ahead of her instead of twelve miles to the eastward, and nobody can tell what might have been the result of her trying to blunder through that unaided.

I do not think it is in the least to the purpose to say that at the moment when she advised the *Tower Bridge* to go to the east, the *Newfoundland* herself did not know how many miles the ice extended to the south. I do not think that is the point. The point is that they knew there was a short way into the clear water by going to the east, and that having got clear of the ice to the east, they could get round it to the south, whereas in fact, as I say, if she had stayed on the general course which she was trying to make before this advice was given and before the *Newfoundland* came up, the *Tower Bridge* would have had to encounter some sixty miles of icefield before she got clear. That, in her then damaged condition, would have been a very dangerous state of things indeed.

Under those circumstances I have to make up my mind what is the proper award to make. I have looked at the page in Kennedy's, L.J. book [Law of Civil Salvage], p. 133, where is set out the various heads of things to be taken into account in awarding salvage. As regards the ship salved, there is no doubt that there was considerable danger both to human life and property, and there is no doubt what the salved value is, because that is agreed at 10,000*l.* As regards the salvors, I think that there was danger to them, too. I think the captain was asked to take a very great responsibility, and did take a very great responsibility, in going back into that icefield in the way in which he did. In fact they damaged their propeller very considerably, and if they had disabled themselves their situation would have been very difficult and awkward. They might have been holed just as the other ship was; they did undoubtedly take some actual risk.

I think that the conduct and skill of the master of the *Newfoundland* were most praiseworthy. I am not going to say whether he could have exonerated himself from obeying this signal, but he never hesitated for a second, and Mr. Carpmael most justly has said that he could not dispute for a moment that his conduct was entirely praiseworthy. He was employing a valuable ship. As I have said, he was exposing it to danger, and in fact the danger has resulted in a definite expenditure in replacing damage which may or may not amount to the 4000*l.* which is actually claimed. The only thing that can be said, it seems to me, and it is an important thing, is that the reward would obviously have had to be very much greater if they had expended the time and labour which would have been involved in standing by until the *Tower Bridge* actually got into St. John. That they did not do.

That being so, as I have said, that element of award comes out altogether. It might have amounted to another two or three days of time and labour expended. Taking one thing with another and giving the best and fairest estimate which I can make, I think that the award ought to be 2000*l.*, of which 1500*l.* goes to the owners, and of the remaining 500*l.*, 200*l.* to the master who incurred this considerable responsibility, and the remaining 300*l.* between the officers and crew, according to their ratings. The salvors will be awarded 2000*l.*, with costs.

Solicitors for the plaintiffs, *Middleton, Lewis* and *Clarke*, agents for *Middleton* and Co., Sunderland.

Solicitors for the defendants, *Constant* and *Constant*.

Supreme Court of Judicature.

COURT OF APPEAL.

October 17, 18 ; *November* 4 ; *and December* 19, 1935.

(Before Sir BOYD MERRIMAN, P., SCOTT, L.J., and SWIFT, J.)

The Beldis. (*a*)

APPEAL FROM THE COUNTY COURT OF NEWPORT, MON., SITTING IN ADMIRALTY.

Practice—Action in rem *based on arbitration award for the refund of overpaid charter hire of one of the defendants' ships—Arrest,* ad fundandam jurisdictionem, *of another ship also belonging to the defendants but unconnected with the matter out of which the cause of action arose—Admiralty jurisdiction of county court—County Courts Admiralty Jurisdiction Amendment Act,* 1869 (32 *and* 33 *Vict. c.* 51), *s.* 2, *sub-s.* (1), *and s.* 3—*Whether claim on an award is a " claim arising out of any agreement made in relation to the use of hire of any ship—Whether action* in rem *maintainable against a* res *other than that to which the cause relates—History and present position of Admiralty jurisdiction generally.*

This was an appeal from a judgment in favour of the respondents delivered by the county court judge for Monmouthshire sitting in Admiralty at Newport in an action in rem *which came before him in the following circumstances: the plaintiffs, by a charter-party entered into between themselves and the defendants, the owners of the steamship* Belfri *on the 13th July,* 1933, *had chartered that vessel from the defendants. The charter-party contained an arbitration clause in the usual terms and a dispute having arisen as to an amount which the plaintiffs claimed they had overpaid by way of hire, the matter was referred to arbitration. On the 24th January,* 1935, *the arbitrator made his award directing that the defendants should pay the amount in question to the plaintiffs with costs. The payment was not made and the plaintiffs thereupon arrested another vessel belonging to the defendants, namely the steamship* Beldis, *and by a plaint* in rem *dated the* 5*th April,* 1935, *brought an action against that vessel in the Newport County Court, in its Admiralty jurisdiction, to enforce the award. The defendants did not enter an appearance, and judgment was given against them by default. After judgment the present appellants, who were mortgagees of the steamship* Beldis, *intervened and challenged the plaintiffs' right to proceed against that ship. They claimed that the arrest of the steamship* Beldis *was illegal, that the proceedings were wrongly taken* in rem, *and prayed that the judgment signed in the action in their absence might be set aside. An issue for submission to the county court judge was agreed between the plaintiffs and the interveners in the following terms : " Whether the plaintiffs' action* in rem *against the steamship* Beldis *is maintainable in view of the fact that the plaintiffs' claim in this action arose out of a charter-party of the steamship* Belfri *being a ship belonging to the same owners." On this point, which was the only one argued before him, the county court judge, basing his decision upon the following passage in the judgment of Fry, L.J. in the Court of Appeal in* The Heinrich Björn (1885, 5 *Asp. Mar. Law Cas.* 391 ; 52 *L. T. Rep.* 560 ; 10 *Prob. Div. p.* 44, at *p.* 54), *" the arrest need not be of the ship in question, but may be of any property of the defendant within the realm," decided that the action was maintainable and gave judgment for the plaintiff with costs. The interveners appealed.*

In the course of the argument in the Court of Appeal, the court directed the attention of counsel to the question, which had not been argued before the county court judge, whether the issue which had been agreed between the parties was not based on a misconception inasmuch as it asserted as a fact that the plaintiffs' claim in the action arose out of a charter-party, whereas it appeared to have arisen out of the arbitration award. The Admiralty jurisdiction of the county court is governed by the County Courts Admiralty Jurisdiction Amendment Act, 1869, *s.* 2, *sub-s.* (1) *of which provides that any county court appointed to have Admiralty jurisdiction " shall have jurisdiction . . . to try . . . any claim arising out of any agreement made in relation to the use or hire of any ship."*

Held, that notwithstanding that the submission to arbitration was contained in the arbitration clause in a charter-party, the claim did not arise out of the charter-party at all but was an ordinary common law claim for the payment of money under an award ; that as it did not arise out of any of the matters set out in sect. 2, *sub-sect.* (1), *of the Act of* 1869 *as conferring Admiralty jurisdiction on county courts, the county court judge had no jurisdiction to try the issue submitted to him, although its terms had been agreed, and that there was consequently no jurisdiction in the Court of Appeal to adjudicate upon it.*

Held, further, as to the validity of the proceedings against the Beldis *(in case the above interpretation of sect.* 2, *sub-sect.* (1), *of the Act of* 1869 *should be held by the House of Lords to be wrong), that, notwithstanding the dictum of Fry, L.J. in the* Heinrich Björn*—which, in the opinion of the court was* obiter, *not binding on the Court of Appeal and erroneous—upon a correct understanding of the authorities and a proper construction of the various statutes dealing with Admiralty jurisdiction, an action* in rem *cannot be brought either in the Admiralty Court or in a county court against any property*

(*a*) Reported by J. A. PETRIE, Esq., Barrister-at-Law.

of the defendant which is unconnected with the res *in relation to which the cause of action arose, and that the appeal must be allowed, the appellants to have their costs in the Court of Appeal and in the court below.*

Appeal from a decision of the county court judge sitting at Newport, Mon., in Admiralty.

The plaintiffs in the original action (the present respondents) were the Anglo-Soviet Shipping Company and had chartered from the defendants in the original action the steamship *Belfri* upon the terms of a charter-party dated the 13th July, 1933. A dispute arose in regard to the charter hire, in respect of part of which the plaintiffs claimed a refund. The matter was referred to arbitration under the arbitration clause in the charter, and on the 24th January, 1935, an award was made in favour of the plaintiffs with costs. The defendants failed to make the payment provided by the award, and the respondents thereupon arrested another vessel belonging to the defendants, the steamship *Beldis*, and sued the defendants *in rem* to enforce the award. The defendants failed to appear, and judgment was entered by default in favour of the plaintiffs for the amount claimed with costs. After judgment, Messrs. Lambert Brothers Limited (the present appellants), who held a mortgage on the *Beldis*, obtained leave to intervene, and it was agreed between them and the plaintiffs that one issue only should be submitted to the county court judge, namely, whether the action *in rem* against the *Beldis* was maintainable. The county court judge decided that it was and gave judgment for the plaintiffs with costs. The interveners appealed.

At an early stage of the hearing the Court of Appeal raised the question whether, apart from the point for decision in the agreed issue, they were not also called upon to decide whether a claim on an award was a "claim arising out of an agreement made in relation to the use or hire of a ship" within the meaning of sect. 2, sub-sect. (1), of the County Courts Admiralty Jurisdiction Amendment Act, 1869, and was therefore a cause which could be prosecuted *in rem*. On this point the respondents contended that, although the charter-party related to the steamship *Belfri* and not to the steamship *Beldis*, the action between the plaintiffs and the defendants, being for money due under an arbitration award in respect of a charter-party, was a claim arising out of an agreement for the use or hire of a ship within the meaning of sect. 2, sub-sect. (1), of the 1869 Act. The words "arising out of" gave a very wide scope to the section. The statute enlarged the jurisdiction of the county courts and, according to the general rule, it ought, in the words of Sir Montague Smith in *The Pieve Superiore* (2 Asp. Mar. Law Cas., pp. 162, 319; 1874, 30 L. T. Rep. 887; L. Rep. 5 P. C. 482, at 492), "to be construed liberally so as to afford the utmost relief which the fair meaning of the language will allow." Counsel for the appellants was not called upon upon this point.

As to the question raised in the issue submitted to the county court judge, it was contended by counsel for the appellants that there had been no reported instance, either in the High Court or in the county court since these courts were given Admiralty jurisdiction, of the arrest, in order to found an action *in rem*, of any property of a defendant other than the *res* in respect of which the cause of action arose. He referred to *The Clara* (1855, Swa. 1, per Dr. Lushington at p. 3), *The Dictator* (7 Asp. Mar. Law Cas. 251; 67 L. T. Rep. 563; (1892) P. 304), *The Ripon City* (8 Asp. Mar. Law Cas., pp. 304, 391; 1897, P. 226, per Jeune, J. at p. 240), *The Bold Buccleugh* (1851, 7 Moo. P. C. 267), *The Gemma* (8 Asp. Mar. Law Cas. 585; 81 L. T. Rep. 379; (1899) P. 285), *The Joannis Vattis* (No. 2) (16 Asp. Mar. Law Cas. 13; 127 L. T. Rep. 494; (1922) P. 213), and *The Sheaf Steamship Company* v. *Compania Transmediterranea*, 1930, 36 Ll. L. R. 197), &c.

On behalf of the respondents, it was argued that the decision of the county court judge based on the dictum in *The Heinrich Björn* (*sup.*) was entirely reasonable. Even if (contrary to the respondents' contention) the right of arrest in an action *in rem* is limited in the High Court to the actual *res*, that need not necessarily apply to the county court. It is purely a matter of the construction of sects. 2 and 3 of the County Courts Admiralty Jurisdiction Amendment Act, 1869, and it may be that in this case the county court has wider jurisdiction than the High Court, as it undoubtedly has in charter-party cases (see *The Alina*, 1880, 5 Ex. Div. 227). Proceedings *in rem* may be instituted both against the property subject to the maritime lien, where there is such a lien, and, where there is no maritime lien, against the property of the defendant within the jurisdiction, for the enforcement of rights against the person, as in necessaries cases. In the present case, the matter in issue was a debt of the shipowner and it was immaterial which property of the debtor was proceeded against. The dictum in *The Heinrich Björn* was not *obiter* and was not disapproved by the House of Lords. It was also quoted with approval by the author of Carver's Carriage of Goods by Sea, in the argument which he propounded to the House of Lords in *The Zeta* (3 Asp. Mar. Law Cas. 73; 69 L. T. Rep. 630; (1893) A. C. 468, at 475).

The further contentions of counsel appear from the judgments, which also contain an exhaustive review of the history of Admiralty jurisdiction both before and since the passing of the Admiralty Courts Act, 1840.

Owen Bateson for the appellants.

A. T. Miller, K.C. and *Norman Richards* for the respondents.

Sir Boyd Merriman, P.—This is an appeal from the judgment of His Honour Judge Thomas, sitting in Admiralty in the Newport County Court. On the 5th April, 1935, proceedings *in rem* were taken in that court by the Anglo-Soviet Shipping Company Limited against the owners of the steamship *Beldis*, then lying in Newport Docks, for the sum of 27*l*. 4*s*. 6*d*. payable by the defendants to the plaintiffs under an award dated the 24th January, 1935, made in a certain arbitration held by virtue of a clause in a charter-party dated the 13th July, 1933, between the defendants of the one part and the agents of the plaintiffs, for and on behalf of the plaintiffs, of the other part. The owners of the *Beldis* failed to appear within the four clear days specified in the summons, and accordingly on the 10th April, 1935, judgment was entered against them by default. On the 24th April, 1935, Messrs. Lambert Brothers Limited, the appellants in this appeal, filed an affidavit showing that by virtue of a mortgage bond dated the 23rd April, 1929, they were mortgagees of the steamship *Beldis* and that the award upon which the plaintiffs were suing related to a claim arising under a charter-party which did not relate to the steamship *Beldis* at all, but to another ship of the same owners named the *Belfri*. It will be observed that the particulars of the plaintiffs'

claim, to which I have already referred, did not specify the ship in respect of which the charter-party of the 13th July, 1933, was made, but it is common ground that in fact this charter-party related to the steamship *Belfri* and not to the *Beldis*, and it was upon that basis that the appellants were permitted to intervene in the suit.

By agreement an issue was submitted to the court in the following terms:

"We, the plaintiffs and the interveners in the above-named action, herewith submit the following sole issue to be tried by this honourable court, pleadings being waived:

"Whether the plaintiffs' action *in rem* against the steamship *Beldis* is maintainable in view of the fact that the plaintiffs' claim in this action arose out of a charter-party of the steamship *Belfri*, being a ship belonging to the same owners.

"The said parties agree that in the event of the question raised in this issue being answered in the affirmative, there shall be judgment for the plaintiffs with costs, and in the event of the question raised in this issue being answered in the negative, there shall be judgment for the interveners with costs."

The issue, therefore, raised the important question whether an action *in rem* in a county court having Admiralty jurisdiction could be based upon the arrest of property of the defendant owners other than that in respect of which the cause of action arose. This was the sole point argued before the county court judge, who decided that an action *in rem* against the steamship *Beldis* was maintainable.

The argument in this court proceeded on the same lines. In the course of the argument, however, we directed attention to the question whether the issue was not based on a misconception, inasmuch as it asserted as a fact that the plaintiffs' claim in the action arose out of a charter-party, whereas the plaintiffs' cause of action appeared not to be upon the charter-party at all but upon an award, although the submission to arbitration was to be found in the arbitration clause of a charter-party.

Having regard to the fact that the parties had agreed upon the framing of the issue, neither Mr. Miller nor Mr. Bateson betrayed any marked enthusiasm for this point, though they both recognised that no agreement of the parties could give this court jurisdiction to deal with a point, however interesting and important, which did not arise upon the actual facts of the case.

Mr. Miller, however, argued that if this court had no jurisdiction to deal with the appeal, the plaintiffs were entitled to hold the judgment in their favour by virtue of the express agreement in the issue. This argument appears to me to be quite untenable. If the truth of the matter is that the plaintiffs' cause of action is nothing but a common law claim upon an award, it would be impossible, nor has Mr. Miller attempted to contend that the Admiralty process *in rem* would be available whether the property against which the action was directed was or was not the very thing in respect of which the cause of action arose. But the county court judge purported to be dealing, as a judge, with an Admiralty action *in rem*, and it seems to me to be quite impossible to hold, if the foundation of that jurisdiction was lacking, that he unconsciously assumed the burden of a private arbitration between the plaintiffs and the interveners. I am of opinion, for reasons which I will proceed to give, that this point is fatal to the jurisdiction of the county court judge, and consequently of this court, notwithstanding the agreed wording of the issue. But in case I am mistaken in this view, and as the validity of the arrest is at the root of the proceedings and raises a point of great importance which has been very well argued by counsel on each side, I propose also to state my reasons for thinking that the judgment of the county court judge cannot in any event be supported. Our decision on this point will also have an important bearing on the question of costs.

Now, the importance of ascertaining whether the plaintiffs' claim in the action did or did not, in the words of the issue, "arise out of a charter-party of the steamship *Belfri*, being a ship belonging to the same owners as the steamship *Beldis*," will be seen upon a consideration of one of the statutes on which the jurisdiction of the county court in Admiralty is founded. By sect. 2 of the County Courts Admiralty Jurisdiction Amendment Act, 1869, it is enacted as follows:—

"Any county court appointed or to be appointed to have Admiralty jurisdiction shall have jurisdiction, and all powers and authorities relating thereto, to try and determine the following causes: (1) As to any claim arising out of any agreement made in relation to the use or hire of any ship . . . provided the amount claimed does not exceed £300."

And by sect. 3:

"The jurisdiction conferred by this Act and by the County Courts Admiralty Jurisdiction Act, 1868, may be exercised either by proceedings *in rem* or by proceedings *in personam*."

Mr. Miller insisted, and the argument is valid whether it tells for or against him, that the jurisdiction of a county court is defined for the present purpose by this statute. It is not suggested that the claim is covered by any other words in the section. Unless, therefore, it can be shown that the plaintiffs' claim arose out of an agreement made in relation to the use or hire of a ship, it cannot be the subject of an Admiralty action *in rem* in the county court.

There was in fact no evidence before the county court judge as to the nature of the dispute arising under the charter-party of the *Belfri*, but the arbitrator's award has been put in before us and I am prepared to assume that both the claim on which he gave his award in favour of the plaintiffs, and the counterclaim which he dismissed, arose in respect of matters relating to the use or hire of the *Belfri* under the charter-party. In other words, I am prepared to assume that, if those same matters had been the actual subject of the litigation before the county court judge, *The Alina* (5 Ex. Div. 227) would have been decisive to show that he had jurisdiction in Admiralty.

But in my opinion the claim in this action was not based upon that foundation at all. It was an action upon the award. The award does not in fact show upon its face what was the nature of the claim made by the plaintiffs; nor is there any reason why it should do so, though incidentally it happens to show the nature of the counterclaim, which was dismissed. The particulars of the claim contain no reference to the nature of the dispute or disputes arising under the charter-party. This is perfectly correct, because it is no part of the cause of action upon an award to show what was the nature of the dispute. All that the plaintiff has to prove is that certain matters in dispute have been submitted to an arbitrator and that he has made his award in the plaintiff's favour.

As a matter of pleading it is unnecessary and, as I think, irregular to specify the nature of the dispute: see Bullen and Leake, Precedents of Pleadings, 3rd edit., pp. 71–74. The modern edition of that classic follows the same precedent: see 9th edit., pp. 86–89. Quite plainly the cause of action is founded, in the summons in this case, upon the award itself and has no relation to the original dispute which gave rise to the arbitration.

That being so, I should not be prepared to hold, even if the matter were free from authority, that a claim upon an award held under the arbitration clause in a charter-party is a claim arising out of any agreement made in relation to the use or hire of a ship. I think that it is a common law claim upon an award and nothing else. It may be that, as the defendants are out of the jurisdiction, this means that the award is difficult of enforcement, whether by action or by proceedings under sect. 12 of the Arbitration Act; but that circumstance affords no ground for bringing an Admiralty action *in rem* in respect of a common law claim.

This view of the matter is supported, even if it is not concluded, by the decision of the Court of Appeal in *Reg.* v. *Judge of the City of London Court* (7 Asp. Mar. Law Cas. 140; 66 L. T. Rep. 135; (1892) 1 Q. B. 273). This case, which is also of great importance upon the other point, decided that no greater jurisdiction, except with regard to charter-parties, was conferred upon county courts by the County Courts Admiralty Jurisdiction Acts, 1868 and 1869, than that which was possessed by the Admiralty Court itself. The point at issue in that case was whether an Admiralty action lay in respect of the negligence of a pilot. There could be no question but that a common law action would lie (see per Lord Esher, M.R., at p. 286 of (1892) 1 Q. B.); but the claim in such an action would then have been limited to 50*l.*, whereas if the Admiralty jurisdiction was available, the limit was 300*l.* There would, of course, as was pointed out in the judgments, be other distinctions between the two jurisdictions resulting from the difference between the Admiralty and common law doctrines as to the distribution of blame. The plaintiff relied on the words "and also as to any claim in tort in respect of goods carried in any ship," which are also contained in sub-sect. (1) of sect. 2 of the Act of 1869, part of which I have already quoted. In his judgment on p. 291, Lord Esher, M.R., makes it quite clear that he was prepared to hold that the Admiralty jurisdiction of a county court extended to a claim upon a charter-party only because he was bound by *The Alina* (*sup.*), so to hold; but he said that he would follow that case so far as it actually went, but not one inch farther. With this exception the court decided that the Admiralty jurisdiction of a county court was co-extensive with that of the Admiralty Court itself. That being the inch to which plaintiffs in a county court are entitled, it is not difficult to imagine what Lord Esher would have said about the present attempt to take an ell. However that may be, I am not prepared to hold that a claim upon an award made under the arbitration clause of a charter-party is within the words "any claim arising out of any agreement made in relation to the use or hire of any ship."

Assuming, however, that I am wrong, and that the claim upon this award comes within the Admiralty jurisdiction of the county court, there remains the question, raised by the issue, whether the action *in rem* can be directed against property of the defendant owner other than that in respect of which the cause of action arose. I have some difficulty in understanding what, in relation to a claim upon an award, the *res* would actually be. But that may be said to be immaterial, because it is certain that the ship actually arrested, the steamship *Beldis*, could not possibly be the *res* connected with the cause of action.

The learned county court judge was invited to decide this issue upon a passage in the judgment of the Court of Appeal in *The Heinrich Björn* (5 Asp. Mar. Law Cas. 391, 395; 52 L. T. Rep. 560; 10 Prob. Div. 44, at pp. 53 and 54). It is evident from his judgment that, having regard to his own considerable experience in Admiralty, he would probably have decided the issue the other way if he had not felt himself bound by the particular passage in the judgment in *The Heinrich Björn*. The passage is as follows:

"But how and in what manner was the new jurisdiction thus given to the Admiralty Court by the statute of 1840 to be exercised? The answer is, that it must be exercised in the manner familiar to the Court of Admiralty and to all courts regulated by the civil law, either by an arrest of the person of the defendant if within the realm, or by the arrest of any personal property of the defendant within the realm, whether the ship in question or any other chattel, or by proceedings against the real property of the defendant within the realm (*The Charkich*, 1 Asp. Mar. Law Cas. 533; L. Rep. 4 A. & E. 59, at p. 91; see also per Dr. Lushington, *The Alexander Larsen*, 1 Wm. Rob. 288, at p. 294).

"But if the material man may thus arrest the property to enforce his claim, how does his claim differ from a maritime lien? The answer is, that a maritime lien arises the moment the event occurs which creates it; the proceeding *in rem* which perfects the inchoate right relates back to the period when it first attached: 'the maritime lien travels with the thing into whosesoever possession it may come' (*The Bold Buccleugh*, 7 Moo. P. C. 267, at pp. 284 and 285); and the arrest can extend only to the ship subject to the lien. But, on the contrary, the arrest of a vessel under the statute is only one of several possible alternative proceedings *ad fundandum jurisdictionem*; no right in the ship or against the ship is created at any time before the arrest; it has no relation back to any earlier period; it is available only against the property of the person who owes the debt for necessaries; and the arrest need not be of the ship in question, but may be of any property of the defendant within the realm."

Mr. Bateson admitted that this passage was decisive against him, but argued that it was *obiter*, and that in any case it was wrong. Seeing that the decision is already fifty years old, it would be a strong thing to ask this court to differ from the statement of the law contained in the passage I have quoted, if it was, as Mr. Miller contended, an integral part of the decision itself.

It is, therefore, necessary to consider whether this passage was or was not *obiter*, and to examine the facts in that case in order to see what the point was. The claim was for necessaries, and the cardinal fact was that at the time when she was arrested the *Heinrich Björn* had been sold to parties who were complete strangers to the cause of action. Her former owner had entered into an agreement in writing in respect of the supply of the necessaries. It was attempted, unsuccessfully, to assert that this agreement was a bottomry bond; alternatively, it was argued that there was a maritime lien on the ship in respect of necessaries. If there were a maritime lien the ship would, of course, be subject to the lien even in the hands of the new owners; but it was held that there was no maritime lien for

necessaries, though it was recognised that a claim for necessaries would give a right to seize the ship for which the necessaries had been supplied in an action *in rem* against owners on whose behalf the debt had been incurred. This right, however, did not relate back so as to be available against strangers to the claim for necessaries to whom the property in the ship had passed before action brought. In other words, when once the question whether the particular agreement amounted to a bottomry bond, which, for present purposes, is irrelevant, was out of the way, the only question remaining for decision was whether the supply of necessaries gave rise to a maritime lien. If not, the arrest of the *Heinrich Björn* could not be justified, since at the material date, namely, the commencement of the action, although she was the *res* in relation to which the cause of action arose, she was not a *res* belonging to the defendant owner. It follows that it was quite unnecessary to consider whether property of the owner, other than the ship itself, was liable to arrest in an action *in rem*. The passage relied upon cannot, therefore, be regarded as a binding statement of existing law on this point, though, naturally, a statement of the law by a court, composed as that Court of Appeal was, must carry weight.

It is, however, material to notice that Fry, L.J., in the passage quoted, couples with the arrest of the ship in question, or any other chattel, the arrest of the person of the defendant, if within the realm, and proceedings against the real property of the defendant within the realm. Now, the last-known instance of the foundation of Admiralty jurisdiction by the arrest of the person was in 1780 (see the passage in Dr. Lushington's judgment in *The Clara* (Swab. 1, at p. 3) quoted below). As regards the statement that the Admiralty jurisdiction was founded by proceedings against the real property of the defendant, this appears to be open to considerable doubt, as appears from the introduction to the Third Edition of the late Mr. Roscoe's book on Admiralty Practice, p. 43, note (*y*). With this qualification as regards proceedings against the real property of the defendant, I have no doubt that the passage relied upon is an accurate statement of the practice of the old Admiralty Court in former days. As regards arrest of the person, I propose to leave the matter where Dr. Lushington left it in *The Clara*, with this further observation, that *The Clara* was tried in 1855, fifteen years after the Acts of 1840 establishing the High Court of Admiralty; that no one would know better than Dr. Lushington what was the practice prevailing in Admiralty at the time when those Acts were passed; and that it is common ground that since that decision in 1855 there is no trace of any attempt to found an Admiralty action by the arrest of the person of the defendant.

As regards the arrest of property, there can, I think, be no doubt that the old Admiralty Court asserted the right to found jurisdiction by the arrest of any property of the defendant within the jurisdiction of the Admiral. This appears quite clearly from the introduction by Mr. Marsden to the Select Pleas in the Court of Admiralty, published by the Selden Society, p. lxxi., which was relied on by Mr. Miller. The passage, of which the marginal note is "Points of law and practice; arrest," reads as follows: "The following points may be noted as to the practice of the court and the law which it administered: The ordinary mode of commencing the suit was by arrest either of the person of the defendant or of his goods. Arrest of goods was quite as frequent as arrest of the ship; and it seems to have been immaterial what the goods were, so long as they were the goods of the defendant and were within the Admiral's jurisdiction at the time of arrest. As pointed out below, the Admiral at this period asserted and exercised a jurisdiction over all public streams, rivers, and waters, whether the same were within the body of a county or not. Scarcely a trace appears of the modern doctrine of arrest being founded upon a maritime lien; the fact that goods and ships that had no connection with the cause of action, except as belonging to the defendant, were subject to arrest, points to the conclusion that arrest was mere procedure, and that its only object was to obtain security that judgment should be satisfied. The form of the article upon first decree shows that the defendant was always cited "at"—*apud*—the goods or ship arrested, and that if he did not give bail to satisfy judgment the suit proceeded against him in his absence as well as against the *res*."

At p. 40 of the Introduction to the Third Edition of Roscoe's Admiralty Practice, the learned author cites Clerke's Praxis to the effect that: "If the defendant could not be personally arrested in a civil cause by reason of being out of the kingdom, or because he had absconded, and he had any goods, wares, ship, or part of a ship, or vessel upon the sea, or within the flux and reflux of the sea, a warrant could be taken out to arrest such goods or such a ship belonging to the defendant debtor, in whose hands soever they were; and upon the attachment of such goods the debtor was cited specially in respect of the goods, and generally all others who had or pretended to have any right to, or interest in, the said goods, to appear on such a day to answer the plaintiff in a certain maritime and civil cause." He proceeds (p. 44) to show that this process was a proceeding *in rem* in the sense that, if the defendant did not appear, the suit could go on without in any way touching the person, and that by the operation of the judgment the defendant was deprived of his property in the chattel, unless he appeared, in which case the proceedings went on in the ordinary course as an action *in personam*. He attributes the development of this form of action to the prohibitions to which the old Admiralty Court was subjected by the courts of common law if it attempted to act *in personam*.

But, in my opinion, it would be most unsafe to arrive at any conclusion as to the scope of Admiralty jurisdiction at and after the passing of the Acts of 1840, without bearing in mind that the old Admiralty Court was consistently asserting claims to exercise jurisdiction which the courts of common law as consistently prohibited. Even with regard to the claim which was the subject-matter of *Reg.* v. *Judge of the City of London Court* (*sup.*), if the Select Pleas in the Court of Admiralty had been published at the time when Lord Esher gave his judgment I doubt whether he would have asserted as emphatically as he does on p. 298 of (1892) 1 Q. B. that "from the beginning of time until now not one case is to be found in the Admiralty Court of any such action being entertained against a pilot." There are, in fact, the records of two such cases in that volume. Again, on p. 293, contrasting the English and American Courts of Admiralty, the learned Master of the Rolls asserted that it was undoubted that no jurisdiction over a policy of insurance in respect of ships or goods has ever been attempted in England. But the Patent of the Admiralty judge is set out in an article by the late Lord Phillimore under the title of "The High Court of Admiralty" in the Encyclopædia Britannica, 14th Edit., Vol. 1, pp. 171–2. The patent had been, in form, substantially unchanged from Tudor times, though the significant words

"the statutes to the contrary notwithstanding" do not appear in the more modern patents. Jurisdiction in respect of policies of insurance is expressly mentioned; as is also the widest possible jurisdiction to arrest goods (see *Warner* v. *Wheler*, Marsden's Select Pleas in the Court of Admiralty, vol. 1, p. 220). But it is generally recognised that the patent was extravagant in its claims. A history of the struggle over jurisdiction is set out by Mr. Roscoe in the introduction to which I have already referred. It may be assumed that the Admiralty Court did not submit to the limitations imposed by the courts of common law without a protest. For example, a forcible expression of the point of view of the civilian is to be found in the remonstrance by Dr. David Lewis, the Admiralty judge of Queen Elizabeth's time, which can be seen in the article on Doctors' Commons in Stow's "Survey of London." Again, the Black Book of the Admiralty, Vol. 1, contains an ordinance directing an inquiry to be made concerning

> "all those whoe doe sue any merchant, mariner or other person whatsoever at common law of the land for any thing of auntient right belonging to the maritime law"

and directing that on conviction the plaintiff shall be

> "fined to the King for his unlawfull and vexatious suite and besides shall withdraw his suite from the common law and shall bring it in the Admiralty Court, if hee will prosecute any further" (see the reprint in the Rolls Series, p. 83).

It is, however, unnecessary to elaborate this aspect of the matter. The point of Lord Esher's judgment in *Reg.* v. *Judge of the City of London Court* is that, even if a particular jurisdiction was asserted by the Admiralty Court, the assertion must be considered in light of the prohibitions from time to time imposed by the courts of common law, to which it was in those days always subject. It must always be remembered that it was not until the Acts of 1840 that the High Court of Admiralty was established as a court with a jurisdiction defined by statute and a judge whose salary was chargeable upon the Consolidated Fund, and who was given in express terms all the privileges and protection appertaining to the judges of the courts of common law. In my opinion, the only safe rule is to assume that Parliament intended that the jurisdiction and practice then existing, but as extended and improved by the specific enactments of the statute, should thenceforward be the jurisdiction and practice of the Admiralty Court.

It is admitted that the industry of counsel has not resulted in finding a single instance in which, either between the passing of the Acts of 1840 and the decision in *The Heinrich Björn* in 1885, or from then until the present time, property, other than that directly connected with the cause of action, has been arrested as the *res* in an Admiralty action. On the contrary, as Scott, L.J. pointed out in the course of the argument, one aspect of the subject under discussion in *The Heinrich Björn* is cloquent to show that no such right was believed to exist. In the passage quoted above from the Introduction to the Select Pleas in Admiralty, Mr. Marsden speaks of the modern doctrine of arrest being founded on a maritime lien. This doctrine is clearly expressed in the opinion of the Privy Council, given by Sir John Jervis in *The Bold Buccleugh* (7 Moo. P. C. 267, at p. 284), where it is laid down that a maritime lien is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such a lien exists, a proceeding *in rem* may be had, it will be found to be equally true, that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing, to be carried into effect by legal process.

This view as to the coincidence of the maritime lien and the action *in rem* was expressly disapproved in the House of Lords in *The Heinrich Björn* (6 Asp. Mar. Law Cas. 1; 55 L. T. Rep. 66; 11 App. Cas. 270) (see in particular the speech of Lord FitzGerald, at pp. 285 and 286. 11 App. Cas). But the very fact that in 1851 it should be possible for the Privy Council to lay down that the action *in rem* was exactly co-extensive with the maritime lien, which was said to be its foundation, shows that no one then contemplated that an action *in rem* could be founded on the arrest of property of the defendant owner unconnected with the circumstances giving rise to the lien.

This brings me to a consideration of the decision of the House of Lords in *The Heinrich Björn*, affirming the Court of Appeal. In the opening paragraph of his speech Lord Watson used the following words:

> "The action is *in rem*—that being, as I understand the term, a proceeding directed against a ship or other chattel in which the plaintiff seeks either to have the *res* adjudged to him in property or possession, or to have it sold, under the authority of the court, and the proceeds, or part thereof, adjudged to him in satisfaction of his pecuniary claims. The remedy is obviously an appropriate one in the case of a plaintiff who has a right of property or other real interest in the ship, or a claim of debt secured by a lien which the law recognises. We have been informed that under the recent practice of the Admiralty Court the remedy is also given to creditors of the shipowner for maritime debts which are not secured by lien; and in that case the attachment of the ship, by process of the court, has the effect of giving the creditor a legal nexus over the proprietary interest of his debtor, as from the date of the attachment.
>
> "The position of a creditor who has a proper maritime lien differs from that of a creditor in an unsecured claim in this respect—that the former, unless he has forfeited the right by his own laches, can proceed against the ship notwithstanding any change in her ownership, whereas the latter cannot have an action *in rem* unless at the time of its institution the *res* is the property of his debtor."

In this passage Lord Watson, while stating that a maritime lien does give rise to an action *in rem*, and recognising that an action *in rem* is also available in respect of maritime debts which are not secured by lien, is engaged in showing that in the one case the action survives, and in the other case does not survive, change of ownership of the ship. This statement is not, of course, quite exhaustive, because under neither heading need the *res* necessarily be a ship: it may be the cargo, or the proceeds of the ship or cargo, and arrest of the cargo may include arrest of the freight. But it is quite plain that in stating the modern practice of the Admiralty Court Lord Watson is regarding the *res* as being the very thing in respect of which the maritime debt, or the maritime lien, as the case may be, has arisen. There is not a hint in the passage quoted of the bringing of a maritime action against anything other than that which gives rise to the cause of action. It is quite true that in the House of Lords, as in the Court of Appeal, it was unnecessary, once it was decided that there was no maritime lien for necessaries, to discuss all possible aspects of the action *in rem*

But of the two statements of the law, both of which are *obiter*, this is the higher tribunal. Even if it does not purport to be exhaustive, I am convinced that it is correct as a statement of Admiralty jurisdiction and practice in recent times and I propose to follow it.

This view, in my opinion, is supported by *The Dictator* (7 Asp. Mar. Law Cas., pp. 175, 251; 67 L. T. Rep. 563; (1892) P. 304). The point for decision in that case was whether, in an action *in rem* in which bail had been given to avoid an actual arrest, the *res* was or was not subject to execution by writ of *fieri facias* in respect of a sum recovered in excess of the amount of the bail. Sir Francis Jeune held that the ship was not exempt from execution. After reviewing the early history of the action *in rem* the learned President says, at p. 313 of (1892) P.: "Actions beginning with arrest of the person became obsolete in practice; as Dr. Lushington says in *The Clara* (Swab. 1, at p. 3) in the last century, the last recorded instance being in 1780; and arrest of property merely to enforce appearance became rare or obsolete, though in theory such arrest of the person or property would seem still to be permissible (per Fry, L.J., in *The Heinrich Björn*, 5 Asp. Mar. Law Cas. 391; 52 L. T. Rep. 560; 10 Prob. Div. 44, at pp. 53, 54). On the other hand, arrest of property over which a lien could be enforced became more common as the idea of a pre-existing maritime lien developed, and arrest of property, in order to assert, for the creditor, that legal nexus over the proprietary interest of his debtor, as from the date of the attachment, of which Lord Watson speaks in *The Heinrich Björn* (6 Asp. Mar. Law Cas. 1; 55 L. T. Rep. 66; 11 App. Cas. 270, at p. 277), grew up.

It will be observed that, though Sir Francis Jeune used the words "rare or obsolete" in connection with arrest of property, he evidently regarded arrest whether of the person or property merely for the purpose of compelling appearance as being in the same category, and only mentioned either as being theoretically permissible because of the dictum in the Court of Appeal in *The Heinrich Björn*. It is unlikely that if there had been any other subsisting foundation for the arrest of property unconnected with the cause of action Sir Francis Jeune would not have said so. It is worthy of note that Lord Watson founds his statement as to the nature of that kind of action *in rem* which is unconnected with a maritime lien upon recent Admiralty practice. In the third edition of Williams and Bruce on Admiralty Practice, at p. 249, the following passage occurs: "Admiralty proceedings may be *in rem* or *in personam*. By proceedings *in rem* the *property in relation to which the claim has arisen*, or the proceeds of such property when in court, can be proceeded against, and made available to answer the claim. This method of proceeding is peculiar to courts exercising Admiralty jurisdiction and generally it is in order to avail themselves of the advantages thus afforded that suitors resort to their jurisdiction. But in cases where the plaintiff does not desire to proceed against the property, the method of proceeding *in personam* may be resorted to."

In the late Lord Phillimore's article on Admiralty jurisdiction in Vol. 1 of the Encyclopædia Britannica, 14th edit., pp. 173–174, it is plainly assumed, though not expressly stated, that the *res* must be that in relation to which the claim has arisen. Finally, in pars. 94 and 95 of the title "Admiralty" in the second edition of Halsbury's Laws of England, for which Lord Merrivale and Langton, J. are responsible, it is stated definitely that both arrest of the person and arrest of any property belonging to him in tidal waters have become obsolete. Even if these statements of the law are not, strictly speaking, authorities, they make a formidable collection of views about the modern law and practice held by those best qualified to know what the law and practice are.

But Mr. Miller argued that once it was shown that the old law and practice were in his favour, it was immaterial that text writers, however eminent, declared that the law and practice had become obsolete. It must be shown how and why they had become obsolete. I am inclined to think that the solution is to be found in the passage from the Introduction to the Select Pleas in Admiralty quoted above. It will be recalled that Mr. Marsden draws the conclusion that arrest was mere procedure, and that its only object was to obtain security that the judgment should be satisfied. It may be that this was not the only, or indeed the primary, object, and that the original object of arrest, as Mr. Roscoe suggested in the introduction to which I have already referred, was to found jurisdiction at a time when any attempt to assume jurisdiction *in personam* was prohibited by the common law courts. It would appear, however, that even before actions *in personam* were recognised by the statutes to which I am about to refer, this method of procedure was adopted in the old Admiralty Court. In *The Milan* (Lush. 388, at p. 397) Dr. Lushington says that "By the ancient law of the Admiralty with respect to damage by collision, whether the damage was occasioned to ship or to cargo, the mode of proceeding was twofold, either by an action *in rem* or by an action *in personam*."

There are indications of this in the text-books (see Williams and Bruce, 3rd edit., p. 321, and Roscoe, 3rd edit., p. 45, note (*c*)); but it is difficult to define when this practice grew up or whether, or to what extent, it was recognised by the common law courts. Probably the action *in personam* developed out of the original practice of founding jurisdiction by arrest of the person (see per Jeune, P. in *The Port Victor*, 9 Asp. Mar. Law Cas., pp. 163, 182; 84 L. T. Rep. 677; (1901) P. 243, at p. 249), and grew as the latter fell into desuetude.

With regard to the statute law, there is no mention in the Acts of 1840 of either form of action. The first statutory reference to an Admiralty action *in personam* appears to be contained in sect. 13 of the Admiralty Court Act, 1854. Seeing that the Act deals almost entirely with procedure, and that the subject-matter of the section is not referred to in the preamble, which merely recites the expediency of resolving doubts about the administering of oaths and for providing for the collection of fees, it is unlikely that sect. 13 was regarded as effecting any very revolutionary change in the law or practice. The section reads as follows: "In all cases in which a party had a cause or right of action in the High Court of Admiralty of England against any ship or freight, goods, or other effects whatever, it shall not be necessary to the institution of the suit for such person to sue out a warrant for the arrest thereof, but it shall be competent to him to proceed by way of monition, citing the owner or owners of such ship, freight, goods, or other effects to appear and defend the suit, and upon satisfactory proof being given that the said monition has been personally served upon such owner or owners, the said court may proceed to hear and determine the suit, and may make such order in the premises as to it shall seem right."

The right to issue a monition *in personam* against the owner or owners is given, but the right to proceed *in rem* is not taken away. It is clear, however, that in the case of arrest, the ship, freight, goods or other effects to be arrested are those in relation to which the cause of action arises. The words "cause or right of action against any ship or freight, goods, or other effects whatever" are perfectly apt to describe the arrest of the ship, freight, cargo, tackle, and other apparel connected with the ship in respect of which the cause of action arose, but would be inapt in connection with a supposed right to arrest any other property of the the defendant owner. Moreover, the Rules, Orders and Regulations made by Order in Council, in pursuance of the Acts of 1840 and 1854, on the 29th November, 1859, and the forms the use of which is thereby enjoined (see Coote's Admiralty Practice, 2nd edit., p. 190, *et seq.*) lead to the same conclusion. When, therefore, by sect. 35 of the Admiralty Court Act of 1861 Parliament enacted that the jurisdiction conferred by that Act upon the High Court of Admiralty might be exercised either by proceedings *in rem* or by proceedings *in personam*, it was merely enlarging the jurisdiction, but not changing the forms of action by which that jurisdiction might be exercised.

Arrest, either of person or property, has long ceased, therefore, to be necessary in order to found jurisdiction. Nor is arrest of property, other than the thing in relation to which the claim arises, necessary in order to obtain security that the judgment shall be satisfied. It is true that, unless the defendant appears to an action *in rem*, satisfaction of the judgment is limited to the value of the *res*, but if the defendant appears, the action proceeds *in personam* as well as *in rem*. In such a case, as where the action is brought *in personam* in the first instance, execution can issue against any property of the defendant, including any surplus value of the *res* over and above the amount for which bail has been given (see *The Dictator* (*sup.*), *The Gemma* (8 Asp. Mar. Law Cas. 585; 81 L. T. Rep. 379; (1899) P. 285), and *The Joannis Vatis* (16 Asp. Mar. Law Cas. 13; 127 L. T. Rep. 494; (1922) P. 213). In my opinion, arrest of property unconnected with the claim was merely procedural, and the maxim "*cessante ratione leges cessat ipsa lex*," applies. I for one am not prepared, to quote Lord Esher's words in *Reg.* v. *Judge of the City of London Court* (*sup.*), at p. 299 of (1892) 1 Q. B., to "reopen the floodgates of Admiralty jurisdiction" upon the public, especially when that public is an international public, and I can see that the innovation would be disastrous to the prestige of the court.

Mr. Miller, however, submitted that even if it was established that in the Probate, Divorce, and Admiralty Division the right to proceed *in rem* is limited to the *res* which gives rise to the cause of action, that cannot apply to the statutory jurisdiction given to a county court. He relied in particular on the fact that the Act of 1869, as construed in *The Alina* (*sup.*), gave to county courts an Admiralty jurisdiction in respect of charter-parties, which plainly is not possessed by the Probate, Divorce, and Admiralty Divisions. By sect. 3 of the Act this extended jurisdiction may be exercised by proceedings *in rem* as well as *in personam*. Therefore, he argued, the meaning of the words "proceedings *in rem*" in the Act of 1869 cannot be restricted to the process *in rem* as understood in the High Court.

I am not convinced by this argument. Sect. 3 of the Act of 1869 merely repeats, with reference to the county court, the corresponding enactment with reference to the High Court of Admiralty contained in sect. 35 of the Admiralty Court Act, 1861, which, as has already been shown, was merely declaratory of the effect of sect. 13 of the Act of 1854. I see no ground for supposing that the Legislature meant to enact that the nature of the process should differ in the two cases, even if the causes of action in relation to which it could be employed were more extensive in the one case than in the other (see *per* James L.J., in *The Alina* (*sup.*).

In support of his construction of the statute, Mr. Miller also relied upon Dr. Lushington's judgment in *The Alexander Larsen* (1 Wm. Rob. 288). I do not think, however, that that judgment really assists his argument. The question there was whether the Act of 1840, which gave the High Court of Admiralty jurisdiction to decide all claims for, among other things, necessaries supplied to any foreign ship, enabled the court to try a claim for such necessaries which had arisen before the passing of the Act. Dr. Lushington said in effect that the action could not have been entertained before the statute because it would probably have been prohibited, though it was plainly within the original scope of the maritime law, but that as the Legislature had recognised the cause of action, and there were no words prohibiting the court from entertaining after the passing of the statute a claim which had arisen before the statute, there was jurisdiction to try the action. Whether the actual decision was or was not in accordance with the general principles governing the construction of statutes it is unnecessary to inquire, as it does not seem to me to touch the present point. What is important is that in the above decision given in the year after the setting up of the High Court of Admiralty, Dr. Lushington uses these words (*sup.*, at p. 294): "The statute therefore simply confers upon the court a jurisdiction to be employed in every lawful mode which the court has the power to exercise for enforcing the payment; it might be by arresting the person of the owner if he were resident here, or by arresting the property in case a necessity occurred."

As this passage is one of the foundations of the *dictum* in *The Heinrich Björn*, in the Court of Appeal (*sup.*), it is worth noting that it is a little surprising, having regard to what he said fourteen years later in *The Clara* (*sup.*), that Dr. Lushington should be speaking in 1841 of arrest of the person as a lawful mode of exercising jurisdiction; but it is significant that even in connection with arrest of the person he speaks of the arrest not of "his" property but of "the" property, by which the context seems to show that he means the property in relation to which the claim has arisen. This appears even more clearly from the relevant passage in his judgment in *The Clara* (Swab. 1), where he says (at p. 3): "In the Admiralty Court there were two modes of proceeding—by arrest of the person, or arrest of the ship. The proceeding by arrest of the person has now for many years been obsolete; I cannot exactly say how long, but I think there was a precedent in 1780; the amount of damage done was the only limit to the amount that might be recovered. The proceedings by arrest of the ship—or *in rem*, as it is called—was the most sure, for to the extent of the value of the ship the plaintiff would be sure of any amount of damage decreed."

But Mr. Miller also relied on Mr. Carver's argument in *The Zeta* (7 Asp. Mar. Law Cas. 360; 69 L. T. Rep. 630; (1893) A. C. 468, at p. 475) as being a statement by an eminent Admiralty practitioner of the existing law. I

think, however, that we are bound by the decision both in that case and in the case of *Reg.* v. *Judge of the City of London Court* (*sup.*), followed, as they were, by a Divisional Court in *The Champion* (150 L. T. Rep. 318; (1934) P. 1), to hold that, except with regard to the special case of charter-parties, the Admiralty jurisdiction given to county courts is that which was then exercised by the High Court of Admiralty.

In this connection the proviso to sect. 8 of the Maritime Conventions Act, 1911, is significant. This section, which applies expressly to all courts exercising Admiralty jurisdiction in this country, imposes a limitation of two years upon any action to enforce any claim against a vessel or her owners (that is to say, upon an action whether *in rem* or *in personam*) in respect, among other things, of any damage or loss to another vessel, her cargo or freight, or any property on board her caused by the fault of the former vessel, or in respect of any salvage services, but provides that "any Court having jurisdiction to deal with an action to which this section relates . . . shall, if satisfied that there has not during such period been any reasonable opportunity of arresting the defendant vessel within the jurisdiction of the Court . . . extend any such period to an extent sufficient to give such reasonable opportunity."

It is true that this section does not cover all cases in which proceedings *in rem* are available; but, between them, the two classes of case mentioned form the majority of Admiralty causes. It is improbable that Parliament would have enacted this proviso with regard to the arrest of the defendant vessel if in an Admiralty action in a county court there was also jurisdiction to arrest any other property of the defendant owner within the realm.

For these reasons, like Lord Esher, I find it impossible to suppose that in 1869 Parliament meant to give to county courts any jurisdiction wider, with the exception mentioned, than it had conferred on the High Court of Admiralty in 1840. The appeal also succeeds, therefore, on the point actually argued before the learned county court judge.

As regards costs, the respondents bear the responsibility for starting this misconceived litigation with the original arrest of the ship. It is true that by concurring in the issue, which is also misconceived, the appellants have enhanced the costs. But I think that costs should follow the event. The appeal will be allowed with costs here and below. The costs in the county court will be on the "C" scale.

Scott, L.J. (read by SWIFT, J.).—This appeal is from a judgment of the county court judge for Monmouthshire sitting at Newport on an issue agreed between the interveners in the action and the plaintiffs on the record, in which the interveners challenged the right of the plaintiffs to proceed *in rem* against the steamship *Beldis* belonging to the defendants. The action was brought in that court in its Admiralty jurisdiction by a plaint *in rem* dated the 5th April, 1935, against the steamship *Beldis*. The particulars of claim were expressed to be for money due and payable by the defendants, the owners of the steamship *Beldis*, to the plaintiffs under an award dated the 24th January, 1935, in an arbitration held by virtue of a clause in a charter-party dated the 13th July, 1933, and made between the defendants and the plaintiffs, whereby the arbitrator awarded to the plaintiffs the sum of *27l. 4s. 6d.* composed of an item of *19l. 7s. 6d.* for money due in account and an item of *7l. 17s.* for costs. Judgment was in default of appearance signed for the amount claimed.

After judgment Messrs. Lambert Brothers, Limited, sought to intervene. By their affidavit they stated that they were mortgagees of the steamship *Beldis* under a mortgage for *20,000l.* sterling registered at Oslo on the 25th May, 1929; they challenged the plaintiff's right to proceed *in rem* against that ship, asked leave to enter an appearance on the grounds (*inter alia*) that the arrest of the steamship *Beldis* was illegal and that the proceedings were wrongly taken *in rem*, and prayed that the judgment signed in the action in their absence might be set aside. An issue was agreed between them and the plaintiffs in the following terms: "We, the plaintiffs and the interveners in the above-named action, herewith submit the following sole issue to be tried by this Honourable Court, pleadings being waived: Whether the plaintiff's action *in rem* against the steamship *Beldis* is maintainable in view of the fact that the plaintiffs' claim in this action arose out of a charter-party of the steamship *Belfri*, being a ship belonging to the same owners. The said parties agree that in the event of the question raised in this issue being answered in the affirmative, there shall be judgment for the plaintiffs with costs, and in the event of the question raised in this issue being answered in the negative, there shall be judgment for the interveners with costs."

The county court judge tried this cause and held on the authority of certain *dicta* of the Court of Appeal in the case of *The Heinrich Björn* (5 Asp. Mar. Law Cas. 391; 52 L. T. Rep. 560; 10 Prob. Div. 44) that the contention of the interveners was wrong and gave judgment against them. The interveners then appealed to this court, the plaintiffs being respondents.

On the hearing of the appeal the said award was produced to us and it appeared on its face that the charter-party in question was made not in respect of the steamship *Beldis*, the ship against which the action *in rem* was instituted, but in respect of a different ship altogether, also belonging to the defendants, namely, the steamship *Belfri*. It further appeared from the award that the said sum of *19l. 7s. 6d.* was a balance due to the plaintiffs in account, being in fact, as we were informed by Counsel, an overpayment of charter hire of the steamship *Belfri*.

The phraseology of the issue indicates that in the view of both parties the plaintiffs' action, although based on the award, was nevertheless a claim which arose "out of an agreement made in relation to the use or hire of a ship," because the arbitration had been held pursuant to an arbitration clause in the charter-party of the steamship *Belfri* and because the dispute before the arbitrator "had arisen out of" that agreement.

In the above circumstances two questions call for decision. Question 1: Assuming that "the cause" was one which could have been prosecuted *in rem* against the steamship *Belfri* under sect. 3 of the County Courts Admiralty Jurisdiction Amendment Act, 1869, as a claim which arose "out of any agreement made in relation to the use or hire of any ship" within the meaning of sect. 2, sub-sect. (1), of that Act, could it be prosecuted *in rem* against another ship belonging to the same owners, the steamship *Beldis*, with which the said charter-party had no concern? Question 2: Is the above assumption legally sound, when the plaintiffs were suing not on the charter-party but on an award of an arbitrator, merely because the arbitration had been held pursuant

to an arbitration clause in such an agreement? Do the words "claim arising out of any agreement, &c.," cover such a cause of action?

In the court below the parties to the issue were in conflict over Question No. 1, but Question No. 2 was not discussed, both sides apparently being in agreement in thinking that the Court could entertain such an action on an award as an Admiralty cause *in rem.* No argument was addressed to us on this point until we directed the attention of counsel to the doubt as to whether county court had any Admiralty jurisdiction over such an action.

It is convenient to dispose of Question No. 2 first. The answer depends upon the true interpretation of the Act of 1869, construed in the light of the state of the law at the time when the Act was passed. Are the words of sect. 2, sub-sect. (1), wide enough and clear enough to cover this action? Voluntary arbitrations at that date were governed by the provisions of the Acts of 9 & 10 Will. 3, c. 15, and 1 & 2 Vict. c. 110, s. 18, and the Common Law Procedure Act, 1854. Then, as now, an action lay at common law to enforce an award (see Bullen & Leake, 3rd Edit.; Russell on Arbitration, 3rd Edit. (1864), p. 505); but the only other means of enforcing an award was either (*a*) by making the submission a rule of Court of Queen's Bench—with the consequence that a party acting in disobedience to the award could be attached for contempt (Common Law Procedure Act, 1854, s. 17, and 9 & 10 Will. 3, c. 15, s. 1; see also Russell on Arbitration, 3rd Edit., Part III, Ch. V, p. 565, *et seq.*); or (*b*) by obtaining from the Common Law Court a rule absolute for payment of the sum awarded (see 1 & 2 Vict. c. 110, s. 18; Russell on Arbitration, 3rd Edit., p. 612, and *Jones* v. *Williams*, 1839, 11 Ad. & E. 175, there cited).

This being the state of the law about the enforcement of "voluntary" awards, it was unlikely that an action on an award would in 1869 be assigned by Parliament to the High Court of Admiralty; and in the absence of clear words it would be wrong so to interpret the Act even assuming the words to be wide enough to include it. But the words of the statute "any claim arising out of any agreement made in relation to the use or hire of any ship" not only are not clear in the sense supposed, but in my view for the following reasons cannot include it.

By the early part of the nineteenth century, as a result of the long war with the common law courts (to which I shall return in connection with question No. 1), the categories of "Admiralty causes" had become limited to damage, salvage, wages, bottomry, and certain other causes arising out of maritime events and affairs, of which there was then in truth a fairly well-defined list. Indeed, it was just because the jurisdiction in Admiralty had become thus restricted that the aid of the Legislature had to be invoked in order to effect the extensions of it contained in the Admiralty Court Acts, 1840 and 1861.

It is true that the Court of Admiralty was thereby given jurisdiction over several causes of action cognisable in either common law or Chancery courts, but each one was defined in precise, plain, and carefully guarded terms; and in the case of those founded on contract, the cause of action was one directly based upon the maritime contract described in the section, *e.g.*, towage and necessaries supplied to foreign ships (1840 Act, s. 6); necessaries to any ship anywhere (1861 Act, s. 5) and certain claims on bills of lading for damage but each of the last two cases only if the shipowner was not domiciled in England and Wales. In my view, it would be entirely wrong to hold that an action on an award arising indirectly out of such a maritime contract was included by the words in the above sections.

Precisely the same reasoning applies to the language of the County Courts Admiralty Jurisdiction Act, 1868, with even greater force, since the assignment of Admiralty jurisdiction to county courts was a new departure and in that Act made rather experimentally. By it certain county courts were given Admiralty jurisdiction to try a limited list of what the Act called "Admiralty" causes; and they were not given the full right of Admiralty procedure *in rem*, being authorised to arrest (otherwise than in execution) only if it was probable that "the vessel or property to which the cause relates" would be removed out of the jurisdiction (sect. 22). It is true that by sect. 3 of the Act of 1869 the right of Admiralty procedure *in rem* was conferred for the purposes of both Acts, but there was no change in the method of describing the permitted field of Admiralty jurisdiction: there was merely an extension of the list of particular Admiralty causes over which the court was to have jurisdiction.

With the above history of Admiralty jurisdiction both before and since 1840, it would in my judgment be plainly wrong to say that under sect. 2, sub-sect. (1), of the Act of 1869 a county court has Admiralty jurisdiction to entertain an action on an award upon a voluntary submission, merely because the arbitration was held pursuant to an arbitration clause in a charter-party for the reference of disputes arising out of that charter-party.

This conclusion is sufficient to dispose of the appeal and to show that the judgment of the learned judge cannot stand, but in case the above interpretation of the words "arising out of any agreement, &c.," be held by the House of Lords to be wrong, I give my conclusion and reasons on question No. 1 also. It is one of great commercial importance, for it applies to all proceedings *in rem* whether in county courts or the Admiralty Division.

In many Continental systems of law and procedure (*e.g.*, in Germany, Sweden, Belgium, and to a certain extent in France) there is a right of arrest for founding jurisdiction and obtaining bail in respect of any ship or other property of a defendant, although wholly unconnected with the cause of action sued on. But in England I have never heard of such an arrest, and I do not believe any attempt has ever been made here to exercise such a right in practice within the memory of any living practitioner in the Admiralty Court, until the plaintiffs in the present action made it. In my view there is no such right in English law to-day.

Mr. Miller for the respondents naturally relied strongly upon the expression of opinion in the Court of Appeal in the case of *The Heinrich Björn* (5 Asp. Mar. Law Cas. 391; 52 L. T. Rep. 560; 10 Prob. Div. 44, which appears in the judgment of the court (composed of Brett, M.R., Bowen and Fry, L.JJ.), and delivered by Fry, L.J., at p. 54 of 10 Prob. Div.). The learned Lord Justice there says in regard to the procedure *in rem*: "The arrest need not be of the ship in question, but may be of any property of the defendant within the realm." That observation was, however, purely *obiter*. Apart from an unfounded contention of a bottomry bond, which the court rejected, the only question of law relevant to the decision of the case was whether a maritime lien attaches in English law to a valid claim for necessaries. That was necessarily the

sole issue in that case, since the ship for which the necessaries had been supplied had passed by sale from the ownership of the shipowner for whom the necessaries had been supplied to that of new owners who had nothing to do with the voyage when the necessaries were supplied. If there was a maritime lien the new owners took subject to the lien; if there was no maritime lien their ship was free and the plaintiff had no right to arrest it in their hands. The opinion of the court in *The Heinrich Björn* is entitled to great respect; but it is not binding on us, and in my view the dictum is erroneous.

My reasons are as follow: There is little doubt that historically the jurisdiction of the Admiralty Court was originally exercised by employing either of two methods of procedure for bringing the defendant before the court: (1) The arrest of his person; (2) the seizure of his goods. There is more than one case in Marsden's Select Pleas of the Court of Admiralty which illustrates the arrest of goods other than the goods or ship concerned in the particular cause of action for the purpose of founding jurisdiction. But it seems to be equally clear that both methods had fallen into disuse before the beginning of the nineteenth century, probably as a result of the incessant war of jurisdiction waged by the common law courts on the Admiralty Court in the sixteenth and seventeenth centuries. A full account of this long quarrel is contained in the third edition of Roscoe's Admiralty Practice, and that account may, I believe, be accepted as substantially accurate.

During the first half of the nineteenth century there emerges a fact of dominant significance. A belief had grown up in the minds of Admiralty practitioners that the ambit of Admiralty procedure *in rem* was coterminous with the ambit of the maritime lien; that where there was a maritime lien the right to proceed *in rem* existed, and where there was no maritime lien the right to proceed *in rem* did not exist. This belief, strongly held and widely prevalent until judicially corrected, actually found expression in 1851 in the judgment of the Privy Council in *The Bold Buccleugh*, reported under the name of *Harmer* v. *Bell* (7 Moo. P. C. 267). There the Privy Council themselves said in the judgment at p. 284: "Having its origin in this rule of the civil law, a maritime lien is well defined by Lord Tenterden, to mean a claim or privilege upon a thing to be carried into effect by legal process; and Mr. Justice Story, 1 Sumner 78, explains that process to be a proceeding *in rem*, and adds, that wherever a lien or claim is given upon the thing, then the Admiralty enforces it by a proceeding *in rem*, and indeed is the only court competent to enforce it. A maritime lien is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such a lien exists, a proceeding *in rem* may be had, it will be found to be equally true, that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim upon a thing, to be carried into effect by legal process. This claim or privilege travels with the thing, into whosoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached."

The view thus expressed, that the right to proceed *in rem* was limited to those cases where a valid maritime lien was recognised in Admiralty law, was considered in the very case of *The Heinrich Björn*, upon which the plaintiffs in the present appeal mainly rely, both in the Court of Appeal (*sup.*) and in the House of Lords (11 App. *sup.*), and there finally negatived as wholly erroneous; but the fact that it was so long and so widely entertained throws much light on the contention raised in the issue before us. If everybody practising in Admiralty had a firm belief that in order to arrest you must have a lien, they must equally have been satisfied that where there was no lien you could not arrest. If they believed that the right of proceeding *in rem* was thus limited, it follows that they must have recognised the impossibility of arresting any ship other than the particular ship to which the cause of action related—since *ex hypothesi* there could be no lien over a ship wholly unconnected with the cause of action. They could never have supposed that *another* ship of the same owner could be arrested in a cause for, *e.g.*, damage or salvage, because *ex hypothesi* no maritime lien for damage or salvage could possibly attach to any but the delinquent ship or the salved ship. This historical misconception is to my mind conclusive proof that during the period of its prevalence the universal practice was to treat the right of procedure *in rem* as applicable only to the ship or property to which the cause of action related, and that the archaic right of arresting *other* property of a defendant, *i.e.*, other than that with which the cause of action was concerned, had before that period fallen wholly out of use and become obsolete.

The complete absence of any reported case in the last 100 years, in which the present attempt to arrest a ship or property unconnected with the cause of action has ever been made before, is, indeed, of itself almost conclusive that the procedure *in rem* was not regarded in the Admiralty Court as extending to such other ships or property, and from this fact, too, I draw the inference that it had ceased to be permissible.

And this view seems to me to be implicit in the language of Parliament in the County Courts Admiralty Jurisdiction Act of 1868. The Act of 1869 is to be read as one with the Act of 1868 (sect. 1). By sect. 3 of the Act of 1869 the Court is empowered to exercise its Admiralty jurisdiction (under either Act) either *in personam* or by the ordinary Admiralty procedure *in rem* in respect of any causes within the combined Act. By sect. 21, sub-sect. (1), of the Act of 1868 the Admiralty jurisdiction thus conferred is locally limited to the district within which the vessel or property "*to which the cause relates*" is at the time when proceedings are commended. These provisions justify two comments. In the first place, they seem to presuppose the impossibility of applying the procedure *in rem* to any ship or property *unless the cause relates to it*; in other words, it is almost a statutory recognition of the existing practice which had then for long prevailed. In the second place, as the county court has no Admiralty jurisdiction beyond what is expressly conferred by the statute, its concomitant power to proceed *in rem* is equally confined, and it seems to me more consistent with sound interpretation to regard the procedural power as conferred in respect of the same *res* as that upon which the substantive jurisdiction is founded, viz., the *res* "to which the cause of action relates."

The language of the Maritime Conventions Act, 1911, to which the learned President has referred, is consistent with and supports the above conclusion. But the argument must not be pressed too far. The proviso to sect. 8 which enacts a statutory limitation of two years for the bringing of collision

and salvage actions, subject to a power in the court to extend the time if there has been no reasonable opportunity of arresting the defendant ship within the jurisdiction, merely repeats Art. 7 of the Convention, and that article was accepted with the above proviso by many Continental nations who had in their codes of procedure the right of arresting property wholly unconnected with the cause of action and had no intention of altering their procedure; and the proviso has, since then, been put into force by several of them in their national legislation without any change being made in their method of procedure. The truth is that those Conventions were not intended by the High Contracting Parties to touch national laws of procedure. The late Lord Sterndale and I were delegates of the British Government at Brussels and conducted the negotiations and signed those Conventions; and we were alive to this wide difference between the procedural laws prevailing in many Continental countries on the one hand and the British Empire on the other. The correct view of the proviso to sect. 8 of the Maritime Conventions Act, 1911, is in my opinion therefore simply recognised and leaves unaltered the English Admiralty procedure *in rem* as it had existed for at least a century.

For the above reasons the conclusion seems to me plain that the respondents here, plaintiffs below, had no right to arrest the steamship *Beldis* even if the cause did "arise out of the charter-party of the steamship *Belfri*." My answer to Question No. 1 is therefore also in favour of the appellants, the interveners.

The appeal ought to be allowed and judgment entered for them, with costs here and below; and the county court costs should in my view be upon scale "C."

Swift, J.—By a claim dated the 5th April, 1935, filed in the County Court of Monmouthshire holden at Newport, the plaintiffs claimed against the owners of the steamship *Beldis* the sum of 27*l.* 4*s.* 6*d.* payable by the defendants to them under an award made by an arbitrator dated the 24th January, 1935, and on the following day a summons directed to the defendants was issued out of the said court. The award was based upon a submission to arbitration contained in a charter-party of the steamship *Belfri* which belonged to the same owners as the steamship *Beldis.* The claim was made under the Admiralty jurisdiction of the court and the action purported to be an action *in rem.*

On the 5th April, the steamship *Beldis* was arrested under Admiralty procedure. Messrs. Lambert Brothers, Limited, claimed to intervene in the said action as being the mortgagees of the steamship *Beldis* and on the 25th April they were permitted so to intervene. Thereafter, the plaintiffs and the interveners submitted a "sole issue" to be tried by the court as to "whether the plaintiffs' action *in rem* against the steamship *Beldis* is maintainable in view of the fact that the plaintiffs' claim in this action arose out of a charter-party of the steamship *Belfri*, being a ship belonging to the same owners."

On the 27th June, the question raised by that issue was decided by the court and the learned judge held that the plaintiffs were entitled to succeed on that question and judgment in their favour was entered with costs. From that judgment the interveners appeal.

The cause of action alleged is an ordinary common law claim for payment of money due under an award. Such a cause of action is not one of those upon which jurisdiction in Admiralty is conferred upon the county court by sect. 2 of the County Courts Admiralty Jurisdiction Amendment Act, 1869, nor is it a cause of action for which an action *in rem* could be brought apart from the County Courts Act. In my view, the proceedings were quite misconceived. The action could not be brought in the Admiralty jurisdiction of the county court at all and it could not be brought as an action *in rem.*

I think, therefore, that the whole action fails, that the parties had no right to propound any issue in such action for the decision of the court, that the decision of the court upon such issue was invalid and that the action should have been dismissed for want of jurisdiction and judgment should have been entered for the defendants and the interveners. That is sufficient, in my opinion, to dispose of this appeal, which should be allowed and the judgment set aside.

The parties, however, on the hearing of the appeal, argued at length the question which was raised before the county court judge, namely, whether an action *in rem* would lie against a ship or other property belonging to a person who was a party to the cause of action, but in respect of which cause of action the ship or other property sought to be made liable was in no way involved. I have read and agree with the judgments of the President and Scott, L.J., on this point and it is not necessary for me to say anything further than that in my view at the present time an action *in rem* will not lie save as against the ship or other property which is the very *res* in respect of or out of which the cause of action arises.

I agree that this appeal should be allowed, with costs here and below, and I agree that the costs on the county court should be costs on scale "C."

Leave to appeal to the House of Lords was asked for, and granted.

Solicitors for the appellant interveners, *Ince, Roscoe, Wilson*, and *Glover*, agents for *Allen Pratt* and *Geldard*, of Cardiff.

Solicitors for the plaintiffs, *Pettite, Kennedy, Morgan*, and *Broad.*

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

October 31; *November* 1, 7, *and* 8; *December* 19, 1935.

(Before Sir BOYD MERRIMAN, P.)

The Njegos. (*a*)

Bill of lading—Form prescribed by Chamber of Shipping River Plate "Centrocon" Charter-party, 1914*—Charter-party made in London—Goods shipped at Argentine ports for delivery at Scandinavian ports—Claim against ship by indorsees of bills of lading for short delivery of cargo — Unseaworthiness — Incorporation in bills of lading of charter-party exceptions clause—Whether law of flag or law governing*

(*a*) Reported by J. A. PETRIE, Esq., Barrister-at-Law.

charter-party applicable to bills of lading—Intention of parties—Business efficacy.

This was a claim by Norwegian and Danish indorsees of certain bills of lading issued in the form prescribed by the Chamber of Shipping River Plate "Centrocon" Charter-party, 1914, *against the owners of the Yugoslavian ship* N. *for short delivery of a cargo of maize and pollards shipped at Rosario and Buenos Aires in May and June,* 1932. *The vessel had been chartered on the terms of the charter-party in the "Centrocon" form by a contract made in London on the* 19*th May,* 1932, *between an English limited company, acting as agents for the shipowners, and the English branch of a company registered in France as agents for the Argentine shippers. After the* N. *had loaded part of her cargo at Rosario, she proceeded to Buenos Aires, and whilst she was there fire broke out on two occasions in her port bunker. The fires were extinguished by the Buenos Aires fire brigade, but water used in the course of extinguishing the fires percolated into No.* 3 *hold and damaged part of the cargo. A large quantity of the cargo was discharged into lighters, and such portions of it as were damaged were sold, the sound portions being subsequently reloaded on board the* N. *Before the vessel left Buenos Aires further quantities of maize and pollards over and above the quantities originally earmarked for the* N. *were loaded in part substitution for the damaged cargo which had been discharged. On arrival at the Scandinavian ports to which the vessel was bound it was found that the cargo was short shipped, and the receivers accordingly claimed damages from the Yugoslavian shipowners. As the vessel had also been damaged whilst at Buenos Aires, an average agreement in Lloyd's form had been signed in London and the sum of* 1750*l. deposited thereunder by the defendants' London agents. Later, the sum of* 750*l. was paid to the shipowners out of the deposit without prejudice to the plaintiffs' liability for general average. The plaintiffs alleged that the fires were due to heating of the bunkers through insufficiency of ventilation or through the shipowners or their servants having permitted the bunkers to become damp, and that the ship was therefore unseaworthy and unfit for the reception or carriage of the cargo. The defendants, whilst denying that the* N. *was unseaworthy, claimed that they were protected by the exceptions clause in the charter-party which was incorporated in the bills of lading, and said that if there were short delivery such short delivery was due to excepted causes included in the said clause. They counter-claimed for a general average contribution by the plaintiffs. The defendants subsequently amended their defence and pleaded that the law governing the bills of lading contracts was the law of the flag,* i.e., *Yugoslavian law, under which, provided that the shipowners had exercised due diligence to keep their ship seaworthy, the exceptions in the charter-party would apply without the warranty of seaworthiness which was implied according to English law. The question of the law applicable to the bills of lading was tried by the court as a preliminary issue. In the course of the hearing the defendants admitted that the proper law of the charter-party was English law.*

Held, (1) *that the arbitration clause in the charter-party was not incorporated in the bills of lading ;* (2) *that, had the arbitration clause been incorporated in the bills of lading, that clause would have been decisive as to the question of whether English law applied :* T. W. Thomas and Co. *v.* Portsea Steamship Company (12 *Asp. Mar. Law Cas.* 23 ; 105 *L. T. Rep.* 257 ; (1912) *A. C.* 1) *followed ; but* (3) *that the charter-party clauses which were incorporated, such as the exceptions clause and the freight clause in sterling, were not embodied in the bills of lading without any reference to their context, and that the context indicated the proper law of the contract from which they were taken ;* (4) *that it must have been intended by the parties as sensible business men that the bills of lading should be interpreted according to the same law as that governing the charter-party ; and* (5) *that both on the ground of business efficacy and on what was to be regarded as the probable intention of the parties the law governing the contract of carriage was English law and not Yugoslavian law.*

PRELIMINARY ISSUE tried on an agreed statement of facts, the question being whether the law governing the contracts of affreightment in the bills of lading for River Plate grain cargoes in the Yugoslavian steamship *Njegos* was or was not the law of the flag.

The plaintiffs were the Norwegian and Danish receivers of certain quantities of maize and pollards shipped at Rosario and Buenos Aires in May and June, 1932, on board the steamship *Njegos*. The defendants, the Yugoslavenski Lloyd, a.d., incorporated under the laws of Yugoslavia, with their head office at Zagreb, were the owners of the *Njegos*.

By a charter-party in the form of the Chamber of Shipping River Plate "Centrocon" Charter-party, 1914, entered into in London on the 19th May, 1932, between Messrs. Baburizza and Co. Limited, a company registered in England, as agents for the defendants, and Louis Dreyfus and Co., the English branch of Louis Dreyfus et Cie, of Paris, as agents for the charterers, Sociedad Anonima Comercial de Exportacion e Importacion (Louis Dreyfus y Cia) Limitada, of Buenos Aires, a company incorporated under the laws of the Republic of Argentina (hereinafter referred to as "the Sociedad"), the *Njegos* was chartered to load a full cargo of maize and pollards at Rosario and Buenos Aires. The *Njegos* commenced loading at Rosario on the 31st May, 1932, and there took in a part cargo of yellow maize. On the 6th June she proceeded to Buenos Aires to complete her loading, and arrived there on the 7th June. On the 10th June and before any cargo had been loaded in the *Njegos* at Buenos Aires, a fire broke out in the vessel's port bunker. This was extinguished and on the same day the *Njegos* commenced to load a cargo which included 2396 bags of pollards. In the afternoon of the 11th June

a second fire broke out in the port bunker and part of the cargo was damaged by water used to extinguish the fire. The damaged cargo, which consisted partly of the maize taken in at Rosario and partly of a portion of the parcel of 2396 bags of pollards shipped at Buenos Aires, had to be discharged and sold. On the 9th July, having finished loading the cargo originally intended for her at Buenos Aires, and also a further quantity of maize and pollards to replace the cargo which had been damaged, discharged, and sold, the *Njegos* proceeded on her homeward voyage. She discharged her cargo at three ports in Norway and one in Denmark, the discharge being completed on the 6th September, 1932.

Two bills of lading, dated respectively the 31st May and the 6th June, 1932, had been signed by the master in respect of the yellow maize shipped at Rosario, and he had also signed another bill of lading dated the 10th June, 1932, in respect of the parcel of pollards loaded at Buenos Aires. These bills of lading acknowledged the shipment in good order and condition of various quantities of the said goods by the Sociedad at Rosario and Buenos Aires, "for carriage to a port as ordered and delivery in the like good order and condition unto Louis Dreyfus et Cie or their assigns." The Sociedad sold the goods to the plaintiffs on the terms of the London Corn Trade Association contracts.

In November, 1934, the *Njegos*, having for the first time since the occurrences here in question come to British waters, was arrested at Hartlepool and a writ was issued against her. She was subsequently released on bail being given on behalf of the defendants.

The plaintiffs, the indorsees of the bills of lading, to whom the property in the goods represented by the bills of lading had passed by reason of the indorsement of the bills of lading, claimed damages against the defendants for the breach of the contracts contained in the said bills of lading by reason of the short delivery of some 251,000 kilos of the said yellow maize shipped at Rosario and of 9784 kilos of pollards loaded at Buenos Aires. According to the statement of claim, which alleged that two fires had broken out before the vessel loaded at Buenos Aires and that, by the fire brigade's accumulation of water, cargo had been damaged, a large quantity of cargo was discharged into lighters and sold by the shipowners' agents at Buenos Aires, who retained the proceeds. The plaintiffs alleged that the steamship was damaged and that an average agreement in Lloyd's form was signed in London and the sum of 1750*l.* deposited thereunder by Messrs. Louis Dreyfus and Co. for the plaintiffs, and that on the 7th December, 1932, 750*l.* was paid to the shipowners out of the deposit without prejudice to the plaintiffs' liability in general average. They said that the fire was due to heating of the bunkers through insufficiency of ventilation or through permitting them to become damp, and that the steamship was therefore unseaworthy and unfit for the reception or carriage of the cargo.

The case for the defendants was that the bills of lading incorporated all the terms and exceptions, including the negligence clause of a charter-party dated in London the 19th May, 1932, and made between the defendants and the Buenos Aires branch of Messrs. Louis Dreyfus and Cie, of Paris. Clause 29 of the said charter-party provided as follows: "The steamship shall not be liable for loss or damage occasioned by . . . perils of the sea . . . fire from ny cause or wheresoever occurring . . . or any latent defects in . . . appurtenances . . . even when occasioned by the negligence default or error of judgment of the . . . master, mariners or other servants of the shipowners or persons for whom they are responsible (not resulting, however, in any case from want of due diligence by the owners of the steamer or by the ship's husband or manager). . . ."

The defendants said that if there were short delivery the short delivery was due to one of the excepted causes included in the above clause 29 of the charter-party. After setting out the circumstances of the fires at Buenos Aires and their extinction by the local fire brigade, the defendants in their particulars said that by reason of the said fires it was necessary to discharge the cargo from the spaces where the fires had broken out and (or) into which water had percolated in order to separate the sound from the damaged cargo and to preserve the sound cargo. The sound cargo was subsequently reloaded and the damaged cargo was sold at Buenos Aires and the defendants said that they had given credit to the plaintiffs in general average in the sum of 254*l.* 0*s.* 8*d.* in respect of the proceeds of the sale. The defendants denied that the *Njegos* was unseaworthy or unfit as alleged by the plaintiffs, and in the alternative they said that if the vessel was unseaworthy the defendants were not liable for any part of the alleged short delivery by reasons of the provisions contained in the charter-party. By an amended defence, the defendants further said that the law governing the bills of lading was Yugoslavian law, that they had complied with the regulations of Yugoslav law in respect of the *Njegos*, and that such compliance was deemed under Yugoslav law to constitute the exercise of due diligence to make the ship seaworthy. In Yugoslav law that was enough, as, under that law, an absolute condition precedent of seaworthiness was not implied in contracts of affreightment and there was no liability upon them such as was required of a common carrier under English law.

The arguments of counsel and the cases relied on by them respectively, are set out or referred to with sufficient particularity in the reserved judgment of the President, which was delivered on the 19th December, 1935.

Sir *Robert Aske*, K.C., and *Harry Atkins*, for the plaintiffs.

H. U. Willink, K.C., and *Cyril Miller*, for the defendants.

Sir Boyd Merriman, P.—This is an argument of a point of law on an agreed statement of facts. The plaintiffs claim, as indorsees of the bills of lading, in respect of the short delivery of a certain quantity of maize and pollards which were damaged as the result of a fire on board the defendants' vessel *Njegos*, in which the goods were shipped. The plaintiffs alleged that the fire was caused by the unseaworthiness of the vessel. The defendants pleaded that the bills of lading incorporated all the terms, conditions and exceptions, including the negligence clause, of the charter-party made between themselves and the shippers, and counterclaimed for a general average contribution. In their reply and defence to counterclaim, the plaintiffs relied on the allegation of unseaworthiness in answer to the negligence clause. Up to this point, therefore, it was the defendants who were relying on the incorporation of the charter-party in the bills of lading, and the issue in effect was whether the damage was or was not caused by the unseaworthiness of the vessel. By an amendment of the

defence, however, the defendants alleged that the law governing the bills of lading was Yugoslav law. It was agreed between the parties that this issue should be tried as a preliminary point of law. The assumption is that if it is established that Yugoslav law governs the contract of affreightment, the exceptions would apply without any implied warranty of seaworthiness and that the defendants therefore would not be liable on the claim and would recover on the counterclaim. But it is not to be taken that it was proved or admitted that this would necessarily be the effect of Yugoslav law.

By a convenient arrangement a statement of facts was agreed, and this statement must be taken to be incorporated in this judgment.

It is only necessary for me to add, by way of summary, that the law of the flag of the ship was Yugoslav; that the charter-party was made in England, in an English form and in the English language, between an English company, as agents for the Yugoslav owners, and the English branch of a French company, as agents for Argentine shippers; that the bills of lading were in an English form and in the English language; and that the destination of the goods were ports in Norway and Denmark respectively. It was also assumed, though it was not expressly stated, that the receivers of the goods were Norwegian or Danish nationals and that the shipping documents were to be taken up in those countries respectively. I was also informed that the bills of lading were in the common form adopted for this particular trade as long ago as 1914. As appears from the agreed statement, the charter-party was in the "Centrocon" form. This means, as the charter-party itself shows, the Chamber of Shipping River Plate Charter-party, 1914 (Homewards), in the form arranged and agreed with the Centro de Cereales of Buenos Aires and adopted by the Documentary Council of the Baltic and White Sea Conference. Mr. Willink expressly admitted that the proper law of that contract was English. I may just add that I have not failed to observe that the form as given to me was as amended in the 1934 edition. The charter-party in this case was of 1932.

This summary of the position shows that the choice of laws governing the contract of affreightment, in accordance with recognised principles, is almost as wide as it can be. The parties, however, themselves confined the choice of laws governing the contract to two alternatives. Sir Robert Aske argued that the contract was governed by English law and Mr. Willink that it was governed by the law of the flag, that is to say, by Yugoslav law. The point is an interesting one and was admirably argued on both sides.

Before dealing with the main argument, I will dispose of a subsidiary point raised, not very hopefully, by Sir Robert Aske. The charter-party contains the usual English arbitration clause. A well-known line of authorities lays down that this, taken by itself, may be regarded as decisive as to the application of English law to the contract (see *Hamlyn* v. *Talisker Distillery*, 71 L. T. Rep. 1; (1894) A. C. 202; and *N. V. Kwik Hoo Tong Handel Maatschappij* v. *James Finlay and Co., Limited*, 17 Asp. Mar. Law Cas. 566; 137 L. T. Rep. 458; (1927) A. C. 604). He argued that this clause was incorporated, among others, in the bills of lading, with the result that English law would automatically apply to them also. I am of opinion that this point is unsound. The principle underlying the cases governing the incorporation of the terms of a charter-party in bills of lading, to some of which I shall have to refer later, seems to me to be inconsistent with the incorporation of the arbitration clause as such (see, for example, *Thomas* v. *Portsea Steamship Company Limited*, 12 Asp. Mar. Law Cas. 23; 105 L. T. Rep. 257; (1912) A. C. 1). Both Sir Robert and Mr. Willink agreed, and their experience in these matters is unrivalled, that since the adoption of this form of bill of lading in 1914, attempts made in Chambers, under the bill of lading to enforce the arbitration clause in the charter-party had uniformly failed, and that no one had been hardy enough to test the matter in court. I stopped Mr. Willink in his argument upon this point and I decide it against the plaintiffs.

This brings me, however, to what, stated in various forms in the course of an interesting argument, is really the kernel of the matter. Mr. Willink argued that it was the existence of the arbitration clause alone which made English law the proper law of that contract. If, therefore, it was decided that this clause was not incorporated in the bill of lading, it followed that such clauses of the charter-party as were incorporated in the bill of lading were to be written into it without, as it were, any label or indication that they were to be interpreted by English law. The material words in the bills of lading are "to be delivered in the like good order and condition at the port of 'as ordered' unto Louis Dreyfus & Cie. or their assigns, they paying freight for the said goods in accordance with the charter-party dated London, May 19, 1932. All the terms, conditions and exceptions of which charter-party, including the negligence clause, are incorporated herewith."

The real crux of the matter is whether clause 29 of the charter-party, the material words of which are set out in the defence, which clause, as usual, is labelled marginally "Exceptions," is to be taken to be incorporated in the bills of lading *verbatim*, but entirely isolated from its context and with no indication of the proper law governing the contract from which it is taken, or whether it is to be taken to be incorporated as an extract from a contract to which English law is known to be applicable.

Now, I do not agree with Mr. Willink that the arbitration clause is the sole test of the nationality of the charter-party. I think there are several indicia all pointing the same way; for instance, the English language and the English form of these clauses which are admittedly incorporated and which include what Greer, L.J. described in *A/S. August Freuchen* v. *Steen Hansen* (1 Ll. L. Rep. 393), as "many old friends"; the fact that the freight is payable in sterling; that the measurements of capacity and the guarantee of grain space are in English measures; and not least important, the exceptions clause itself.

Even so, however, Mr. Willink urges that the point remains the same. Only so much of the charter-party as is actually covered by the words I have quoted is to be incorporated into the bills of lading. The rest is to be ignored completely, and that which is incorporated carries with it no label of nationality derived from that which is to be ignored. It is not disputed, however, that the exceptions clause as a whole is included.

Now, both counsel start with the principle that the question, what law governs the contract, must be decided by the intention, actual or presumed, of the parties to the contract; see Dicey's "Conflict of Laws," 5th Edit., p. 628, and Cheshire's "Private International Law," pp. 182 to 185. But, to quote Professor Dicey at p. 666:

"Here, as in other branches of law, an inquiry into the intention of the parties is really an inquiry, not into the actual intention of X. and A., for it possibly never had any real

existence, but into the intention which would have been formed by sensible persons in the position of X. and A. if their attention had been directed to contingencies which escaped their notice."

Mr. Willink relies on the well-settled principle that, as between shipowners and shippers, the charter-party alone forms the contract, and the bills of lading are nothing but an acknowledgment of the shipment of the goods (*Rodoconachi* v. *Milburn*, 6 Asp. Mar. Law Cas. 100; 56 L. T. Rep. 594; 18 Q. B. Div. 67; per Lord Esher, M.R., at p. 597 and p. 75, respectively). But the contract in issue here, as he points out, is not the charter-party but the contract between the shipowners and the ultimate receivers arising from the indorsement to them and the acceptance by them of the bills of lading in accordance with commercial usage. The bills of lading are the record of this contract: *Leduc* v. *Ward* (5 Asp. Mar. Law Cas. 571; 58 L. T. Rep. 908; 20 Q. B. Div. 475). But as a matter of commercial practice the receivers can have no means of knowing the terms even of the bills of lading until the moment when, under their obligation to their sellers, they take up the shipping documents. I gather from a document which was put in as a typical contract of sale, that the receivers are in fact sub-purchasers of part of a quantity of unascertained goods, not specified as being loaded in any particular ship, which had been sold by the shippers to the Norwegian State Grain monopoly, and that this sale contract was governed by English law. But even when they take up the shipping documents the receivers have no means, in practice, of acquainting themselves with such terms of the actual charter-party as must be taken to be incorporated by the very terms of the bills of lading by which they are bound. Although, therefore, the receivers bind themselves, unseen, by the terms of the bills of lading, provided always that these are in a form usual and proper for the trade (see *Burstall* v. *Grimsdale*, 11 Com. Cas. 280, at p. 290), and although these terms include such terms, conditions and exceptions of the charter-party as are held to be incorporated in the bills of lading, there is no room, Mr. Willink argues, for any implication from these unseen terms as to the law by which the contract is to be governed.

Now, I entirely agree with Mr. Willink that the doctrine of constructive notice has no application to commercial documents (see *Manchester Trust* v. *Furness*, 8 Asp. Mar. Law Cas. 57; 736 L. T. Rep. 110; (1895) 2 Q. B. 539); but it seems to me that there is all the difference in the world between an attempt, such as was made in the case cited, to import from a charter-party into a bill of lading contract, by constructive notice, an abnormal provision which was not germane to the payment of freight or the other conditions to be performed on the delivery of the cargo, and importing, with those clauses of the charter-party which are undoubtedly incorporated, the proper law by which they are governed, when it must be recognised that the charter-party will necessarily have a proper law, and that this will probably appear, expressly or by inference, on its face. There is no suggestion in the judgments in the Court of Appeal in *Manchester Trust* v. *Furness* (*sup.*), that the incorporation by reference of whatever in the charter-party is "germane to the receipt, carriage, or delivery of the cargo or the payment of the freight" (to quote the words of Lord Atkinson in *Thomas* v. *Portsea Steamship Company Limited* (*sup.*), at p. 6; and see Lord Gorell, *ibid.*, at p. 8) offends the rule against applying the doctrine of constructive notice to commercial transactions. Indeed, Lord Lindley (at p. 113 and p. 545) recognises that this is the effect of the reference to a charter-party in a bill of lading.

In the absence of any expressed intention as to the law governing the contract, I am, as Professor Dicey points out, confronted with the difficult, but not unfamiliar, problem of deciding what that hypothetical person, the sensible business man, must be taken to intend when he is content to be bound by a contract in writing of which, by commercial usage, he is unable to see the actual terms beforehand, and with which, in practice, as Mr. Willink insisted, he does not really trouble himself in the least.

Now, the charter-party in this case, as I have already said, is in the standard form adopted by the trade in 1914. When, therefore, a sensible business man contracts on the terms of bills of lading in a form also adopted by the trade in the same year, it seems to me, even if I am not permitted to suspect that he would actually know that the charter-party therein referred to would probably be in the "Centrocon" form and would, therefore, be governed by English law, that it is pressing too far the well-recognised principle that everything in the charter-party that is insensible must be rejected (see, for example, *Hogarth Shipping Company* v. *Blyth, Greene, Jourdain, and Co.*, 14 Asp. Mar. Law Cas. 124; 117 L. T. Rep. 290; (1917) 2 K. B. 534; *Fort Shipping Company* v. *Pederson*, 19 Ll. L. Rep. 26; and *Vergottis* v. *Robinson David and Co.*, 31 Ll. L. Rep. 23) to argue that the proper law of the charter-party is to be ignored when incorporating the material provisions in the bills of lading. I do not myself profess to understand how anyone contracting on the basis that the liabilities of the shipowner in connection with the receipt, carriage, and delivery of the cargo are subject to the exceptions contained in a separate document, can know the terms on which he is contracting, unless and until he informs himself as to the system of law by which those exceptions are governed. It is not improbable that by this time the warranty of seaworthiness is implicit, unless it is expressly excluded, and that some other systems of law differ in this respect.

If, therefore, negotiations could take place between the shipowner and the receiver as to the incorporation in a bill of lading contract in English of certain specific clauses extracted from a charter-party in English, including an exceptions clause in the well-known English form, sensible business men would naturally wish to ascertain whether it was proposed that the contract should be read with the English implication or not. Otherwise, the exceptions to the liabilities of the shipowner would not be clearly defined. But even if this would be too much to expect with regard to a warranty which is read into the exceptions by implication, one would suppose that, at any rate, they would wish to define by what system of law the expressed exception of negligence was to be measured. If nothing was said to the contrary I should assume that the intention was that the contract should be interpreted in light of the law by reference to which its clauses were drawn.

What, then, is the proper inference when the exigencies of commerce preclude any antecedent negotiations, and in the absence of any expressed intention? Provided always that it is proper, according to mercantile usage in the circumstances of the case, to tender as one of the shipping documents a bill of lading incorporating by reference certain provisions of an English charter-party in the customary form, I think that the true inference

is that the sensible business man must be assumed to intend that the contract shall be read with the English interpretation which admittedly attaches to the charter-party as such, though that interpretation is nowhere expressly stated but is to be inferred from several indications scattered throughout the charter-party, and, notwithstanding that one of the indications, namely, the arbitration clause, is not included among the provisions incorporated in his contract.

On the basis, however, that the incorporated provisions of the charter-party afforded no guide as to the proper law of the contract, Mr. Willink argued that there were only four possible alternatives as to the proper law, namely, the *lex loci contractus*, the *lex loci solutionis*, the law of the flag, or that law which best gives efficacy to the contract. Of these he maintained that in connection with the contract of affreightment it is settled that the law of the flag should be preferred (*Lloyd* v. *Guibert*, 2 Asp. Mar. Law Cas. 260, 283; 13 L. T. Rep. 602; L. R. 1 Q. B. 115). Of these possibilities he asked me to reject the *lex loci contractus* and the *lex loci solutionis*. I agree with him, but I think that the reason why I was invited to reject these alternatives is worth noticing. The *lex loci contractus* with regard, for example, to some of the bills of lading would be Oslo, for it was there that the shipping documents were to be taken up; but as Mr. Willink pointed out, the place might have been anywhere in the Baltic, according as the bills of lading were indorsed to a national of one country or another. For the same reason the *lex loci solutionis* might be a port in one of several Baltic states. And, however willing the receiver might be to be bound by the law of his own state, there was, he said, no reason why the shipowner should be supposed to be ready to leave it to chance by what law he was to be bound.

I will refer in a moment to the authorities relating to the law of the flag, but in passing I would point out that there seems to be no particular business reason why the parties to this contract should wish to be bound by the law of the flag. The shipowner has already discarded the law of the flag in connection with the charter-party, though his own law. The receiver has actually bound himself to take the usual shipping documents by a contract which gave him no guidance whatever as to what the law of the flag might be expected to be. But Mr. Willink argued that there were only four reported cases in which the law of the flag had been ignored in connection with a contract of affreightment. They are *A/S August Freuchen* v. *Steen Hansen* (*sup.*), where Greer, J. preferred the English law of the charter-party for the sake of uniformity; the *Adriatic* (3 Asp. Mar. Law Cas. 16; 145 L. T. Rep. 580; (1931) P. 241), in which Langton, J., while not wholly convinced by the argument of uniformity, rejected the law of the flag on the ground that none of the parties was in the least concerned with the nationality of the ship; in *Re Missouri Steamship Company* (6 Asp. Mar. Law Cas. 264, 423; 61 L. T. Rep. 316; 42 Ch. Div. 321), where the *lex loci contractus*, which incidentally was the law of the flag, was rejected in favour of English law on the ground that the contract of affreightment was in the English form and contained an exceptions clause valid in English law but invalid in the United States of America, where the contract was made (*cf. Hamlyn* v. *Talisker Distillery*, *sup.*); and, finally, the *Industrie* (1 Asp. Mar. Law Cas. 17; 70 L. T. Rep. 791; (1894) P. 58), where the Court of Appeal laid special stress on the English form of the charter-party. Lord Esher's judgment in this last case seems to me to be particularly valuable as showing what are the real limits of the presumption in favour of the law of the flag in connection with a contract of affreightment. It seems quite plain that, in connection with such contracts as the master may be driven to make by necessity in the course of the voyage, the law of the flag should prevail, for it is that law which governs his relations with his owners; but that, as is pointed out by Lord Esher, M.R. at p. 76, is by no means inconsistent with the proper law of the contract of affreightment being a different law.

In my opinion, all these cases show very clearly that, as regards the contract of affreightment as a whole, there is no necessary presumption that the law of the flag applies. I can well imagine that if the parties in this case had been in a position to form an actual intention as to the law to govern their contract, the sensible shipowner would almost inevitably have stipulated that his rights and obligations in connection with the receipt, carriage and delivery of the cargo or the payment of the freight, should be the same in the two contracts formed respectively by the charter-party itself and by the bills of lading incorporating the relevant clauses of the charter-party. Nor, in the circumstances of this case, can I see any valid reason which would have induced the indorsees of the bills of lading to dissent from that proposal.

Both on what, I think, should be presumed to be the intention of the parties and on the ground of business efficacy, I am prepared to hold that the law of the Kingdom of Yugoslavia is not the law governing this contract. I am not expressly invited to say what the proper law is; but in case it may be of assistance to the parties if I express my opinion, and I have not already made it plain what that opinion is, I say that I think the proper law of the contract is English law.

The plaintiffs will have the costs. I have decided the preliminary point of law in the plaintiffs' favour, and given them the costs; I am not pronouncing any ultimate judgment in the case.

Solicitors: for the plaintiffs, *Waltons and Co.*; for the defendants, *Richards, Butler, Stokes, and Woodham Smith.*

Feb. 5, 6, 7, 10, 11, *and* 12, 1936.

(Before BUCKNILL, J., assisted by Elder Brethren of Trinity House.)

The Prinses Juliana. (*a*)

Collision outside entrance to Harwich Harbour—Negligence—One vessel outward bound approaching sharp bend in fairway and navigating against the tide—Other vessel rounding Beach End Buoy to enter harbour—By-law 8 *of the Harwich Harbour Conservancy Board By-laws* (1929)—*Regulations for Preventing Collisions at Sea* (1910), *art.* 25—*Evidence—Whether pilot's report to Trinity House admissible.*

This was a claim brought by the owners of the Danish twin-screw motor vessel E. *against the owners of the Dutch twin-screw steamship* P. J. *for damage sustained by the* E. *as the result of a collision between the* E. *and the* P. J., *which occurred at the entrance to Harwich Harbour at about* 6.40 *p.m. on the* 29*th June*, 1935. *The* E. *was outward bound and was proceeding down the harbour entrance on her proper side*

(*a*) Reported by J. A. PETRIE, Esq., Barrister-at-Law.

of the fairway at full speed. The P. J. *was inward bound and was proceeding to the westward before making her turn into the harbour entrance. She also had her engines working at full speed ahead. It was agreed by both sides at the hearing that the collision occurred well to the westward of mid-channel. Both vessels were carrying passengers and both were in the charge of Trinity House pilots, pilotage being compulsory for vessels of this kind when entering and leaving Harwich Harbour. The tide at the time was flood. Shortly before the collision the master of the* P. J., *which had taken a very wide sweep round the Beach End Buoy, took the charge of the vessel out of the hands of the Trinity House pilot, as, having regard to the relative positions of the vessels at that moment, he was afraid that they would not pass port to port. The master countermanded the pilot's helm orders in an endeavour to pass the* E. *starboard to starboard, but, although after hard-aporting the wheel of the* P. J. *he subsequently steadied the wheel to throw her quarter clear of the oncoming* E., *a collision occurred, the stem and starboard bow of the* E. *coming into violent contact with the starboard side of the* P. J. *abaft amidships. After calling their evidence, the plaintiffs applied to be allowed to put in a report of the collision made by the pilot of the* P. J. *to Trinity House, contending that this document was admissible because it was an admission by a servant of the defendants for whose acts the defendants were responsible.—Held, on this point, that the statement was not admissible against the defendants, the pilot's report having been made when his employment by the defendants had ceased, and he had reverted to his position as an independent pilot. By-law* 8 *of the Harwich Harbour Conservancy Board By-laws* (1929) *provides as follows: "A steam vessel navigating against the tide shall, on approaching points or sharp bends in the Fairway, ease her speed and if necessary stop and wait before rounding so as to allow any vessel navigating with the tide to round and pass clear of her." Art.* 25 *of the Regulations for Preventing Collisions at Sea is as follows: "In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel." The plaintiffs contended that by-law* 8 *did not apply, as beyond the channel marked by the Cliff Foot and the Beach End Buoys it was open sea and vessels might approach those buoys from any direction, but that if it did apply and "the Fairway" extended beyond the Beach End Buoy, then Art.* 25 *of the Regulations (the narrow channel rule) applied and the defendants were to blame for a breach of that article.*

Held, that by-law 8 *applied and that the* E. *was to blame for not having eased her speed in order to allow more time and room for the* P. J. *to round the bends, but that the* P. J. *was more to blame than the* E. (a) *because (as the learned judge found as a fact) she had got to the wrong side of the channel;* (b) *because she did not pass the* E. *port to port; and* (c) *because, although the* E.*'s final act of negligence in not easing her engines had continued until she was so close to the* P. J. *that she caused the master of the* P. J. *to give a wrong order, that wrong order in fact brought about the collision. He apportioned the blame as to two-thirds on the* P. J. *and one-third on the* E. *No order was made as to costs.*

DAMAGE by collision. The plaintiffs were the owners of the Danish twin-screw motor-vessel *Esbjerg* (2762 tons gross); the defendants were the owners of the Dutch twin-screw steamship *Prinses Juliana* (2907 tons gross). The collision occurred at about 6.40 p.m. (B.S.T.) on the 29th June, 1935, just outside the entrance to Harwich Harbour.

The plaintiffs' case was that shortly before 6.42 p.m. B.S.T. on the 29th June, 1935, the *Esbjerg* was proceeding down the entrance channel to Harwich Harbour outward bound on a voyage from Harwich to Esbjerg (Denmark). She was carrying passengers, mails and general cargo, and she was manned by a crew of forty-eight hands all told. The weather was fine and clear; the wind was S.E. light; and the tide was flood of the force of between one and two knots. Her engines were working at full speed ahead and making about twelve knots, and a good look-out was being kept on board the *Esbjerg*. When the *Esbjerg* had reached a position in the neighbourhood of the North Shelf Buoy a steamship which proved to be the *Prinses Juliana* was observed over the land at Languard Point approaching the harbour and distant about one-and-a-half miles on a bearing of about 1 to 1½ points on the starboard bow of the *Esbjerg*. The *Esbjerg* continued to navigate down the channel on her own starboard side of it, altering her course from about S.E. to about S.½W. magnetic. On passing abeam of the South Shelf Buoy her course was again altered to S.W. by S.½S. magnetic, and she had the Cliff Foot Buoy right ahead of her. Thereafter the *Prinses Juliana* was observed to proceed round the bend in the neighbourhood of the Beach End Buoy. The *Esbjerg* maintained her course and speed with the Cliff Foot Buoy right ahead and expected that the *Prinses Juliana* would pass her in safety port to port, but the *Prinses Juliana*, which was coming on at very high speed, taking an unusually wide sweep round the Beach End Buoy, suddenly sounded two short blasts and instead of completing her turn to starboard as she could, and ought to, have done, and passing the *Esbjerg* port to port, the *Prinses Juliana* was seen to come on heading across the bows of the *Esbjerg*. The engines of the *Esbjerg* were thereupon immediately put full speed astern and her wheel was put hardaport, two short blasts being sounded on her whistle. The *Prinses Juliana* continued to come on at high speed, however, and with her starboard side amidships struck the stem and starboard bow of the *Esbjerg*, doing serious damage to the latter vessel. The plaintiffs charged those on board the *Prinses Juliana* with negligence in that they failed to keep a good look-out; failed to keep the *Prinses Juliana* to her own starboard side of mid-channel; failed to pass the *Esbjerg* port to port; improperly and at an improper time put and kept the *Prinses Juliana's* wheel to port and (or) failed to starboard their wheel sufficiently or to keep it to starboard; failed to use their twin-screws to assist in turning the head of the *Prinses Juliana* to starboard; improperly attempted to cross ahead of the *Esbjerg*; proceeded at excessive speed; failed to ease, stop, or reverse their engines in due time or at all; and failed to comply with by-laws 7 and 12 of the

Harwich Harbour Conservancy Board By-laws and Regulations 19, 22, 23, 25, 27, and 29, of the Regulations for Preventing Collisions at Sea.

The case put forward on behalf of the defendants was that shortly before 6.39 p.m. B.S.T. on the day in question the *Prinses Juliana* was approaching the entrance to Harwich Harbour on a voyage from Flushing to Harwich laden with passengers and cargo and manned by a crew of sixty-six hands all told. According to the defendants, the wind was N.E., a light air or breeze, and the tide, which was about one hour flood, was of the force of about one-and-a-half knots. The *Prinses Juliana* was on a course of W.½N. magnetic. Her engines were working at reduced full speed ahead, and she was making about fifteen knots through the water. A good look-out was being kept on board her. In those circumstances those on board the *Prinses Juliana* observed over Languard Point and about one to one-and-a-half miles distant, the *Esbjerg*, bearing broad on the starboard bow of the *Prinses Juliana*. The *Prinses Juliana* kept her course and speed until her wheel was put to starboard and shortly afterwards hard-astarboard to round Beach End Buoy. As the *Prinses Juliana* was rounding the buoy the *Esbjerg* was observed to be coming on at high speed without holding back and giving the *Prinses Juliana* time to round on a course up the harbour, as she could and ought to have done. Thereupon the wheel of the *Prinses Juliana* was put amidships, and immediately afterwards hard-aport, her engines were stopped and two short blasts were sounded on her whistle. Very shortly afterwards, as no reply was received from the *Esbjerg*, two short blasts were again sounded on the whistle of the *Prinses Juliana*, both her engines were put full speed astern for a few revolutions, and then stopped. As no reply was received from the *Esbjerg*, which vessel appeared to be keeping her course and speed and causing imminent danger of collision, two short blasts were again repeated on the whistle of the *Prinses Juliana*, her port engine was put to full speed astern and her starboard engine was put to full speed ahead for a few revolutions respectively to assist the helm, and then both her engines were stopped. Shortly afterwards, as it was seen by those on board the *Prinses Juliana* that a collision was imminent but that the *Esbjerg* would probably collide with the after-part of the *Prinses Juliana*, the wheel of the *Prinses Juliana* was put amidships, her port engine was put full speed ahead and her starboard engine was put full speed astern in an endeavour to throw her quarter clear or to minimise the damage, but the *Esbjerg*, continuing to come on at high speed, with her stem struck the starboard side of the *Prinses Juliana* abaft amidships, doing damage. Just before the collision the *Esbjerg* was heard to sound a signal of two short blasts on her whistle. It was alleged by the defendants that those on board the *Esbjerg* failed to keep a good look-out; that they failed to keep clear of the *Prinses Juliana* or to take the proper or any steps in due time, or at all, to keep clear; that they improperly failed to hold the *Esbjerg* back, as they could and ought to have done, and allow the *Prinses Juliana*, which was navigating with the flood tide, to round the bend at the entrance to the harbour and pass clear; that the *Esbjerg* improperly kept her course and speed, and was proceeding at excessive speed; and that the *Esbjerg*, which at a later stage could have passed the *Prinses Juliana* safely starboard to starboard if her wheel had then been ported, failed to port her wheel as she could and ought to have done in the circumstances; and, finally, that the *Esbjerg* improperly failed to ease, stop or reverse her engines in due time or at all. The defendants charged those on board the *Esbjerg* with failing to comply with Nos. 7, 8, and 12, of the Harwich Harbour Conservancy Board By-laws, and with Arts. 23, 27, and 29, of the Regulations for Preventing Collisions at Sea.

In cross-examination the pilot of the *Esbjerg* admitted that he had not eased his speed, but he considered that under by-law 8 of the Harwich Harbour Conservancy Board By-laws it was only his duty to do that when necessary, and that in the present circumstances he did not think the by-law required him to ease speed as he was not at the bend. He agreed that the by-law was reasonable. The master of the *Esbjerg*, in his evidence, said that the *Prinses Juliana* could easily have finished her swing to starboard. She was coming at about sixteen knots, and there was no time for the action taken by the *Esbjerg* to be effective. He admitted in cross-examination that the *Esbjerg* had been about twenty minutes late in leaving Parkeston. He heard only one signal from the *Prinses Juliana* when she was two cables away. The chief officer of the *Esbjerg* said that he sounded two short blasts in reply to the *Prinses Juliana*. The *Esbjerg* did not succeed in getting off much of her way before the collision. In reply to the learned judge he said that the *Esbjerg* usually passed the incoming ship by the Cork light vessel. The chief engineer of the *Esbjerg* said that at the moment of the collision the *Esbjerg's* engines were full speed astern and had been so for half a minute. A licensed pilot who was at the time being taken by the *Esbjerg* to the Sunk light-vessel, said that he did not consider it the duty of the *Esbjerg* to wait for the *Prinses Juliana*. He also stated in reply to the learned judge that when the *Prinses Juliana* altered her course to port she had nearly finished her turn.

A preliminary point of evidence dealing with the admissibility of a report made by the pilot of the *Prinses Juliana* to Trinity House in compliance with the Trinity House by-laws made under the Pilotage Act, 1913, was decided by the learned judge after the plaintiffs had closed their case and before evidence was called on behalf of the defendants, in the following terms:

Bucknill, J.—This point is one which has never been decided, so far as I know. It is a very important point, and I would very much have preferred to consider the matter carefully before giving my ruling. But that would mean holding up the action, and, therefore, it is best that I should express my view at once.

The *Prinses Juliana* was in the charge of a Trinity House pilot, and while he was in charge of her he was a servant of the owners of the vessel. After the service had come to an end he made a report to Trinity House in compliance with rules and by-laws passed under the Pilotage Act by Trinity House, and I presume that the contents of the report have been disclosed to the owners of the *Prinses Juliana* in the ordinary course of events. The solicitors for the plaintiffs have very properly not interviewed the pilot or taken a statement from him, but they have subpœnaed the Trinity House authorities to produce the report, and it has been brought into court in a sealed envelope. The question now is whether that report is admissible as evidence on behalf of the plaintiffs.

It is clear to everybody that, if justice is to be administered, the greatest precautions must be taken to see that the best evidence available is presented to the court, and that every step should be taken to see that only reliable evidence should be the ground on which the court should proceed to judgment. As everybody knows, the chief

safeguards in that respect are, first of all, that the evidence should be given in open court; secondly, on oath; and, thirdly, subject to cross-examination. Now, this report, if it is to be put in, is not tested in any of these ways. It is not made on oath and there is no statutory duty on the part of the pilot to make it, and he is not cross-examined on it and does not appear before me. Therefore, primarily, the evidence is objectionable on these grounds.

But Mr. Willmer says it ought to be received on the ground that it is an admission by a man who is a servant of the defendants. If one looks at the authorities, they all point out two things, and, most conveniently, in Taylor on Evidence (12th edit., s. 602, p. 381), the learned editor says: "The declarations of agents are admissible against their principals on grounds very similar to those which govern the declarations of co-partners. The principal constitutes the agent as his representative in the transaction of certain business. Whatever, therefore, the agent does in the lawful prosecution of that business, is the act of the principal; and, as Mr. Justice Story observes (Story on Agency, par. 134), 'where the acts of the agent will bind the principal, there his representations, declarations, and admissions, respecting the subject-matter, will also bind him, if made at the same time, and constituting part of the *res gestæ*.' They are original evidence and not hearsay; and, being regarded as verbal acts, they are receivable in evidence without calling the agent himself to prove them. Still, the admission of the agent cannot always be assimilated to the admission of the principal. The party's own admission whenever made may be given in evidence against him, but the admission or declaration of his agent binds him only when it is made during the continuance of the agency, in regard to a transaction then depending, *et dum fervet opus*. When the agent's right to interfere in the particular matter has ceased, the principal can no longer be affected by his declarations, any more than by his acts, but they will be rejected in such cases as mere hearsay."

I do not think that the pilot here is an agent of the principal, the owners of the ship, for the purpose of making any admissions of this kind, and, moreover, the admission was not made at the time when he was in the service of the owners, but after the employment had ceased, and when he had reverted to his position as an independent pilot. That seems to me to be dealt with in the second part of the section, where it is stated that the party's own admission, whenever made, may be given in evidence against him, but that the admission of his agent is binding on him only when it is made during the continuance of the agency in regard to a transaction then pending.

I think, for these reasons, that this report of the pilot is inadmissible as evidence against the owners of the *Prinses Juliana*.

The defendants then called their evidence, in the course of which the master of the *Prinses Juliana* explained that he took over the navigation of the *Prinses Juliana* from the compulsory pilot and countermanded the pilot's orders because he saw that it was impossible for the *Prinses Juliana* to continue her swing to starboard, and thought that by altering her course to port and ordering the engines to help the rudder to keep the ship to port he would avoid a collision. He said that if the *Esbjerg* had stopped her engines when the *Prinses Juliana* blew the first two blasts on her whistle there would not have been a collision. The chief officer of the *Prinses Juliana* said that he agreed with the view taken by the master and that the *Esbjerg* was about three to four cables away when the captain of the *Prinses Juliana* had ordered the wheel to be put hard aport.

At the close of the defendant's evidence counsel for the plaintiffs invited the court to call the pilot of the *Prinses Juliana*, which he said could be done if both parties consented to this course being adopted, and cited in support of this contention in *Re Enoch and Zaretzky, Bock, and Co.* (101 L. T. Rep. 801; (1910) 1 K. B. 327). The defendants, however, refused their consent and counsel for the plaintiffs, on whose advice the pilot had been subpœnaed to attend the hearing, said that he waived his right to cross-examine him. Dealing with the question of liability, counsel for the plaintiffs contended that it was for the *Prinses Juliana* to show that she got on to the wrong side of the channel without negligence: (*The Fredavore*, 1927, 29 Ll. L. Rep. 25). With regard to by-law 8, he said that its object was to prevent vessels meeting at the apex of the point of the bend (*The Braa* (1929) 34 Ll. L. R. 137), and that a vessel in the straight need not wait until vessels that may be seen across the land have passed clear: (*The Margaret* 5 Asp. Mar. Law Cas. 137, 204, 371; (1884) 9 App. Cas. 873). He also referred to *The Blue Bell* (7 Asp. Mar. Law Cas., p. 601; 72 L. T. Rep. 540; (1895) P. 31) and Stuart Moore's Rules of the Road at Sea, 4th edit., p. 420, note 1.

Counsel for the defendants contended that by-law 8 applied and that the approach to Harwich Harbour was a narrow channel. He said that the *Prinses Juliana* was coming with the tide and was therefore entitled to expect the *Esbjerg* to ease her engines and hold back until the *Prinses Juliana* had rounded the bend at the entrance to the harbour. He referred to the observations of Scrutton, L.J. in *The Hontestroom* (1925, 22 Ll. L. Rep. 458), and said that by not easing her engines and holding back the *Esbjerg* created a position of danger which was the reason why the master of the *Prinses Juliana* had taken the navigation of the vessel out of the hands of the compulsory pilot in an attempt to pass the *Esbjerg* starboard to starboard when he believed that to endeavour to pass her port to port would involve the vessels in collision. On behalf of the plaintiffs, counsel contended that by-law 8 did not apply as beyond the channel marked by the Cliff Foot and Beach End Buoys it was open sea, and that accordingly vessels might approach these buoys from any direction. The Beach End Buoy was the terminus of the fairway.

H. G. Willmer and *Owen L. Bateson* for the plaintiffs.

K. S. Carpmael, K.C., *J. V. Naisby*, and *E. E. Addis* for the defendants.

Bucknill, J.—This case arises out of a collision between the twin-screw motor vessel *Esbjerg* and the twin-screw steamship *Prinses Juliana* in the entrance to Harwich Harbour at about 6.40 p.m. (B.S.T.), on the 29th June, 1935. The *Esbjerg* is 2762 tons gross, 322ft. long and 44ft. in beam. At the time of the collision the *Esbjerg* was outward bound from Harwich on a draught of 12ft. 9in. forward and 14ft. 9in. aft. The *Esbjerg* was manned by a crew of forty-eight hands, and had 134 passengers on board. The *Prinses Juliana* is 2907 tons gross, 365ft. long, and 42ft. in beam. At the time of the collision the *Prinses Juliana* was inward bound to Harwich, and was drawing 11ft. 1in. forward and 13ft. 7in. aft. The *Prinses Juliana* was manned by a crew of sixty-six hands, and had 311 passengers and mails on board. Each vessel was in the charge of an experienced Trinity House pilot. Pilotage was compulsory for each vessel.

The weather was fine and clear, there was no material wind, and the tide was about an hour's flood, of a force of one-and-a-half to two knots. At the time when the vessels became clearly visible to one another, the *Esbjerg* was proceeding down the harbour and was making about twelve knots. The *Prinses Juliana*, on the other hand, was outside the entrance to the harbour, and was proceeding to the westward before making the turn into the entrance. The *Prinses Juliana* was making about sixteen-and-a-half knots, which was shortly afterwards reduced to fifteen knots. The vessels remained in sight of one another, and collided at an angle of two to three points, the stem and starboard bow of the *Esbjerg* striking the starboard side of the *Prinses Juliana* a little abaft amidships just above the water-line and doing great damage.

The precise place of the collision was in issue, and the evidence on this point varied between 400ft. and 1500ft. to the northward of the Cliff Foot Buoy. The captains of both ships agreed that the collision was well to the westward of mid-channel. According to the evidence from the *Esbjerg*, which I accept, the *Esbjerg* duly got on to a course of S.W. by S.½S. mag., and came down the harbour on her own starboard side of the channel, with the Cliff Foot Buoy right ahead, at a speed of about twelve knots. As the two vessels approached one another, those in charge of the *Esbjerg* noticed that the *Prinses Juliana* was taking a very wide sweep into the harbour round the Beach End Buoy. The *Esbjerg* continued on her same course and speed, expecting the *Prinses Juliana* to come round in time to pass the *Esbjerg* port to port. But when the *Prinses Juliana* was about 400yds. away and was one point to one-and-a-half points on the port bow of the *Esbjerg* and was still about two points off her proper course up the harbour, the *Prinses Juliana* stopped her swing to starboard and sounded two short blasts. The engines of the *Esbjerg* were at once stopped and put full speed astern, the wheel was put hard aport and her whistle was sounded two short blasts, but the *Prinses Juliana* crossed the *Esbjerg's* bows, and the collision happened.

According to the witnesses from the *Prinses Juliana*, the *Prinses Juliana* reduced her speed to fifteen knots just before reaching the Rolling Ground Buoy. When the *Prinses Juliana* was about 200yds. S.E. of the Beach End Buoy, and had the Beach End Buoy and the Cliff Foot Buoy in line, the wheel was put to starboard by order of the pilot. The master then came on the bridge after a short absence. Shortly afterwards, when this buoy was abeam and about 200ft. off, the wheel was put hard astarboard by order of the pilot. Both these helm orders were given for the purpose of rounding into the harbour.

When the *Esbjerg* was about three or four cables distant and was bearing four to five points on the starboard bow of the *Prinses Juliana*, which was heading about N.W.½N. and was under hard astarboard wheel, the master of the *Prinses Juliana*, according to his evidence said to the pilot: "You won't clear her (meaning the *Esbjerg*); you will have to steady her." The pilot made no reply, and gave no order, and the master himself then told the helmsman to steady the ship, and immediately after the order to steady the helm the master of the *Prinses Juliana* gave the order hard aport, and stopped both engines, and ordered two short blasts to be sounded. No reply was heard from the *Esbjerg*, and the master then put both engines full astern for a few revolutions, and sounded two short blasts again and then stopped both engines, and gave a third signal of two short blasts, and then put the starboard engine full ahead and port engine full astern for a few revolutions, and then stopped both engines, and just before the collision put the wheel hard astarboard so as to try to make a glancing blow of it. A few seconds before the collision the *Esbjerg* was heard to sound two short blasts.

It will be seen on comparison of the two cases that there is not really much conflict as to the essential facts leading up to the collision. There is some discrepancy as to the number of whistle signals sounded by the *Prinses Juliana*, and the precise moment when the *Esbjerg* sounded her two short blasts. As to this I find that the *Esbjerg* replied after an interval of a few seconds to the first signal of two short blasts from the *Prinses Juliana*, and that they did not hear any further signal from the *Prinses Juliana*—this being probably due to the excitement caused by the impending collision. I think that those on the *Esbjerg* would naturally notice the check in the swing to starboard of the *Princes Juliana* a little after the order was given on board the *Prinses Juliana*, and that there is no substantial discrepancy on this point. The vessels would also have drawn closer by the time the checking of the swing to starboard of the *Prinses Juliana* was noticed on the *Esbjerg*. It must be borne in mind that the vessels were closing on one another at the rate of about 900yds. a minute

When two fine, well-equipped and handy vessels such as the *Esbjerg* and the *Prinses Juliana*, each in the charge of an experienced Trinity House pilot and manned by an experienced master, officers and crew, and each accustomed to go in and out of Harwich Harbour, thus collide on a fine summer afternoon, it is clear that there was serious negligence somewhere. The explanation of the collision given by the *Esbjerg* is that the *Prinses Juliana* suddenly changed her mind and went to port, and, in so doing, turned a position which was safe or momentarily becoming safe into a position in which a collision was inevitable. The explanation of the master of the *Prinses Juliana* is that the vessels were never in a position which was safe or becoming safe, and that the only possible chance of averting a disastrous collision was to do what he did.

Upon this conflict of views the court did not have the advantage of hearing the evidence of the pilot of the *Prinses Juliana*. The defendants, the *Prinses Juliana*, elected not to call her pilot as a witness. The plaintiffs, the owners of the *Esbjerg*, had subpœnaed him but did not call him as a witness. The plaintiffs sought to put in as evidence in support of their case the report which the pilot of the *Prinses Juliana* made to Trinity House after the accident in accordance with the rules and by-laws of Trinity House, but the defendants objected to this course on the ground that the report was inadmissible as evidence. I upheld the objection. The absence of the pilot as a witness for the *Prinses Juliana*, together with his silence when spoken to by the master, as to which I have already referred, leads me to think that the pilot considered that his orders were proper and that the master was wrong in interfering with these orders while the *Prinses Juliana* was entering the harbour.

The first question I have to decide is whether the action of the master of the *Prinses Juliana* in giving the orders which he gave was unseamanlike. The fact that the pilots on each of the vessels concerned were apparently satisfied with the position indicates that in their view the vessels would clear one another without any action or further action on their part.

I saw the master of the *Prinses Juliana* in the witness-box. He had an excellent record, and has been in command of the *Prinses Juliana* for 15

years. I am satisfied that when he countermanded the order of the pilot he believed that the vessels could not clear if the *Prinses Juliana* continued her swing to starboard, and that he acted as he thought for the best in the interests of his passengers and crew and ship.

Having regard to the speed of each vessel and the turn which the *Prinses Juliana* had still to make to get port to port with the *Esbjerg* at the time when the master gave the order to steady the wheel, I think that the master had some cause for anxiety. But I think Mr. Willmer's contention was right that if the master sees fit to take the navigation out of the hands of the pilot and countermands his orders, he must satisfy the court that he was justified in so doing, and that the action which he took was at all events more calculated to avoid a collision than the manœuvre which he countermanded.

The point which I have to decide on this aspect of the case seemed to me to be a matter on which I should consult the Elder Brethren. I have accordingly asked the Elder Brethren to assume the course and speed of the *Esbjerg* to be as already stated in my judgment, and the position of the two ships to be as stated by the master of the *Prinses Juliana* and stated by me in my judgment, at the time when the master of the *Prinses Juliana* ordered the helm to be steadied. Upon these assumptions, which are my findings of fact, I have asked the Elder Brethren to advise me whether in their view there was a risk of collision if the *Prinses Juliana* had continued on with her manœuvre and the *Esbjerg* had continued on her course and speed.

Their answer to this question is that in their view the *Prinses Juliana* would have cleared the *Esbjerg* with a safe margin and passed her port to port, if she had continued on with both her engines working at full speed ahead and her wheel hard astarboard and the *Esbjerg* had kept her course and speed.

I have also consulted the Elder Brethren on this further question. Assuming there was risk of collision which required action by the master of the *Prinses Juliana*, did he take the action which a skilful seaman ought to have taken? The answer of the Elder Brethren to this question is emphatically that the master of the *Prinses Juliana* took the wrong action. In their view the captain of the *Prinses Juliana* in any case ought not to have given an order to go to port under the circumstances, but, if he thought action was required, he should have kept the wheel hard astarboard and the port engine full ahead and have slowed or stopped his starboard engine, and thereby accelerated his turn, or, alternatively, he should have gone full speed astern with both engines. According to the evidence of the master of the *Prinses Juliana*, his ship can be pulled up in three ships lengths from full speed by going full astern. I agree with this advice of the Elder Brethren to both these questions.

The collision which was brought about was in fact very near a disaster. A strip of about 100ft. of the starboard plating and belting of the *Prinses Juliana* was peeled off by the stem of the *Esbjerg*, and if this damage had been below the water instead of being just above it there would probably have been serious loss of life.

I have now to consider how it came about that this condition of things which gave the master some cause for anxiety arose, and whether either of the two ships was to blame for causing such a state of things to come into being. On this part of the case I have to consider two main questions. The first one is whether the *Esbjerg* committed a breach of by-law No. 8 of the Harwich Harbour Bye-laws (*a*).

In my view this by-law applied. I think that the *Esbjerg* was approaching a point or sharp bend in the fairway and that it was her duty to act under the by-law. I think she committed a breach of the by-law in not easing her speed and that this breach contributed to the collision. The question as to the gravity of the breach by the *Esbjerg* appears to me to depend on the place of collision, and on the way in which the *Prinses Juliana* in fact rounded the point or sharp bend.

In coming to a decision on this part of the case, I have to consider and weigh the evidentiary value of the position of the wreckage as found, and of the photograph taken by Mr. Lucas of the *Prinses Juliana* shortly after the collision. I think it is possible that the wreckage as located was not in the precise position of the two ships when the piece of wreckage was sheared off or was torn off. It is possible that the wreckage was carried on a little by the stem of the *Esbjerg*.

After considering the matter carefully and consulting with the Elder Brethren as to this point, and also as to the possibility of movement of the wreckage by attachment of the dredger to it, by influence of passing ships or by a possible error in taking the sextant angles, and after considering the oral evidence, and especially from those in charge of the ship and of Mr. Learmont, a reliable witness, I find that the collision took place about 800ft. from the Cliff Foot Buoy and well over on the west side of the fairway.

On this finding of fact it appears to me that the *Esbjerg* not only committed what might be considered a technical breach of the rule by not easing her speed, but that the position of the *Prinses Juliana* was in such proximity to the apex of the turn that it was necessary for safety that the *Esbjerg* should take off her way sufficiently to give the *Prinses Juliana* more time and room to get round.

I therefore find the *Esbjerg* to blame for a substantial breach of by-law No. 8. Even if the by-law does not apply, I should find that she was to blame for breach of good seamanship in not reducing her speed when approaching the point and the *Prinses Juliana*.

The questions that remain are these: (1) Whether the *Prinses Juliana* was also to blame for not keeping to her own proper side of the channel in making her turn. (2) Whether the *Esbjerg* was negligent in not taking proper action immediately those in charge of her saw the *Prinses Juliana* check her swing.

Art. 25 of the Collision Regulations applies to these waters and is in the following terms: "In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel."

It is to be noted that the rule says, "when it is safe and practicable." Having regard to the existence of by-law No. 8, which I have held applies in this case, and to the state of the tide, and to the length of the *Prinses Juliana*, I do not think that the *Prinses Juliana* was negligently navigated up to the time when the master ordered the wheel amidships. Up to that time I think the *Prinses Juliana* had kept in her proper water and, as I have already said, would have cleared the

(*a*) 8. A steam vessel navigating against the tide shall, on approaching points or sharp bends in the fairway, ease her speed and if necessary stop and wait before rounding so as to allow any vessel navigating with the tide to round and pass clear of her.

Esbjerg port to port. Her breach of art. 25 arose when the master gave the steady and hard aport.

As regards the other point, I am unable to see any ground for saying that the *Esbjerg* was negligent after she heard two short blasts from the *Prinses Juliana.* On both these points my views are supported by the advice of the Elder Brethren.

In the result, therefore, the *Esbjerg* committed the initial act of negligence and this negligence continued until the *Prinses Juliana* also committed an act of negligence which in fact brought about the collision. But the negligence of the *Esbjerg* contributed to the collision because it was her negligent proximity which led the master of the *Prinses Juliana* to give a wrong order.

Having regard to the fact that the master of the *Prinses Juliana,* wrongly, as I think, and without any justification, took the matter out of the pilot's hands, and without the pilot's consent, and gave a wrong order without which no collision would have happened, I think the preponderance of blame is clearly on the *Prinses Juliana.* I apportion the blame as follows: two-thirds to the *Prinses Juliana* and one-third to the *Esbjerg*.

No special order as to costs was made.

Solicitors: for the plaintiffs, *Thomas Cooper* and *Co.*; for the defendants, *Stokes* and *Stokes*.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Wednesday, February 19, 1936.

(Before BRANSON, J)

Admiralty Commissioners v. Owners of the M/V Valverda. (*a*)

Salvage remuneration—Agreement to pay salvage for services rendered by His Majesty's ships—Public policy—Contracting out of statutory provisions—Validity of agreement—Merchant Shipping Act, 1894 (57 *&* 58 *Vict. c.* 60), *s.* 557, *sub-s.* (1)—*Merchant Shipping* (*Salvage*) *Act,* 1916 (6 *&* 7 *Geo.* 5, *c.* 41), *s.* 1.

Shipowners entered into an agreement with the Admiralty Commissioners whereby they agreed, in consideration of salvage services rendered and to be rendered by His Majesty's ships to their vessel, to pay to the Commissioners "a reasonable amount of salvage," the amount whereof was in default of agreement to be fixed by an arbitrator.

By the Merchant Shipping Act, 1894, *s.* 557, *sub-s.* (1), *no claim for salvage is to be allowed for any loss, damage, or risk caused to any of Her Majesty's ships or their stores, tackle or furniture, or for the use of any stores or other articles belonging to Her Majesty supplied in order to effect those services.*

Held, that the agreement was valid and not contrary to public policy, and that the arbitrator was entitled to award salvage remuneration for the loss, damage, and risk caused to those of His Majesty's ships which had taken part in the salvage operations, notwithstanding the provisions of the above mentioned sub-section.

(*a*) Reported by V. R. ARONSON, Esq., Barrister-at-Law.

SPECIAL case stated by the arbitrator (Sir Norman Raeburn, K.C.) appointed under an agreement of the 25th January, 1935, to determine the amount of salvage remuneration payable for services rendered by ships belonging to His Majesty to the appellant's ship *Valverda.*

The dispute between the parties was whether that agreement was valid, notwithstanding the provisions of sect. 557, sub-sect. (1), of the Merchant Shipping Act, 1894, or whether it was either (*a*) void as being contrary to public policy, or (*b*) limited in its operation to the items of salvage remuneration permitted by the sub-section to be recovered for the services of H.M. ships.

The Merchant Shipping Act, 1894, s. 557, sub-s. (1), provides as follows:

"Where 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 caused to the ship or her stores, tackle or furniture, or for the use of any stores or other articles belonging to Her Majesty, supplied in order to effect those services, or for any other expense or loss sustained by Her Majesty by reason of that service, and no claim for salvage services 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 to the prosecution of that claim is proved."

The Merchant Shipping (Salvage) Act, 1916, s. 1, provides as follows:

"Where salvage services are rendered by any ship belonging to His Majesty and that ship is a ship specially equipped with salvage plant, or is a tug, the Admiralty shall, notwithstanding anything contained in sect. 557 of the Merchant Shipping Act, 1894, be entitled to claim salvage on behalf of His Majesty for such services, and shall have the same rights and remedies as if the ship rendering such services did not belong to His Majesty."

The facts found by the arbitrator, so far as they are material to this report, were as follows: The *Valverda* is a steel twin-screw motor tank vessel of 8806 tons gross. At the time of the services hereinafter referred to she was on a voyage from Curacao to Land's End laden with 13,246 tons of petroleum. The salved values were as follows: Ship, 68,316*l.*; cargo, 20,000*l.*; freight, 4390*l.*; total 92,616*l.* On the 21st January, 1935, a fire broke out in the *Valverda's* engine-room, and an S.O.S. signal was sent out for assistance. To that signal a French steamship and also H.M.S. *Frobisher* responded, and the latter vessel reached the *Valverda* on the morning of the 22nd January, and proceeded to take her in tow. The fire was finally extinguished on the 23rd January, but the main engines were completely disabled. It was therefore decided that the *Frobisher* should tow the *Valverda* to Bermuda, some 800 or 900 miles distant.

On the evening of the 23rd January, the owners of the *Valverda* got in touch with the Admiralty and entered into negotiations which resulted in an agreement being signed between them and the Admiralty on the 25th January. That agreement was on a form known as "Admiralty Standard Form of Salvage Agreement," and provided that the Admiralty should use such endeavours as they thought fit to salve the *Valverda,* and that their remuneration if the services were successful should consist of "a reasonable amount of salvage," the amount to be fixed by an arbitrator in default of agreement. At the time of entering into that agreement the owners of the *Valverda* knew that H.M.S. *Frobisher* and H.M.S. *Guardian* were

already on the spot assisting the *Valverda*, and they did not suggest that any distinction should be drawn between the classes of Admiralty vessels participating in the services.

In the result the *Valverda* was safely taken by the Admiralty to Bermuda and placed in a position of safety. Five vessels took part in that operation, namely, H.M.S. *Frobisher*, a cruiser; H.M.S. *Guardian*, a cruiser; H.M.S. *Orangeleaf*, an oil-carrying ship; H.M.S. *Sandboy*, a tug; and H.M.S. *Creole*, a "yard craft." Of these, the *Sandboy* and *Creole* were tugs or vessels specially equipped for salvage within the meaning of the Merchant Shipping (Salvage) Act, 1916, s. 1. The other three ships were not so equipped.

The owners of the *Valverda* admitted that the Admiralty were entitled to claim salvage remuneration in respect of the services of the *Sandboy* and the *Creole*, but denied that they were entitled to remuneration for the services of the three other vessels. The Admiralty contended that, by virtue of the terms of the salvage agreement, they were entitled to remuneration for the services of all five ships. The arbitrator held that the Admiralty were entitled to salvage remuneration in respect of all five ships and assessed the amount thereof at 11,000*l*. He further held that the contract of the 25th January, 1935, was not void, as being against public policy, or at all. In the alternative, he held that, if remuneration was only recoverable in respect of the *Creole* and the *Sandboy*, the proper amount was 6500*l*.

Carpmael, K.C. and *H. G. Willmer* for the appellants.—The agreement of the 25th January, 1935, is contrary to public policy and void, since it is an attempt to contract out of the provisions of sect. 557 of the Merchant Shipping Act, 1894. That is a statutory prohibition and cannot be evaded by agreement. Alternatively, the provision in the agreement that a reasonable amount of salvage shall be paid must be construed with reference to the items which could lawfully be charged. [They cited *The Sarpen* (13 Asp. Mar. Law Cas. 370; 114 L. T. Rep. 1011; (1916) P. 306), *The Iodine* (3 Notes of Cases 140), and *The Alma* (Lush, 378).]

Pilcher, K.C. and *N. V. Craig* (Sir *Thomas Inskip*, K.C. (A.-G.) with them) for the respondents. —It is not contrary to public policy for the owners of a ship to make a special contract with the Admiralty for salvage remuneration. Sect 557 of the Merchant Shipping Act, 1894, does not forbid the Admiralty to recover salvage; it merely provides that they shall do so at a lower rate than other shipowners. Contracting out is permitted under other Acts, such as the Public Authorities Protection Act, 1893, and the Employers' Liability Act, 1880; and there is no higher public policy involved in this Act than in those. [They cited *The Louisa* (1 Dods 317) and *Griffiths* v. *Dudley* (47 L. T. Rep. 10; 9 Q. B. Div. 357).]

Carpmael, K.C. replied.

Branson, J.—This case raises a neat point and, so far as it applies to the particular statute in question, the Merchant Shipping Act, 1894, a new one. It comes before me upon a case stated by a learned arbitrator, Sir Norman Raeburn, and the facts, so far as they are material to my judgment, are as follows. The *Valverda* is a steel twin-screw motor tank vessel of 8806 tons, and was on a voyage from Curacao to Land's End. On the 21st January, when she was in an estimated position of latitude 25.17 N. and longitude 52 W., a fire broke out in her engine room, and an S.O.S. signal was sent out for assistance. To this signal, a French steamship and also His Majesty's ship *Frobisher* responded, and the *Frobisher* reached the ship on the morning of the 22nd January and proceeded to take her in tow. The fire was extinguished on the morning of the 23rd January, but it was found that the main engines were so disabled as to be useless, and it was therefore decided that the *Frobisher* should tow the *Valverda* to Bermuda, some 800 to 900 miles distant. On the evening of the 23rd January the owners of the *Valverda* in Glasgow, who had been informed of the casualty, telephoned to the Admiralty regarding the position, and certain communications took place, with the result that on the 25th January the Admiralty "Standard Form of Salvage Agreement" was signed by a representative of the owners and a representative of the Admiralty. The learned arbitrator goes on in par. 4: "In case it should be material, I find as a fact that the said agreement was entered into voluntarily on behalf of the owners, and with full knowledge that the Admiralty ships *Frobisher* and *Guardian* were already on the spot and assisting the *Valverda*. I further find as a fact that the owners of the *Valverda*, in entering into the said agreement, made no suggestion that any distinction should be drawn between the classes of Admiralty vessels which might participate in the services." The *Valverda* was safely taken to Bermuda by the Admiralty; she was towed for a distance of about 900 miles, and in the services rendered to her there participated His Majesty's ship *Frobisher*, a cruiser; His Majesty's ship *Guardian*, another cruiser; His Majesty's ship *Sandboy*, a tug; and His Majesty's yard craft *Creole*.

The learned arbitrator, whose duty it was to decide the question submitted to him, has under this agreement awarded certain salvage to the Lords Commissioners of the Admiralty, basing that upon the assumption that he had to take into consideration not only the services rendered by the personnel on board these various ships of His Majesty, but also the ships themselves, and the damage received by the ships, the gear that was used and the fuel consumed, and so on. Finding that under the agreement the Admiralty were entitled to salvage on that basis, he assessed the remuneration at 11,000*l*.

Before the arbitrator the question was raised as to whether he was entitled to consider the whole of that material, or whether he was not bound to consider only the services rendered by the personnel of all the ships concerned, and the expenses, stores, and articles which were used or damaged by the two ships, the *Sandboy* and the *Creole*. He held that if the Admiralty were not entitled to salvage remuneration in respect of the services of the *Frobisher*, the *Guardian*, and the Royal Fleet auxiliary, the *Orangeleaf*, which was sent out with oil, then the amount of salvage should be reduced to 6500*l*. The owners of the *Valverda* being dissatisfied with that award, have come to this court.

It seems to me the first question which arises for my decision is, whether on the true construction of the agreement, supposing it to be an agreement into which it was open for the parties to enter, the learned arbitrator was right or wrong. The only point upon which it is suggested he has gone wrong in the construction of the agreement is that it is said that the remuneration which was provided for under that agreement was to be a reasonable amount of salvage, and that the reasonable amount of salvage must be calculated having regard to the fact that under sect. 557 of the Merchant Shipping Act no claim is to be allowed "for any loss, damage,

or risk caused to the ship or her stores, tackle, or furniture, or for the use of any stores or other articles belonging to Her Majesty supplied in order to effect those services," and that, therefore, the learned arbitrator was wrong in taking into consideration, as obviously he did, the coal expended by these two of His Majesty's ships, the *Frobisher* and the *Guardian*, and the stores and the value of the gear used and lost in rendering the salvage services. It seems to me that that point really begs the question. Treating the agreement as an agreement entered into between two parties *sui juris* and construing it according to the meaning of the language used without reference to anything else, it seems to me that the arbitrator has arrived at a perfectly correct conclusion. I think that if the agreement is a good and valid agreement, it is plain that the parties meant it to apply to the services which were being rendered, as they knew, by two of His Majesty's ships which, apart from this agreement, would find their claims for salvage either altogether barred or, at all events, circumscribed by sect. 557 of the Merchant Shipping Act. At the moment I do not pause to consider which of the two positions they would have found themselves in. It seems to me to follow from the facts as found by the arbitrator, that the ships in attendance upon the *Valverda* were two of His Majesty's ships to which the definitions of the Merchant Shipping (Salvage) Act of 1916 did not apply, and it seems also to follow from this that if an agreement was entered into at all, that the circumstances which would have governed the situation apart from the agreement, were intended by the parties to be altered. I decide the first point as the learned arbitrator has decided it. I think if this agreement was one in which the parties were *sui juris* and acting voluntarily, as these parties are found to have acted, they were competent to enter into the agreement, and, therefore, the award made by the learned arbitrator was correct.

That brings me to the second question which was raised. It was argued that this class of agreement is one which is prohibited under sect. 557 of the Merchant Shipping Act, and it is said also that if it is not in words prohibited, it is, at all events, shown to be contrary to public policy by that section of that Act. With regard to the actual words of that section, they are, as far as is material, as follows: "Where salvage services are rendered by any ship belonging to Her Majesty . . . no claim shall be allowed for any loss, damage, or risk caused to the ship or her stores, tackle, or furniture, or for the use of any stores or other articles belonging to Her Majesty supplied in order to effect those services, or for any other expense or loss sustained by Her Majesty by reason of that service." I think in order to understand the section properly, it is necessary to look at the history of the position with regard to salvage services rendered by His Majesty's ships. That history was shortly stated, and, as it seems to me, with great respect, completely accurately, by Bankes, L.J., in the case of *The Sarpen* (13 Asp. Mar. Law Cas. 370, at p. 374; 114 L. T. Rep. 1011, at p. 1015; (1916) P. D. 306, at p. 319), and the way in which the Lord Justice puts it is this. He says: "The rule restricting any claim for salvage by a vessel belonging to His Majesty appears to be of very old standing"—I draw attention to the word "restricting," not "prohibiting." He goes on: "It was referred to in the case of *The Iodine* (3 Notes of Cases 140, at p. 141) by Dr. Lushington, in the year 1844 in the following terms: 'Observations have been made in the argument respecting one of Her Majesty's vessels preferring a claim of this nature. I thought that question had long ago been settled; for from the very earliest date of my experience as an advocate, as far back as 1808, I thought the opinion expressed by Lord Stowell had decided this question. I apprehend that where assistance is rendered by any vessel belonging to Her Majesty, the following principles are to be applied: that where a service is done, and there is personal risk and labour, Her Majesty's officers and seamen are entitled to be rewarded precisely in a similar manner on the same principles, and in the same degree, as where any other persons render that service. But, with regard to the use of the vessel, a different consideration would apply, and a less remuneration would always be made, on account of the vessel being the property of the country, and the property of owners under these circumstances never being risked.'" Bankes, L.J., goes on to say: "Ten years later the rule as extended was incorporated in the Merchant Shipping Act, 1854." Mr. Carpmael suggested that something must have gone wrong with that report, but, on the contrary, it seems to me that the Lord Justice, with his usual accuracy, has completely expressed the position, and that, in fact, sect. 557 of the Merchant Shipping Act, which now represents sects. 484 and 485 of the Act of 1854, does not bar every claim, but it simply says that certain matters shall not be taken into consideration in any such claim. Now it seems to me that it would be pushing matters to a quite impossible extreme, to say that the statute, which does not bar all claims on behalf of His Majesty's ships, for salvage, but only says that certain points should not be considered in assessing them, has set up some doctrine of public policy which prohibits any person from entering into an agreement to contract out of it, or which, to put it in a slightly different, and perhaps more apposite way, prohibits persons from so contracting as to take on themselves liabilities which, without such a contract, they would not under that section have been obliged to incur. Public policy has been said to be a difficult horse to ride. When one gets questions in which public policy is concerned, it is necessary to ride warily, and when it so happens that there is not only one question of public policy but two involved, the difficulty of the equestrian feat becomes one which takes a circus rider to surmount satisfactorily. It has been said, not once but many times, to be a cardinal principle of public policy that the freedom of contract between persons *sui juris* should not be held to have been interfered with unless the statute which is said to interfere with it does so in express and unequivocal terms. That, at all events, is a doctrine of public policy as to which there can be no doubt. If I am asked if it is true to say that sect. 557 involves any question of public policy at all, which of these two principles has got to give way, I should unhesitatingly say that the principle that you do not so construe an enactment as to interfere with the capacity of persons *sui juris* to contract freely with each other is one which must override the question as to whether it is public policy that in a claim by the Admiralty certain elements which are taken into consideration in an ordinary claim for salvage shall be left out. I do not think as a matter of fact, sect. 557 embodies questions of public policy at all; it is simply an enactment which gives the subject, or, as it does not only apply to subjects, perhaps one ought to say to the salved ship, an advantage when the salvage services have been rendered by one of His Majesty's ships which the owners of the salved property would not get if those services

had been rendered by other persons. That is an advantage which anybody may resign by contract, and it seems to me quite clear that in the present case the parties have contracted that that advantage should not accrue to the owners of the *Valverda*.

That being my view, I think it is unnecessary to go into any further consideration of the authorities, beyond saying this, that in the cases which have been cited by Mr. Carpmael as specimens of many other cases of a similar type which he might have cited, but which he kindly spared me, the courts have used expressions such as those which were used by other members of the Court of Appeal in the case of the *Sarpen*. Swinfen Eady, L.J., said (13 Asp. Mar. Law Cas. at p. 371 ; 114 L. T. Rep. at p. 1014 ; (1916) P. at p. 312) : "Where salvage services are rendered by a King's ship, no claim to salvage can be made in respect of the ship," and he quotes this sect. 557. The point which is now before me was not before the court, and it seems to me that I should be quite wrong in holding myself bound by such expressions as those, which are really *obiter*, which were pronounced in cases where attention was not directed to the language of sect. 557, and to hold that they really are binding decisions as to the proper meaning of this sect. 557.

The only matter which has given me even a little difficulty in this case has been the fact that in that sect. 557 the language used would seem to indicate a direction to the tribunal which is trying the case of salvage to disallow claims under particular heads, but consideration of the matter has satisfied me that it would be wrong to regard those words as imposing a duty on the tribunal in favour of one party, which that party could not waive by agreement, and I am supported in the view that it would not be right to take that as the proper meaning and intention of sect. 557, by the consideration that in other sections where similar language is used, it is, and always has been, construed as giving a right to the one party to the litigation which that party to the litigation may waive by agreement or otherwise if he chooses. It is not necessary to go through all the various statutes to which this observation would apply. I think it is sufficient to refer to the Public Authorities Protection Act of 1893. Now, under sect. 1 of that Act, it is enacted : "Where after the commencement of this Act," certain actions against certain bodies are commenced, "the following provisions shall have effect : (*a*) The action, prosecution, or proceeding, shall not lie or be instituted unless it is commenced within six months." Those are words just as positive on the face of them as anything that is used in sect. 557, and yet in that statute and in the Statute of Limitations, and a number of other statutes, exactly similar language has been construed as giving a right which the one party may insist upon if he likes, but which he may equally waive if he likes. A very apposite case is the case of *Griffiths* v. *The Earl of Dudley* (47 L. T. Rep. 10 ; 9 Q. B. Div. 357). The point there was that sect. 1 of the Employers' Liability Act, 1880, enacted that where personal injury is caused to a workman in certain specified cases he or his legal representative "shall have the same right of compensation and remedies against the employer as if the workman had not been a workman, not in the service of, the employer, nor engaged in his work," that is a positive enactment that he shall have certain remedies. The case arose because the workman in question had contracted to put himself out of a fund which existed in the works and agreed that his employer should not be liable under the Employers' Liability Act. It was suggested there that the workman could not contract out of the positive enactment contained in sect. 1 of the Act, and the court held that it was a right which was given to him as to which he could, upon an agreement entered into for good consideration, bind himself by waiving it. In giving his decision in that case, Cave, J. used the following language (47 L. T. Rep. at p. 18 ; 9 Q. B. Div. at p. 364) : "The main question is whether or not a workman can contract himself or his representatives out of the benefits of the Employers' Liability Act. The plaintiff's husband did so contract himself ; it is said that the contract was against public policy. No authority has been cited in support of that proposition, and I can see no reason why such a contract should be against public policy. I should not hold it to be so, and thus interfere with freedom of contract, unless the case were clearly brought within the principle of the decisions as to the contracts which are against public policy." Every word of that applies in the present case. The suggestion that it would be against public policy to make such a contract is a mere suggestion based upon no authority, nor, so far as I can see, any reason. I cannot see why, if a person likes to contract that the Admiralty should use a warship to salvage his vessel and be paid reasonable salvage for doing so, there is anything in the public interest which would prevent his so contracting.

The result is that, in my opinion, the learned arbitrator was correct in the view which he took, and, consequently, I answer the question put in par. 3 in the affirmative, and, therefore, the award which he has made will stand.

Appeal dismissed.

Solicitors : for the appellants, *William A. Crump and Sons* ; for the respondents, *The Treasury Solicitor*.

Tuesday, April 28, 1936.

(Before Branson, J.)

Furness, Withy, and Co. Limited v. Duder. (*a*)

Marine insurance—Indemnity against liability to pay damages arising from collision—Collision with Admiralty tug through tug's negligence—Payment under contract for repairs to tug—No liability in tort—Policy not applicable.

A policy of marine insurance provided that if the insured ship should come into collision with any other ship and the assured should in consequence thereof become liable to pay a sum of money by way of damages to any person, the underwriters would repay that amount, subject to certain limitations, to the assured.

The ship came into collision with an Admiralty tug hired by the assured. The collision was solely due to the negligent navigation of the tug. Under a contract made with the Admiralty, the shipowners were obliged to pay, and did pay, to the Admiralty the cost of repairing the tug, although their ship was not to blame for the collision.

Held, that the loss was not covered by the policy.

Action on a policy of marine insurance in which the plaintiffs claimed to recover the sum which they had been obliged to pay as the result of a collision between their ship and an Admiralty tug hired by them. A clause in the policy provided as follows : "And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel and the assured . . . shall in consequence thereof become liable to pay and shall

(*a*) Reported by V. R. Aronson, Esq., Barrister-at-Law.

pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the ship hereby insured we will pay the assured . . . such proportion of such sum or sums so paid as our subscription hereto bears to the policy value of the ship hereby assured."

During the currency of the policy the insured ship came into collision with an Admiralty tug hired by the plaintiffs. The collision was solely due to the negligent navigation of the tug. The tug was employed under a contract between the plaintiffs and the Admiralty, whereby the plaintiffs agreed to make good to the Admiralty any loss arising out of the service, whether due to their negligence or not. The loss amounted to 119*l.* 12*s.* 8*d.*, and the plaintiffs paid it, and now sought to recover that amount under the above-mentioned clause in their policy.

A. T. Miller, K.C., and *Furness* for the plaintiffs.

Willink, K.C., and *McNair* for the defendant.

Branson, J.—This case raises a short point upon an agreed statement of facts. The statement of facts is so short that I will read it: "The plaintiffs are and were at all material times the owners of the steamship *Monarch of Bermuda.* By the policy of marine insurance, dated the 9th November, 1932, a copy of which is attached hereto, and which was subscribed to by the defendant for 15/100ths of 9090*l.* part of 1,000,000*l.*, the defendant insured the plaintiffs in respect of the steamship *Monarch of Bermuda* upon the terms and conditions therein set out including the running down clause. On the 30th October, 1933, the said steamship *Monarch of Bermuda* was in collision with the Admiralty tug *St. Blazey* in Two Rock Passage, Bermuda. The collision was solely caused by the negligent navigation of the said tug, and resulted in the tug sustaining damage amounting to $579.62 or 119*l.* 12*s.* 8*d.* The said tug was at the time of the collision under engagement to the plaintiffs on the usual terms upon which Admiralty tugs are engaged from His Majesty's dockyard at Bermuda. These terms are contained in Form D. 461 (a copy of which is attached hereto). No other towage assistance was available except other Admiralty tugs, which could only have been engaged on the terms contained in Form D. 461. The plaintiffs, believing that in consequence of the said collision they had become liable to the Admiralty under the said towage contract, have paid to the Admiralty the said sum of 119*l.* 12*s.* 8*d.* For the purpose of this action the defendant admits that the plaintiffs did in fact become liable to pay the said sum to the Admiralty under the said towage contract, but denies that he is liable under the policy to contribute towards the sum so paid by the plaintiffs."

The amount involved is negligible, and the action is brought merely to get the point cleared up. I think it all turns upon the wording of the first two lines of the running down clause in the policy. Those words are: "And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the assured and (or) charterers shall in consequence thereof become liable to pay and shall pay by way of damages to any other person or persons any sum," and so forth. The question here is whether the 119*l.* odd which the plaintiffs have paid to the Admiralty is a sum which they became liable to pay in consequence of the ship having come into collision with another ship, and have become liable to pay by way of damages. The argument for the plaintiffs is that the incident of having to contract with a tug under terms which make the ship responsible for any damage which the tug may sustain while engaged in towing, or for any damage which the tug may do to third persons whilst so employed, should be paid by the shipowner to the owners of the tug—and it is argued that, bearing that fact in mind, these words in the policy are sufficiently wide to cover the damages which, in the present case, the plaintiffs have had to pay to the Admiralty under the contract between themselves and the Admiralty. Mr. Miller urges that the real cause of the payment was the collision, none the less because without the collision the fact that the plaintiffs had entered into the contract would have given rise to no liability. He says that the collision was an operating cause and the proximate cause of the arising of the liability of the plaintiffs to pay, and therefore that it can correctly be described as the cause in consequence of which the plaintiffs became liable to pay.

In my view the clause must be read as it is written. I do not think it helps to divide it into two limbs, and ask oneself whether the payment arose in consequence of the collision, and then to say: "Well, if it did so arise, was it a payment by way of damages, or not?" In my view it leads to a clearer view of the meaning of the clause if one reads it as it is written, in one sentence, and asks oneself: What did the parties mean when they said: "If the ship comes into collision and in consequence thereof the owners become liable to pay something by way of damages." What are the circumstances which the parties contemplated? I do not think, really, that any of the cases cited help in one way or the other, unless one is to get some comfort for the view which I am going to suggest from what Lord Sumner said in the case of *Admiralty Commissioners* v. *Steamship Amerika* (13 Asp. Mar. Law Cas. 558; 116 L. T. Rep. 34; (1917) A. C. 38), but his Lordship there was really dealing with considerations which are not present in the case before me, and it may be that this is no more than a case of first impression where one has to read the sentence and say what one thinks it means; and approaching it from that point of view, I think the sentence means that where as the result of a collision there arises a legal liability upon the shipowners to pay something which can properly be described as damages for a tort, then the underwriters will indemnify them. The expression "becoming liable to pay by way of damages" indicates, to my mind, a liability which arises as a matter of tort, and not as a matter of contract.

I do not think I need really pursue the matter any further, except to say that if one were to hold that this language in the running down clause was sufficient to cover any sort of liability which a shipowner might undertake to pay by way of contract if and when his ship got into collision, the prospect of the underwriters would only be limited by, I suppose, the pity which the shipowners might be expected to extend to them.

However, as I say, it really is a question of reading the clause and coming to a conclusion as to what one thinks it means. I think it means what the defendants say it means, and that this action should be dismissed.

Solicitors: for the plaintiffs, *Middleton, Lewis, and Clarke*; for the respondent, *Wm. A. Crump and Son.*

END OF VOL. XVIII.

Biblioteka Główna

BIBLIOTEKA
UNIWERSYTECKA
GDAŃSK
1937,
01787
ZA LATA 1929-193