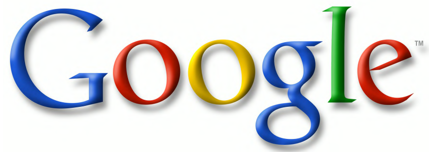


This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at http://books.google.com/

18 & 20 ST. GILES STREET,
EDINBURGH.

STANDARD LAW BOOKS

RECENTLY PUBLISHED BY

WILLIAM GREEN & SONS,

Law Publishers.

CATALOGUES ON APPLICATION.

Macdonald's Criminal Law.

A Practical Treatise on the Criminal Law of Scotland. By J. H. A. MACDONALD, Q.C. (Lord Justice-Clerk). Second Edition, greatly enlarged. 8vo. £1, 11s. 6d.

Currie's Confirmation of Executors.

The Confirmation of Executors in Scotland, according to the Practice in the Commissariot of Edinburgh, with Appendices of Forms, &c. By JAMES G. CURRIE. Second Edition. 8vo. 14s.

"The second edition seems to effect all the improvement that was possible upon the first."—*Journal of Jurisprudence.*

Mackay's Practice.

The Practice of the Court of Session. By Æ. J. G. MACKAY, Advocate. Two volumes, royal 8vo. £3, 12s.

Lorimer's Studies, National and International.

Occasional Lectures delivered in the University of Edinburgh, 1864-1889. By the late JAMES LORIMER, Professor of Public Law, University of Edinburgh; with a Biographical Notice by Professor Flint, and an Engraving of the Portrait of Professor Lorimer by J. H. Lorimer, A.R.S.A. 8vo. 10s. 6d.

"These 'Studies' were revised by the Author himself, shortly before his death, with a view to their publication. They formed the subject of much thought and discussion, and were written with great care and deliberation, usually in the autumn vacation previous to their delivery. They originated in his custom of spending the first hour of the session, when the attention of the students could not well be concentrated on more special subjects of study, 'in discussing in a popular manner what seemed to be the leading public question or public event of the day.'" —*Extract from Prefatory Note.*

Murray's Notaries Public.

The Law Relating to Notaries Public, with Forms of Instruments. By J. C. MURRAY. 8vo. 12s.

"A volume which will be the indispensable possession of every Scottish notary public."—*Scotsman.*

"The volume is one full of value to bankers."—*N. B. Economist.*

"To country practitioners it should prove an invaluable *vade mecum.*"—*Scottish Law Review.*

Digitized by Google

Law Books published by William Green & Sons.

Campbell's Mercantile Law.

Principles of Mercantile Law in the Subjects of Bankruptcy, Cautionary Obligations, Securities over Moveables, Principal and Agent, Partnership, and the Companies Acts. By R. VARY CAMPBELL, Advocate. Second Edition, revised and enlarged. 8vo. 12s.

Trayner's Maxims.

Latin Maxims and Phrases. Collected from the Institutional Writers on the Law of Scotland and other Sources. By JOHN TRAYNER, one of the Senators of the College of Justice. Third Edition. 8vo. 21s.

Ferguson's Railway Rights and Duties.

A Summary of the Law relating to a Railway in Operation. By JAMES FERGUSON, Advocate. 8vo. 18s.

"An original, laborious, and highly creditable monograph. Mr. Ferguson's statement of the law is uniformly clear and accurate."—*Glasgow Herald.*

"The profession will find in this volume an instructive and safe guide to the many questions arising in the working of our vast railway system."—*Scottish Law Review.*

Balfour's Court of Session Practice.

A Handbook of Court of Session Practice for the use of Students. By DAVID BALFOUR, Solicitor. 8vo. 12s.

Bar's International Law.

Private and Criminal. Translated with Notes, by G. R. GILLESPIE, B.A. Oxon., Advocate. 8vo. 25s.

"Mr. Gillespie's notes relative to the English and Scottish treatment of questions of prescription and of marriage are specially valuable."—*Scotsman.*

"Should find a place at once among the shelves of the criminal lawyer as well as the international jurist."—*Law Magazine and Review.*

Kirkpatrick on Evidence.

A Digest of the Scottish Law of Evidence. By JOHN KIRKPATRICK, M.A., LL.B., Advocate. Second Edition, revised and enlarged. Crown 8vo. 8s.

"May now be regarded as a standard work on the subject."—*Scottish Law Review.*

"Its undoubted accuracy makes it peculiarly suited for the use of students."—*Scottish Leader.*

M'Kechnie and Lyell's Court of Session Styles:

Being Forms of Summonses, Notes of Suspension, Petitions, &c. Compiled by D. M'KECHNIE, M.A., and W. D. LYELL, M.A., Advocates. 8vo. 16s.

"The names of the authors are a guarantee that the compilation has been made with care and discretion. . . . About 100 pages are taken up with forms of declarator which will be of use to Sheriff-Court practitioners."—*Glasgow Herald.*

Digitized by Google

A. CHAUNCEY NEWLIN COLLECTION
OF
OCEANS LAW AND POLICY

LAW LIBRARY
OF THE
UNIVERSITY OF VIRGINIA

Digitized by Google

John E. Nelson
1892

A DIGEST OF DECISIONS

IN

SCOTTISH SHIPPING CASES.

Digitized by Google

Digitized by Google

A DIGEST OF DECISIONS

IN

SCOTTISH SHIPPING CASES

1865-90

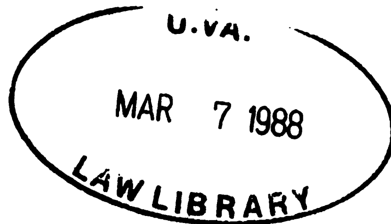
WITH NOTES

BY

WILLIAM GEORGE BLACK

MEMBER OF THE FACULTY OF PROCURATORS, GLASGOW

AUTHOR OF "THE LAW RELATING TO SCOTTISH COUNTY COUNCILS," ETC.



EDINBURGH

WILLIAM GREEN & SONS

LONDON: STEVENS & HAYNES

1891

Digitized by Google

EDINBURGH:

PRINTED BY LORIMER AND GILLIES,

31 ST. ANDREW SQUARE.

OCEANS
68
GBS
.63
.B627

Digitized by Google

TO

THE RIGHT HONOURABLE

JAMES PATRICK BANNERMAN ROBERTSON,

LORD JUSTICE-GENERAL OF SCOTLAND,

THIS BOOK

IS

(WITH HIS PERMISSION) RESPECTFULLY

DEDICATED.

Digitized by Google

Digitized by Google

PREFACE.

THE object of this volume is to furnish in a convenient and clear form, a review of the cases affecting Shipping which have been decided by the Court of Session during the last quarter of a century. It has long been felt that the various treatises upon Shipping Law published in England are less useful than they might be, owing to the rarity with which Scottish cases are cited. In the following pages an attempt has been made to bring together the numerous judgments of the Scottish Bench, with notes as to relevant English cases.

It has been my purpose to give as full an account as possible of the circumstances of each Scottish case; English cases are chiefly incorporated by references, or, where this seemed specially requisite, with a brief summary of the import of the decisions. To any tendency to enlarge upon the topics which suggest themselves in dealing with so varied a subject as marine law, I have felt constrained to set very narrow limits. When it is remembered that there is not a branch of marine law which has not been made the subject of one or more lengthy treatises, the reason for such restraint will be obvious. It is with reluctance, however, that on several points I have confined myself to the work of narrating decisions, where comments suggested themselves which seemed not inappropriate to the matter in hand. Yet, if a sense of proportion was to be observed at all, it was clear that an

Digitized by Google

editor's observations must be of the briefest. It is, perhaps, necessary that this should be said in order to guard against misapprehension, and to make it clear that in the pages which follow the principles of shipping law dealt with are in the main those which are illustrated by the circumstances of cases decided by the Scottish Court within the last twenty-five years.

It is hoped that this volume will be found useful, not only to lawyers, but also to the mercantile community. Every care has been taken to ensure accuracy, but I shall appreciate the kindness of readers who may forward corrections to me.

WILLIAM GEORGE BLACK.

88 West Regent Street,
Glasgow, *October*, 1891.

Digitized by Google

CONTENTS.

CHAPTER I.

THE SHIP.

PAGES

PRINCIPLES OF ENGLISH AND SCOTTISH SHIPPING LAW ARE THE SAME—CONTRACT TO BUILD SHIP—PAYMENT BY INSTALMENTS — FAILURE TO FULFIL CONDITIONS — SALE TO A FOREIGNER — WHAT IS INCLUDED IN SALE OF A SHIP — SEQUESTRATION OF REGISTERED OWNER AFTER EXECUTION OF BILL OF SALE—SHIPBROKER'S COMMISSION—REPAIR OF SHIPS—LIEN—PUBLIC HARBOUR—SURVEY, &C.—WHEN 'SHIP' COVERS TUG AND TOW—SHIP MEASUREMENT—LLOYD'S REGISTER—PASSENGER SHIPS, ... 1-25

CHAPTER II.

THE OWNERS—MANAGING OWNER—MASTER—AND SEAMEN.

OWNERS—POWER OF MAJORITY TO BIND MINORITY—DISPUTE BETWEEN CO-OWNERS—TRUSTEE IN SEQUESTRATION—CHARTERER'S AGENT'S POWERS WHEN ACTING AS OWNERS' AGENT—PASSENGERS' LUGGAGE — SAFETY OF PUBLIC — MANAGING OWNER — REMUNERATION — COMMISSION — DISBURSEMENTS—REPAIRS—SEQUESTRATION OF SHIP'S HUSBAND—HIS HYPOTHECATION OF FREIGHT—POWERS OF A GENERAL MANAGER, 26-36

SHIPMASTER.

SHIPMASTER—HIS FIRST CHARGE IS SAFETY OF CARGO—DUTY AS TO PERISHABLE CARGO—ONUS, WHEN CARGO DAMAGED—SUING MASTER FOR SUPPLIES ORDERED BY HIM—MASTER CANNOT RENDER OWNERS LIABLE FOR MORE GOODS THAN SHIP RECEIVES—RESPONSIBLE FOR ACCURACY OF DATES OF SHIP-

Digitized by Google

PAGES

MENT IN BILLS OF LADING—BOTTOMRY BONDS—ADVANCES BY CHARTERER'S AGENTS TO MASTER, &c. — APPREHENSION OF DESERTER — MASTER'S CERTIFICATE — JETTISON BY NEGLIGENCE OF MASTER—FAILURE TO RECORD DRAUGHT IN LOG, 36-50

SEAMAN.

SEAMAN—PROOF OF DESERTION—WAGES—NEGLECT OF DUTY—INJURIES—APPRENTICE MAY BE CHASTISED, . . . 51-57

CHAPTER III.

CONTRACT OF AFFREIGHTMENT.

WHEN TERMS OF CHARTER-PARTY MAY BE VARIED IN BILL OF LADING—CLEAN BILL—MASTER IN SIGNING BILL OF LADING ACTS AS AGENT FOR CHARTERERS, NOT FOR OWNERS—DEVIATION—SEAWORTHY SHIP—APPARATUS—DEMURRAGE—CUSTOM OF PORT — DEAD WEIGHT — ACCIDENTS OF THE SEAS — 'ERRORS OR NEGLIGENCE OF NAVIGATION,' &c. — LESSER CLAUSE—OBLIGATIONS OF SHIPPER, OR CONSIGNEES, OR ENDORSER OF BILL OF LADING TO PAY FREIGHT—PRIMAGE—LIEN—TIME FREIGHT—DEAD FREIGHT—ADVANCES BY CHARTERER'S AGENTS, ... 58-125

CHAPTER IV.

COLLISION.

COMPENSATION FOR LOSS BY COLLISION—RULES AS TO TRACING LIABILITY—ONUS ON AN OVER-TAKING VESSEL AND OTHERWISE—CONJOINT DAMAGE—EQUAL NEGLIGENCE—INFRINGEMENT OF REGULATIONS FOR PREVENTING COLLISION—LIMITATION OF LIABILITY — COMPULSORY PILOTAGE — STRANDED VESSEL—PROCEDURE—NOTICE TO BOARD OF TRADE BEFORE ACTION — OFFER MADE FOR SETTLEMENT WHEN CASE IN COURT—JUSTICIARY CASES, ... 126-148

CHAPTER V.

SALVAGE AND TOWAGE.

RECORD OF EVIDENCE IN SHERIFF-COURT—COASTING VESSEL AS COMMON CARRIER—SALVING AGREEMENTS MAY BE INVESTIGATED — TWO SALVORS—SALVAGE OR TOWAGE? — MEASURE OF REWARD—DEMURRAGE ARISING OUT OF A CONTRACT FOR TOWAGE, ... 149-168

Digitized by Google

CHAPTER VI.

MARINE INSURANCE.

PAGES

UNDERWRITERS MAY RELY ON OBSERVANCE OF PROVISIONS OF MERCHANT SHIPPING ACT BY BRITISH SHIPOWNERS—BROKER'S KNOWLEDGE — BREACH OF WARRANTY — RISKS INSURED AGAINST—CONSTRUCTIVE TOTAL LOSS—IMPROPER NAVIGATION—EXCEPTED RISKS—TIME-POLICY—WHERE TWO COLLIDING VESSELS BELONG TO SAME OWNER—RELATION OF TUG AND TOW—FOREIGN AVERAGE SETTLEMENT—MEANING OF 'AT OUR RISK'—'ALL OTHER PERILS'—RIGHT OF MORTGAGEES TO PREVENT SHIP SAILING WITHOUT BEING INSURED—PROCESS—JUSTICIARY CASES, ... 169-189

CHAPTER VII.

HARBOUR, ETC.

PORT AND HARBOUR—PORT OF GREENOCK—PORT OF CARDIFF —OPEN ROADSTEAD—PORT OF NEWRY—PORT OF GLOUCESTER —CLYDE—BALLAST FROM RIVERS—AYR HARBOUR—GRANGEMOUTH—WHITEHAVEN—EXEMPTIONS FROM DUES OF 'RESIDENT BURGESSES OF DUMBARTON'—LIABILITY FOR PILOTS —HARBOUR TRUSTEES—CULPA, ... 190-202

CHAPTER VIII.

ARRESTMENT—EVIDENCE—FOREIGN LAW.

ARRESTMENT — PROCEDURE WHERE ACTION RAISED PERSONALLY AGAINST A MASTER AS GRANTER OF A BOTTOMRY BOND—ARRESTMENT ILLEGAL—ARRESTMENT IN SCOTLAND FOLLOWING ON DECREE OF HIGH COURT OF JUSTICE IN ENGLAND—EXPENSES OF ARRESTMENT ON DEPENDENCE—ARRESTMENT AD JURISDICTIONEM FUNDANDAM—COMES TO AN END WHEN CAUTION FOUND — RECALL OF ARRESTMENT—EVIDENCE—FOREIGN LAW, ... 203-212

INDEX OF CASES, ... 215

" " SHIPS, ... 225

GENERAL INDEX, ... 229

Digitized by Google

Digitized by Google

CHAPTER I.

THE SHIP.

PRINCIPLES OF ENGLISH AND SCOTTISH SHIPPING LAW ARE THE SAME—CONTRACT TO BUILD SHIP—PAYMENT BY INSTALMENTS—FAILURE TO FULFIL CONDITIONS—SALE TO A FOREIGNER—WHAT IS INCLUDED IN SALE OF A SHIP—SEQUESTRATION OF REGISTERED OWNER AFTER EXECUTION OF BILL OF SALE—SHIPBROKER'S COMMISSION—REPAIR OF SHIPS—LIEN—PUBLIC HARBOUR—SURVEY, &C.—WHEN 'SHIP' COVERS TUG AND TOW—SHIP MEASUREMENT—LLOYD'S REGISTER—PASSENGER SHIPS.

CASES :—

Seath & Co. v. *Moore; M'Bain* v. *Wallace & Co.; Spencer & Co.* v. *Dobie & Co.; Gillespie & Co.* v. *Howden & Co.; Henckell du Boisson & Co.* v. *Swan & Co.; Valery* v. *Scott; Granfelt & Co.* v. *The Lord Advocate; Armstrong & Co.* v. *M'Gregor & Co.; Watson* v. *Duncan; Moss* v. *Cunliffe & Dunlop; White* v. *Munro; Walker, Donald & Co.* v. *Birrell, Stenhouse & Co.; Neilson* v. *Skinner & Co.; Barr & Shearer* v. *Cooper; Ross & Duncan* v. *Baxter & Co.; Inglis* v. *Buttery & Co.; M'Cowan* v. *Baine & Johnston; Leith, Hull & Hamburg Steam Packet Co.* v. *The Lord Advocate; Lord Advocate* v. *Clyde Steam Navigation Co.; Henderson* v. *Lloyd's Association; Denny & Bros., &c.* v. *Board of Trade, &c.*

The Ship.

THE term 'ship,' as understood in marine law, comprehends every kind of sea-going vessel except such as are propelled by oars, Bell's Dict. p. 1010. The law of England relative to shipping will generally be found to be that of Scotland also. In the case of *Salvesen* v. *Gray*, 13 R. 85, Lord President

Digitized by Google

Inglis took occasion specially to refer to this subject, observing:—'To cases decided in England on a branch of 'the law, the principles of which are the same in England 'and Scotland, we are always inclined to give, and we do 'give, great weight, although they are not strictly binding 'on us. Where that law has been matured by a series of 'decisions, I think we should certainly follow it.' And, in a similar spirit Lord Selborne observed of a decision in a Scottish case, 'So far as it proceeds upon principles of 'general jurisprudence, it ought to have weight in England' (L.R. 1885, 10 App. Cas. p. 499; see also Lindley, L.J., 1887, 12 P.D. at p. 94). Thus the Scottish lawyer and the Scottish shipowner may with propriety endeavour to apply the judgments in English cases to the circumstances of Scottish cases. (Not, however, without exception, for the Scottish Courts have refused to follow the dicta of the present Master of the Rolls, Lord Esher, in *Kish* v. *Corry*, L.R. 10 Q.B. 553, that lien for demurrage does not include a lien for damages for detention.*)

The intention of this chapter is to deal with the law relative to vessels before they enter upon employment at sea. The contracts relative to vessels before they enter upon the element which is to be their home are now-a-days, numerous and complicated, and questions of importance relative to their construction have been frequently the subject of judicial decisions. Such contracts, it is true, cannot be said strictly to belong to the domain of shipping law; they fall indeed to be construed like other agreements.

Agreement to build a ship.

An agreement to build a ship is based upon the same conditions as an agreement to build a store, in respect that both are executory contracts. A person desires in the one case a vessel fit to carry a certain amount of cargo,

* See Scrutton, *Charter-parties*, 1890, p. 118 and p. 123. The liberty reserved by the Scottish Courts to differ from English decisions is also illustrated by Lord Young's observations in the *Avon Steamship Company, Ltd.* v. *Leask & Co.*, 18 R. p. 286, 'The only authority cited to us as against the 'law which I have indicated as in my opinion the law of this case was a case 'before two Judges of the Queen's Bench in 1880. I think that case is not in 'point, but if it were I should not assent to it. I should be much more willingly 'ruled by your Lordships' opinion.'

Digitized by Google

and in the other he wishes a house which will contain a certain amount of goods. What is called cargo in the one case is called goods in the other. The conditions relative to the building of the store for goods are applicable to the building of the ship for cargo.*

Payment by instalments.

Payment being usually made for a ship in instalments, the question has several times been before the Courts, whether in the case of the bankruptcy of the builders before the completion of the work, the vessel so far as constructed and paid for, is the property of the persons who ordered her construction and have paid the instalments. The authority for that view is *Simpson* v. *Creditors of Duncanson*, August 2, 1786, M. 14,204. The proposition that the property of the part of an unfinished ship which has actually been constructed, passes to the purchaser without delivery is, however, negatived by the opinions expressed by the House of Lords in *Seath & Co.* v. *Moore*, March 8, 1886, 13 R. (H. of L.) sec. 7, where the circumstances were as follows:—

A firm of engineers undertook to supply and fit up in five different ships (the *Elms*, the *Brighton*, the *Satanella*, and a *barge* for Trinity Board, and the *Bonnie Princess*), engines of various kinds at certain prices. In some of the contracts, it was provided that the price should be paid by instalments; in others, there was no such stipulation. The precise condition of payment by instalments was in no case observed, but, in all five cases, advances were made from time to time as the engineers required them, when it appeared that sufficient work had been done to warrant the payments. The last contract of the five was dated 1st December, 1882, and of even date, the parties entered into a general agreement with reference to all contracts or agreements made, or that should be made, between them, by which it was stipulated that on a payment being made on account of any contract, 'the por-

* Cargo is of course here used in its general sense. It may mean one thing in a charter-party, another in a policy, another in a contract of sale; and 'must be interpreted with reference to the context' (*Colonial Insurance Company of New Zealand* v. *Adelaide Marine Insurance Company*, Privy Council, Dec. 18, 1886, L.R. 12 App. Cas. at pp. 129 and 136).

Digitized by Google

'tions of the subjects thereof so far as constructed, and all 'materials laid down' in the engineers' yards 'for the 'purpose of constructing the same, shall become and be 'held as being the absolute property of' the shipbuilders, 'subject only to the lien' of the engineers 'for payment 'of the price or any balance thereof that may remain due 'to us.' At the date of the agreement, the engineers were hopelessly insolvent, and the shipbuilders were aware of the state of their affairs. They suspended payment on 4th May, 1883, and their estates were sequestrated on 12th May, 1883. The shipbuilders brought an action against the bankrupts' trustee, to have it declared that they were proprietors of the unfinished engines and materials connected therewith lying in the bankrupts' yard, and, for delivery, but the House of Lords affirming the judgment of the Second Division of the Court of Session *held*—(1) That the agreement of 1st December, 1882, which professed to transfer to the shipbuilders the right of property in the unfinished engines, and in the materials laid down for their construction without delivery, was ineffectual; (2) that under the other contracts (*a*) the materials laid down to be used in the construction of the engines had not been sold to the shipbuilder; and (*b*) the unfinished engines had not been sold, as they had not been inspected and accepted as in part implement of the contract of sale by the purchaser; and, therefore (3) that section one of the Mercantile Law Amendment Act, 1856, did not apply, and the defender was *assoilzied* (*Seath & Co.* v. *Moore*, March 8, 1886, 13 R. (H. of L.) L.R. App. Cas. 350). Lord Watson observed: 'So far as I understand the laws 'of the two countries, the same circumstances and con'siderations which, in England, sustain the inference that 'a chattel has been "sold" to the effect of passing its 'property to the vendee, will in Scotland generally be 'sufficient to sustain the inference that it has been "sold" 'to the effect of transferring the risk to the purchaser, and 'giving him a *jus ad rem* enforceable against the creditors 'of the seller under the Act of 1856.' 'Where it appears 'to be the intention, or, in other words, the agreement of

Digitized by Google

'the parties to a contract for building a ship that, at a 'particular stage of its construction, the vessel, so far 'as then finished, shall be appropriated to the contract 'of sale [in England], the property of the vessel, as 'soon as it has reached that stage of completion, will pass 'to the purchaser, and subsequent additions made to the 'chattel thus vested in the purchaser with accessions, 'become his property. . . . Such an intention or agree-'ment ought, in the absence of any circumstances pointing 'to a different conclusion, to be inferred from a provision 'in the contract, to the effect that an instalment of the 'price shall be paid at a particular stage, coupled with the 'facts that the instalment has been duly paid, and that 'until the vessel reached that stage, the execution of the 'work was regularly inspected by the purchaser, or some 'one on his behalf. . . . Materials provided by the builder, 'and portions of the fabric, whether wholly or partially 'finished, although intended to be used in the execution 'of the contract, cannot be held to be appropriated to the 'contract, or as "sold," unless they have been affixed to, or 'in a reasonable sense made part of the *corpus*,' pp. 55-6. Lord Watson referred in the following terms to the case of *Simpson* v. *Creditors of Duncanson*, August 2, 1786, M. 14,204: 'It was maintained by the appellants (the ship-'builders), that by the law of Scotland, the work executed 'under each contract, so far as then completed, vested in 'them, and became their property whenever they made 'payment of an instalment or an advance to account. 'That proposition was founded upon *Simpson's* case. The 'decision in that case does not, in any view of it, go 'so far as to support the claim preferred by the appel-'lants to the property of articles, finished or unfinished, 'merely intended for use in the construction of a vessel, 'but not yet made part of the thing sold. Nor, in my 'opinion, can it hold as authority for the general proposi-'tion, that in the circumstances narrated in the report, the 'property of that part of an unfinished ship, which has 'actually been constructed, passes to the purchaser without 'delivery. The report of the case, as collected by Morison, 'and supplemented by Professor Bell (Commentaries, 5th

Digitized by Google

'ed. i. 157), is exceedingly meagre, and there may have
'been circumstances before the Court, sufficient to warrant
'the inference that delivery had been made, which had
'not been noticed by the reporter,' p. 64.

Simpson's case had previously been the subject of consideration by the House of Lords in *M'Bain* v. *Wallace & Co.*, July 27, 1881, 8 R. (H. of L.) 106, L.R. 6 App. Cas. 588, where the circumstances were as follows:—

A shipbuilder, with a vessel on the stocks, applied to a firm, to whom he was already indebted, to assist him with advances to enable him to complete the vessel, and they consented on condition that the vessel should be sold to them, as they considered that in no other way would they be safe to make advances. A contract of sale was entered into by the parties, absolutely without qualification, but there was admittedly an honourable understanding that should the vessel realise a profit beyond the sum advanced, the benefit would be communicated to the shipbuilder. The advances already made were attributed towards the agreed-on price, and receipts were granted by the seller 'to 'account of the purchase price,' for the payment by instalments of the balance. At the same time, to raise money to keep the purchasers out of cash advances, bills to the necessary amount were drawn by the purchasers, which being accepted by the shipbuilder, were discounted by them. They then entered into negotiations for the sale of the vessel, which was described as a vessel belonging to the shipbuilder, in which they had a personal interest, as they had made considerable advances. They did not succeed in selling the vessel, and before it was completed and delivered, the shipbuilder was sequestrated. The accommodation bills were not retired till after his sequestration. The House of Lords (affirming the judgment of the Court of Session) *held* that though the motive of the transaction undoubtedly was to secure advances made and to be made by, and although there might be not only an honourable understanding, but even a binding collateral agreement as to the appropriation of any surplus on the sale of the vessel over the sum advanced, still the contract was a clear contract of sale and nothing else, which fulfilled every condition of

Digitized by Google

the provision of the Mercantile Law Amendment Act, 1856, sec. 1, and that there was nothing in the transaction or the accompanying circumstances to affect the operation of that provision as regarded securing the purchaser's right to enforce delivery from the seller against subsequent diligence of the seller's creditors, 'including sequestration.'

The Lord Chancellor (Lord Selborne) referred to *Simpson's* case as not being an authority upon which it was satisfactory to rest the decision in *M'Bain* v. *Wallace*, while to rest it on the terms of the Mercantile Law Amendment (Scotland) Act, 'renders a consideration of the difficul-'ties which might have arisen in regard to *Duncanson's* 'case now immaterial,' p. 109. The real question is, has there been a sale in fact and in intent? The construction of sec. 1 of the Mercantile Law Amendment Act, by the Judges in the above two recent cases, satisfactorily shows that where the purchaser accepts the completed portion of a ship as in part implement of the contract of sale, he acquires a *jus ad rem* to the part completed. It may be thought, further, that the question, whether, by the *common law* of Scotland, the property of a ship passes to the purchaser without delivery as the instalments of the price are paid, may be regarded as now immaterial in view of the decision in *Seath & Co.* v. *Moore*, *supra.**

* This, however, is not the view of the learned editor of Bell's *Principles*, who says (ed. 1889, sec. 1303, p. 809), 'The last Scots case upon the subject '[meaning *M'Bain* v. *Wallace*] was decided upon the Mercantile Law Amend-'ment Act, but notwithstanding the difficulties which undoubtedly surround 'the question, and which were felt in that case, by the Judges both in Scotland 'and the House of Lords, the rule of *Simpson* v. *Duncanson's Creditors* must 'be held to be firmly settled.' It may, however, be remarked (apart from the case of *Seath & Co.* v. *Moore*, clearly expressed though the opinions of the Judges there are), that the determination of *Duncanson's* case was thought by the Judges (in the words of the reporter, Lord Monboddo), to depend not so much on general principles of law, as on the special terms of the agreement. By these, the employer was to pay the price in different portions. Before payment, however, he had a right to see the work so far properly performed. Thus, as the builder proceeded, such an appropriation took place, as prevented his creditors from attaching the ship without refunding the sums advanced. Speaking of the law of England, Mr. Foard says, 'Merchant Shipping,' 1880, p. 145: 'There must be a mutual intention to specifically appropriate by the 'vendor, assented to by the vendee, to constitute a complete transfer of the 'property, and perfect the appropriation.' His statement of the law of Scotland, on p. 150, is, in view of the cases in the text, now inaccurate.

Digitized by Google

Contracts for Building.

Where a shipowner contracts for the construction of a ship of a definite carrying capacity he is entitled to claim damages from the builders even after accepting delivery if the vessel prove deficient in carrying capacity, thus:—

Messrs. Spencer & Co. contracted with Messrs. Dobie & Co., shipowners, to build for them the *Firth of Tay*, to be of carrying capacity equal to her register tonnage and a half, at a fixed draught of water, the price to be so much per register ton, payable in four instalments, three during construction and the rest on completion. Before sending the last instalment the purchasers wrote that they reserved all claims for breach of contract, as they thought the carrying capacity contracted for would not be provided. The builders took no notice, but gave a receipt for the fourth instalment, and delivery taken by the purchasers. The carrying capacity turned out to be defective as the shipowners had feared, and they raised an action of damages for breach of contract against the builders. It was pleaded by the builders that the action was barred by the purchasers taking delivery, and that the action was an attempt to introduce the *actio quanti minoris* into the law of Scotland. The Second Division of the Court of Session *held,* after a proof, that, in the circumstances, the purchasers were entitled to damages, a purchaser in an executory contract where payment is made by instalments, and constructive delivery and appropriation takes place at each payment, notwithstanding that he has taken possession of the subject, being (Lord Ormidale indicated) entitled to claim damages for breach of contract should it appear that such has occurred (*Spencer & Co.* v. *Dobie & Co.*, '*Firth of Tay*,' December 17, 1879, 7 R. 396). Lord Ormidale observed that where a defect in an article of merchandise is latent, and can only be discovered after trial, the purchaser, even though he may have paid the price and used the article, will not on that account be precluded from his claim of damages, taking as example the case of seed used, where the sower of it would not be 'precluded from his claim of 'damage when the seed has grown up, if the disconformity 'could not have been sooner ascertained,' p. 405 (citing M'Laren's edition of Bell's Comment., pp. 463-4 and cases

Digitized by Google

there referred to). See Bell's Prin., sec. 99, and Foard, 126. This decision was followed in a case where it was alleged that it was impossible to build a seaworthy ship of the required dimensions and carrying capacity according to the model approved of by both parties. It was *held* in an action brought by the purchasers for damages for breach of contract, that this was no defence to the shipbuilder against a claim for damages. Lord Rutherfurd Clark (who delivered the opinion of the Court), observed that the measure of damages was to be found in the difference between the carrying power of the ship furnished and that of the ship contracted for (*Gillespie & Co.* v. *Howden & Co.*, March 7, 1885, 12 R. 800). The ship in this case was deficient in carrying capacity to the extent of nearly two hundred tons. There was no controversy as to the questions raised in *Spencer & Co.* v. *Dobie & Co.*, the only points to be determined being—(1) had the builders failed to fulfil their contract, and if so (2), for what amount of damages they were liable?

Impossibility of performance.

When a builder undertakes 'to build a vessel and deliver,' at a certain port, and the vessel is lost on the way to that port, he cannot sustain as a defence against the person employing him a plea that payment of the price having been made by instalments, delivery had really taken place. On the contrary, he is bound to repay to the owners of the vessel the sum received from them in payment of the price of the vessel (*Henckell Du Buisson & Co.* v. *Swan & Co.*, Dec. 12, 1889, 17 R. 252), she being undelivered, not having arrived at the port fixed for delivery.

'Build and deliver' at a certain port.

Messrs. Scott & Co., shipbuilders, Greenock, entered into a contract, executed in Paris, to build certain steam packets for Messrs. Valery, Freres et Fils, Marseilles and Paris. At the same time and place a member of the Scottish firm gave a letter to a member of the French firm engaging to pay him a certain percentage on the contract price. In an action for payment of the commission, the Scotsman pleaded in defence that the letter fell to be construed according to the law of France, and was not valid in respect that it was not duly stamped. The First Division of the Court of Session *held* that the letters constituted a

Foreign owners.

Digitized by Google

Scottish contract, and repelled the plea (*Valery* v. *Scott*, July 4, 1876, 3 R. 965). Lord President Inglis observed: 'Nothing here is French except the fact that the contract-'ing parties happened to be in Paris. Of course the idea 'of a Scottish contract requiring a French stamp to make 'it binding is out of the question,' p. 967. See Story's Conflict of Laws, sec. 280.

Sale to foreigner.

In the case of the *Florida* (*Granfelt & Co.* v. *The Lord Advocate*, March 10, 1874, 1 R. 782), the Lord President observed that an order for detention by the Board of Trade under the Merchant Shipping Act, 1873, sec. 12 (repealed by the Act of 1876), does not prevent a British ship being transferred to a foreigner, and the British register being closed.

The question whether a British vessel may be detained under sec. 12 after transfer to a foreigner, but before the British register is closed, was one, his Lordship observed, on which it was, in the case before him, unnecessary to give an opinion.

What is included in sale of ship.

When a steamer is sold by missive, 'with all belonging 'to her on board and on shore,' this was held to include a chronometer previously used in the vessel, which at the moment was in the hands of an optician on shore for the purpose of regulation, a chronometer being a necessary instrument of navigation, and there being no local or general usage of trade to lead to a different construction of the missive (*Armstrong & Co.* v. *M'Gregor & Co.*, '*Macedon*,' Jan. 19, 1875, 2 R. 339). Lord President Inglis observed that the law, so far as there was any law in the matter, was well expounded in the case of *The Dundee* where the question was to what extent *The Dundee* was liable for damage done by a collision, under the Act 53 Geo. III. cap. 159. *The Dundee* was a whaler bound for the Greenland fishery, and a question arose whether the fishing stores fell under the term 'appurtenances.' It was contended by the owner of the sunken vessel that all stores necessary for the purposes of the particular voyage on which she was sailing were included in that word. This contention was given effect to. See *The Dundee*, Jan. 28, 1823, 1 Haggart's Admiralty Cases, 109. The case of a chronometer is

Digitized by Google

specially mentioned by Abbott, Shipping, 341. See also *Gale* v. *Lawrie*, 5 B. and C. 156; *Laughton* v. *Horton*, 6 Jurist, 910, and the recent case of *Coltman* v. *Chamberlain*, '*Freedom*,' June 7, 1890, L.R. 25 Q.B.D. 328.

Sequestration of registered owner after execution of bill of sale.

A bill of sale followed by possession, effectually vests in the purchaser of a vessel, the right of property, which will not be affected by the subsequent sequestration of the seller, while still registered as owner (*Watson* v. *Duncan*, '*John Watson*,' July 12, 1879, 6 R. 1247). In this case Lord President Inglis pointed out that although sec. 57 of the Merchant Shipping Act of 1854 provided that every bill of sale should be registered, 'there is no clause providing, as 'formerly, that a bill of sale shall be of no effect until 'it is registered, that clause which is in both the previous 'Acts [3 & 4 Will. IV. c. 55, and 8 & 9 Vict. c. 89]. 'There is also another remarkable change, to the effect that 'beneficial or equitable interests are recognised and dealt 'with. It therefore came to be thought that under the '1854 Act it was no longer necessary to complete a title 'to a ship or a share in a ship, that there should be 'registration, though registration of bills of sale was 'provided for.'

The Lord Ordinary in dealing with the case in the Outer House, had referred to it as not distinguishable from *M'Arthurs* v. *M'Brair*, June 20, 1844, 6 D. 1174, but that case, as the Lord President showed, having been decided under the now repealed Act above-mentioned, 3 & 4 Will. IV. c. 55, was now no authority. The Act of 1862 by sec. 3 was intended to determine the operations and effect of the Act of 1854, with regard to registration, and is expressed in the form of a declaration, not an enactment, viz.:—'It is hereby 'declared that the expression "beneficial interest," when-'ever used in the second part of the principal Act 'includes interests arising under contract, and other 'equitable interests, and the intention of the said Act is 'that, without prejudice to the provisions contained in the 'said Act for preventing notice of trusts from being 'entered in the register book, or recorded by the registrar, 'and without prejudice to the powers of disposition and of

Digitized by Google

'giving receipts conferred by the said Act on registered 'owners and mortgagees, and without prejudice to the 'provisions contained in the said Act relating to the 'exclusion of unqualified persons from the ownership of 'British ships, equities may be enforced against owners 'and mortgagees of ships in respect of their interest 'therein, in the same manner as equities may be enforced 'against them in respect of any other personal property.' 'It appears to me,' said the Lord President, after quoting the above section, 'that the plain construction of this 'clause is that a person having a beneficial interest in the 'property of a vessel, though his title to it be not 'completed by registration, may enforce that right against 'the registered owner or mortgagee just as he might 'enforce a right in respect of any other personal property. 'These are the very words of the statute. There are 'exceptions, and no doubt important ones, but they do 'not affect this question. First, the registered owner or 'mortgagee has power of disposing and giving receipts; 'second, there is to be no notice on the register of trusts— 'that is, the circumstance that there is a beneficial interest 'is not to appear in the register; and third, the clause is 'not to effect the exclusion of unqualified persons from 'holding British ships. But with these exceptions, the 'right which any one acquires by contract to an interest in 'a vessel may be enforced.'

Shipbroker's commission.

In the two following cases the Second Division of the Court of Session decided adversely to the claims of *shipbrokers* for commissions alleged to have been earned by sales through their agency.

In the case of *Moss* v. *Cunliffe & Dunlop*, March 20, 1875, 2 R. 657, a broker sued a shipbuilder for 2½ per cent. commission on the price of a ship built by the defender, on the ground that the order had been obtained through the pursuer's introduction and recommendation. It was held upon a proof, reversing the judgment of the Lord Ordinary (Lord Curriehill), that the pursuer had failed to prove any contract between him and the defender for payment of the commission sued for, or to show that the order was the direct result of his intervention, and consequently that he

Digitized by Google

was not entitled to commission. The Lord Justice-Clerk (Moncreiff) dissented. In the subsequent case of *White* v. *Munro, &c.*, July 11, 1876, 3 R. 1011, his Lordship again dissented from the judgment of the Court. In this case Messrs. Matheson & Company, merchants and shipowners, London, required a steamer for correspondents in China, and put themselves in communication with Mr. John White, shipbroker, London, who brought under their notice the s.s. *Europe*, and wrote to the owners that he had done so, and requesting that should a sale result, they would reserve his commission. It was subsequently arranged that the vessel should be inspected on behalf of Matheson & Co. The report was unfavourable, and Mr. White intimated to the owners that 'his friends must 'decline her.' Three months after the date of this letter of declinature, a Captain Bolton arrived in England, who had been commissioned by the persons in China, for whom Matheson & Co. had been acting, to buy a steamer 'through the medium and with the assistance of Matheson '& Co.' Captain Bolton went to see Mr. Denny, shipbuilder, of Dumbarton, who knew what the China trade required, and who happened also to be a friend of the owners of the *Europe*, and, for the sake of the family of one of the owners of the ship, was desirous of getting her sold. Mr. Denny recommended the *Europe* as well suited for the Chinese trade, and after meeting one of the owners, Captain Bolton agreed provisionally to purchase the vessel. Captain Bolton wrote to Matheson & Co. what he had done, and they then informed him that this was the same vessel which the shipbroker, Mr. White, had spoken of, and which had been unfavourably reported on. Captain Bolton went to see Mr. White, and decided to proceed with a fresh inspection. The result was that Matheson & Co. were induced by Captain Bolton and Mr. Denny to reconsider their determination, and the *Europe* was purchased. Mr. White thereupon raised an action against the owners of the *Europe* for commission on the sale. The Second Division *held* that White was not entitled to commission upon the sale in respect that, though the seller had been introduced to the

Digitized by Google

purchaser by him as broker, the sale which ultimately took place was not in consequence of the broker's introduction. In giving his reasons for dissenting from this judgment, the Lord Justice-Clerk (Lord Moncreiff) said:—'There 'lay at the root of much of the argument addressed to us, 'both in this case and in the former case of *Moss* v. *Cunliffe* '*& Dunlop*, a notion that a claim of this nature was not of 'a character legitimately professional, and that it ought to 'be judged of strictly, if not viewed with suspicion. 'There also seemed to prevail an idea that if such 'a claim could be put forward by a broker, a similar 'demand could be made by any friend, or acquaintance, or 'stranger who might happen to give useful information on 'similar topics. But such views proceed on a want of 'familiarity with the kind of transactions in hand. The 'pursuer follows an occupation which has sprung up from 'the exigencies of our immense commercial concerns. He 'makes it his business to know, in the shipbuilding trade, 'which of the builders or merchants are desirous of finding 'customers or purchasers, and which are desirous of pur-'chasing or giving orders. These, of course, are constantly 'varying, and it is found convenient for those who are 'largely occupied to have recourse to such middlemen, 'instead of looking out for themselves. The sole business 'of such brokers is to find a possible customer for the seller, 'and a possible seller for the merchant. With the after 'negotiations and contract the broker has no concern, nor 'has he any responsibility in regard to them. If the 'principals come to one, and business ensues, he has his 'commission from the seller on the first transaction, if there 'be one in view. If nothing ensues, he has no claim. In 'all this there is nothing but an ordinary contract of 'employment for a particular service, resting like a great 'many such contracts in a well-defined usage, and limited 'and qualified by the custom on which it rests.' 'A great 'authority, Chief-Justice Earle, whom every jurist must 'respect,' continued the Lord Justice-Clerk, 'referring 'to the decision pronounced by that judge in *Green* v. '*Bartlett*, May 30, 1863, 32 L.J., C.P. 261; 14 Scott's C.B. 'Rep. 681, said that the broker's introduction must be the

Digitized by Google

'*causa causans* of the ultimate transactions. I agree that 'there must be the relation of antecedent and consequent 'between them, and that an incidental or indirect result 'will not be sufficient. But this remark has, I think, been 'misapplied. In accurate language an introduction of one 'person to another with a view to a contract never can be 'said to be the *causa causans* of the contract. It is enough 'in such a claim that the introduction produces negotia-'tions, and that negotiation is followed by a concluded 'contract. All this is not directly disputed; but the main 'consideration which, I think, has been rather lost sight 'of in the present case, and on which my dissent proceeds 'is, that the broker undertakes introductions only, not 'negotiations.' On this assumption the Lord Justice Clerk argued that the vicissitudes of the negotiations did not affect the broker's claim to commission if a sale was carried out ultimately, 'the purchaser may decline the 'bargains through Mr. Mathieson in October, he may 'resume it through Captain Bolton in January.' The opinion of Lord Moncreiff has been cited at considerable length, in order to show the position his Lordship assumed in both the cases under notice. In the second case, however, that of the sale of the *Europe*, the opinion of the majority of the judges, which amounts to the acknowledgment of the purchase through Mr. Denny being an altogether new transaction from that attempted through Mr. White, remains that which most recommends itself to common sense in the circumstances. Mr. Denny was entitled to commission, he did not seek it, but as Lord Ormidale said, had he claimed commission in competition with Mr. White, 'I cannot doubt but that Denny would be preferred,' p. 1021. The circumstances of the above case cannot, however, be regarded but as being very special.

A custom of trade has now been definitely recognised by the First Division of the Court of Session, that if a shipbroker brings a customer to a shipbuilder, and the shipbuilder accepts the employment, the broker is entitled to a commission (*Walker, Donald & Co.* v. *Birrell, Stenhouse & Co.*, Dec. 21, 1883, 11 R. 369), even although, as in the case cited, the first negotiations follow-

Digitized by Google

ing upon the introduction do not result in business, if a contract be ultimately arranged deducible from the introduction; in the circumstances the rate of commission was fixed at one per cent. The cases of *Moss & Cunliffe* v. *Dunlop, supra* and *White* v. *Munro, supra*, were cited in argument, but are not referred to in the judges' opinions. Lord Shand observed, p. 374: 'There has been a proof 'of the practice of the trade led in this case, and we well 'know from other cases both here and in England (*Mansell* 'v. *Clements*, L.R. 9 C.P. 139; *Wilkinson* v. *Alston*, June '29, 1879, 48 L.J., Q.B. 733), that the practice is that when 'the services of a broker are accepted and business results 'a commission is due,' and p. 375: 'The builders took 'the benefit of the introduction, business resulted, and 'therefore giving effect to the custom of trade, which has 'been proved, the builder is liable for the broker's com-'mission. It may be that it did not occur to the ship-'builder that he was incurring this liability, but if that 'was his view he mistook his own position. As the 'builder was taking advantage from the broker's intro-'duction, he should have taken care to stipulate for such 'a price as would cover the broker's commission, or have 'refused the contract.'

Where a broker received a commission on the price of a vessel from its builders, certain of the owners who acquired shares direct from the builders, raised an action (ten years after their purchase of more shares), against the broker, to recover their respective proportions of the commission. They contended that the broker was the agent of the owners, and was bound to communicate any such commission. The broker had in fact procured subscriptions for one-half of the price, and the builders had procured subscriptions for the other. The commission stated was 1¼ per cent., being one-half the usual commission. The Second Division of the Court of Session held, that the commission was really chargeable upon only one-half of the price of the ship subscribed by the broker's friends, and that the broker was not the agent of the pursuers, and assoilzied the broker (*Neilson* v. *Skinner & Co.*, '*Loudon Castle*,' July 18, 1890, 17 R. 1243).

Digitized by Google

Repairs.

Lien.

A shipwright, who has once parted with the possession of the ship, is not, as Lord Tenterden observes (Abbott, Shipping, p. 101), to be preferred to other creditors, nor has he any particular claim or lien upon the ship itself for the recovery of his demand. But what is meant by 'parting with the possession'? In the following case it was *held* by the House of Lords that a shipbuilder's lien for repairs, is not lost by removing the ship from his own slip into a public harbour the better to enable his repairs to be completed.

Public Harbour.

The *Joan Cunllo* of Aberystwith, was in September, 1872, placed in a patent slip at Ardrossan, belonging to Barr & Shearer, shipbuilders there, for repairs. After some of the repairs were completed she was removed for the repairers' convenience, into a public wet dock, into which the patent slip opened; the repairs were there finished; the vessel was attached to pawls situated within the shipbuilders' yard, and lay close to their slip. She was moved for the convenience of those using the slip at the order of the harbour-master from time to time, but chiefly by Barr & Shearer's men. The master was present in the ship every day, and at night a ship keeper. After the repairs were completed, the shipbuilders replaced the *Joan Cunllo* in the slip and detained her in security of the payment of their account for repairs. The mortgagee of the ship then raised an action in the Court of Session against Barr & Shearer, pleading that he was entitled to possession of the ship as mortgagee, and to sell it in payment of his debt preferably to all other creditors, and that the defenders had lost their lien or retention over the vessel as soon as she was put into the public harbour. The Lord Ordinary (Lord Gifford) having decided in the shipbuilders' favour, the mortgagee reclaimed, and the First Division of the Court of Session reversed his judgment, holding that the lien which the shipbuilders had for the cost of the repairs while the vessel was in their slip, ceased when she was removed into the public wet dock, and became subject to the orders of the harbour-master,

Digitized by Google

the power of detention being absolutely necessary to the right of lien. The shipbuilders appealed to the House of Lords, and it was there decided that the possession of the ship, and the resulting lien for the cost of repairs, which the shipbuilders had while it remained in their slip, did not cease when the vessel was removed by them to the public dock (*Barr & Shearer* v. *Cooper*, '*Joan Cunllo*') Feb. 26, 1875, 2 R. (H. of L.) 14. The Lord Chancellor (Cairns) pointed out that the question was in reality one of fact, and in the conclusion of his judgment he summarised the opinions of the Court of Session in three propositions: 'They say'—(1st) said his Lordship, 'with regard to a 'ship in a public harbour or a maritime highway, repairs 'executed upon a ship under such circumstances confer no 'lien. Very probably they do not. I should be disposed 'to say, *prima facie*, in the absence of some countervailing 'circumstances, that they do not. But I am not prepared 'to say that, even then, there may not be circumstances 'indicating such a transmission of the ship, such a handing 'over of the ship to the workmen, that there may arise a 'lien for repairs. That is not a question to be decided 'now, and I only guard against being supposed to have 'expressed an opinion upon it, but I accept the opinion 'of the Court that *prima facie* in that condition there is 'not a lien for repairs. Then say the learned Judges; '(2nd) There was a lien for repairs by virtue of the 'presence of the ship upon the private slip of Messrs. Barr '& Shearer; but they say (3rd) Seeing that at a later 'period the ship was moved into a public dock—a public 'highway—insomuch as originally there could not have 'been a lien on the ship for repairs effected on the ship 'while in that public dock, the moment she gets into the 'public dock from the slip, the lien which existed while 'she was upon the slip ceases, and no lien whatever con-'tinues to attach. My Lords, it is to that conclusion in 'that third proposition that I must venture most respect-'fully to object. I cannot follow the conclusion of the 'learned Judges. I think it is a question of fact, and of 'the circumstances of the case, and it appears to me that 'the circumstances of the present case clearly show that

Digitized by Google

'this ship was originally handed over, in the literal sense 'of that expression, to the builders for repair. She was 'taken possession of by them as was intended, and she was 'placed upon their slip. In that state of things a lien 'attached and was maturing, and that lien did not cease 'when, for the limited purpose which I have described, and 'under the circumstances which I have mentioned, she 'was moved off the slip for the completion of the repairs, 'in a part of the public harbour adjacent to the premises 'of the builders.'

A decision on similar lines was pronounced subsequently by the Court of Session in the case of *Ross & Duncan* v. *Baxter & Co.*, *&c.*, Nov. 13, 1885, 13 R. 185. A firm of engineers had contracted with a shipbuilder to put engines into the *Greetlands*, a vessel then in course of building, on her being brought to Leith for the purpose. The following stipulations were contained in the contract and relative specifications:—'The engines, boilers, &c., shall be held to 'be the property of the second parties (the engineers) until 'the full price is paid to the second parties in cash, but 'shall be subject to the absolute lien of the first parties '(the shipbuilders) thereon, for all moneys or bills paid by 'them to the second parties.' 'The vessel to be brought 'to the crane at Leith for the purpose of having the 'machinery put on board, and remaining at the disposal 'of the engineers for that purpose for the necessary period. 'Vessel to be removed by shipbuilders after receiving her 'machinery, the engineers providing men to work the 'machinery. Vessel to be throughout in charge of the 'shipbuilders.' The *Greetlands* was towed to Leith Harbour on 27th December, 1883, in charge of a foreman shipwright, who, after the vessel had moored, intimated to the engineers, in terms of his instructions, that he handed over the vessel to them. One of the shipbuilders' men, however, a certificated master named Dover was left on board the *Greetlands* and remained on board continuously while the engineers were engaged on the vessel, and subsequently; but the movements of the *Greetlands* in the harbour were directed by the engineers without consulting him. On 25th January, 1884, the

Digitized by Google

engineers put a man on board, to remain night and day. Dover objected, but remained on board himself all the same. On 2nd February, after almost the whole work under the agreement had been executed, the shipbuilders became bankrupt. Later in the year an action was brought by the engineers against the shipbuilders and the trustee on their estate, and certain bankers who had made advances to the shipbuilders on the security of the ship, for declarator that they had a lien over the ship. It was held by the First Division of the Court of Session that, having regard to the stipulation that the vessel should continue in charge of the shipbuilders, and to the fact that they had retained a representative on board during the whole time, the engineers had never obtained possession of the ship, and had therefore no lien over it. Lord Shand observed that he had found this case to be one of extreme difficulty, and he and also Lord Mure expressed opinions to the effect that a shipbuilder or enginebuilder may have such possession of a vessel in a public harbour as to have a lien over it for work executed.

Survey.

The necessity of a precise and careful *survey* of a vessel before *contracting for repairs*, is exemplified in the case of the *United Service*, where the pursuer had entered into a contract to 'overhaul and repair' that vessel for a slump sum, the agreement being in the following terms:—'*Iron* '*work*.—The plating of the hull to be carefully overhauled 'and repaired. Deck beams, ties, diagonal ties, main and 'spar deck stringers, and all iron work to be in accordance 'with Lloyd's rules for classification.' The words, 'if any 'new plating is required, the same to be paid for extra,' had been deleted from the specification before signature. Messrs. Inglis found on setting to their work, that a large amount of the plating of the hull was so much worn that it had to be replaced by new plating to enable the vessel to be classed at Lloyd's. The House of Lords *held*, *affirming* the judgment of the Second Division of the Court of Session, that upon a sound construction of the terms of the contract the shipbuilder was bound to supply the new plating required for classification (*Inglis* v. *Buttery & Co.*, '*United Service*,' March 12, 1878, 5 R. 58).

Digitized by Google

Tug and Tow.

In maritime usage, the word *ship* is frequently understood to cover both a ship and the tug by which it is towed; hence the underwriters of the ship *Niobe* were held liable for damage arising from the collision of her tug with another vessel (*M'Cowan* v. *Baine & Johnston, &c.*, July 27, 1891, 7 *T.*L.R. 713). The decision in the case of the *Quickstep*, decided a year earlier had specialities of its own which led to a decision on other grounds. That vessel, proceeding down the river Tees with a hopper barge in tow, came into collision with a paddle steamer. It was held that the owners of the hopper barge were not liable for the negligence of the crew of the *Quickstep* (August 5, 1890, the *Quickstep*, L.R. 15 Prob. Div. 196). Butt, J., observed:—'It is the practice on the Tees, as in 'many of our rivers, for steam-tugs to tow several barges 'at the same time. The barges frequently belong to 'different owners. In such cases, whose servants are the 'crew of the tug? Supposing barges A, B, and C, each 'belonging to a different owner, to be in tow of one steam-'tug, and damage to be caused to another vessel by the 'negligence of the master of the tug; is each of the 'owners of the barges to be held liable for the damage 'done on the ground that the crew of the steam-tug are 'his servants? If so, it would follow that if, by the 'negligence of those on board the tug, barge A is brought 'into collison with another vessel, the owners of barges 'B and C would each be liable for the damage so caused; 'a conclusion which would not seem consistent with 'reason or good sense. The truth is no general rule 'can be laid down. The question, whether the crew of 'the tug are to be regarded as the servants of the owner 'of the vessel in tow, must depend upon the circum-'stances.' While the learned Judge went on to remark that it would be a hopeless task to attempt to reconcile either the English or American decisions bearing on the subject, he referred with approval to the judgment of Mr. Justice Clifford of the Supreme Court of the United States of America in *Sturgis* v. *Boyer*, 24 Howard's Rep. 110, at page 122.

The two following cases relate to ship measurement

Digitized by Google

— a matter of occasionally very considerable difficulty.

Merchant Shipping Act, 1854, sec. 21, sub-sec. 4.

The space below the hurricane deck of the *Danzig*, which extended from the forecastle to a bridge (connecting the bulwarks), was not entirely closed in, there being a passage on either side of a small round house, which was situated below the centre of the bridge. There was no means for closing in these passages. The hurricane deck did not prevent seas being shipped, and the working of the ship was almost entirely conducted on the main deck. Lord Gifford as Lord Ordinary *held*, and his judgment was not appealed against, that the space below the hurricane deck was not 'a closed-in space on 'the upper deck available for cargo or stores, or for the 'berthing or accommodation of passengers or crew,' within the meaning of sub-section 4 of section 21 of the Merchant Shipping Act, 1854, and, therefore, did not fall to be included in the measurement of the ship (*The Leith, Hull & Hamburg Steam Packet Co.* v. *Lord Advocate*, '*Danzig*,' March 20, 1873, 11 Mac. 597).

In the case of the steamer *Bear*, which had an awning-deck above the main deck, with two gaps, thirteen feet six inches and eight feet six inches broad respectively, which extended across the vessel, the gaps could be planked over, if required, so as to cover the vessel from stem to stern, but the doors of the gaps were not able to resist the sea, and the coverings were not made water-tight; it was *held* by the House of Lords, affirming the judgment of the Second Division of the Court of Session—(1) that the vessel had not 'a third deck, commonly called a spar deck,' within the meaning of the provisions of sub-section 5 of section 21 of the Act; and (2) that the space between the awning deck and main deck was not 'a permanent closed-in 'space on the upper deck available for cargo or stores, or 'for the berthing or accommodation of passengers or crew' in terms of the sub-section 4 of section 21, and should not, therefore, be included in the measurement of the ship (*Lord Advocate* v. *Clyde Steam Navigation Co.*, '*Bear*,' March 11, 1875, 2 R. (H. of L.) 23). The Lord Chancellor (Lord Cairns) in his judgment observed:—'I

Digitized by Google

'think it clear that the kind of upper or spar deck mentioned 'in the Act of Parliament is a continuous deck from stem 'to stern, fastened down and water-tight, sealing up the 'cylinder formed between the two decks, and making it 'a fit place for the stowage of cargo like a hold. In the 'case of the *Bear*, judging by the evidence and the 'model, the upper deck plays rather the part of a 'covering platform for the main or tonnage deck. . . . 'The *Bear*, being a steamer used for coasting purposes 'and chiefly for the conveyance of cattle, this, which is 'called a deck, is in reality a covering run along the ship, 'above and parallel to the main deck, for the purpose of 'affording shelter against weather, and at the same time 'affording a platform along which the crew can pass in 'navigating the ship. The cargo, between this covering 'and the main deck, is not cargo stowed and sealed up in a 'hold, but is deck cargo protected against the weather.'

Lloyd's Register.

The classification of vessels in Lloyd's Register is a matter as to which the Courts will not interfere. Lloyd's cannot be compelled to register a vessel unless she conforms to their rules. The rules and regulations were brought under the notice of the Court in the case of the *California*. As they stood in 1872, they required that 'awning-decked' vessels should have 'scuppers and ports at the main deck 'through the side to discharge water,' but they were subsequently altered in 1875 and 1876, and 'awning-decked' vessels were required to have a maximum load line approved by Lloyd's marked on their side. If loaded beyond that line they lost their character in the register-book. The *California* was built under special survey, and was entered in Lloyd's Register, in 1872, as an iron screw awning-decked steamer of the highest class, and remained on that classification till 1876. In 1877, her owners refused to mark the load line on the sides of the vessel, and the vessel appeared in the Register, for 1877, as a ship disqualified for classification by reason of non-compliance with the rules of Lloyd's Association. It was not alleged that the pursuers had ever infringed the rule in force in 1872. The owners of the *California* raised an action of damages against Lloyd's for breach of contract, alleging

Digitized by Google

that Lloyd's were bound to continue the classification of the pursuers' vessel so long as the conditions specified in the defenders' rules, at her date of classification, continued to be fulfilled. The defenders answered that there was no contract, that Lloyd's never came under any obligation to the owners of the *California* to register her under any other denomination than that to which they thought her entitled for the time, and that they could not be made responsible for proceeding in accordance with their uniform practice. The Second Division of the Court of Session held, confirming the decision of the Lord Ordinary (Lord Young), that the facts averred by the pursuers did not imply a contract between them and Lloyd's Association entitling them to insist on their vessel being retained in the class first assigned to her, or which would interfere with the exercise of the Association's independent judgment in framing new conditions of classification (*Henderson* v. *Lloyd's Association*, '*California*,' March 15, 1879, 6 R. 835). The Lord Justice-Clerk Moncreiff, in giving judgment, pointed out that the position of Lloyd's was very different from that of an association or company holding itself out as ready, for its own profit, to register all and sundry vessels that may come to it. 'There is no 'contract,' his Lordship continued, 'between the association and the outside public, as there would be in the case 'of such an association or company. Certain conditions 'are laid down by the defenders' association which must 'be complied with by the owners of vessels which are 'to be classified and registered by them. But that does 'not make a contract with the public. It is a notification 'and nothing else, of certain requisites which the association insist shall be fulfilled before they will register a 'vessel. Now, the value of the defenders' Register depends 'upon their perfect independence, and it would, therefore, 'overturn the very object of the associated members, if 'there could be any contract compelling the Association to 'register a vessel except according to their own independent judgment. If they were compelled to do so by any 'such contract, the character of their Register would be 'destroyed, and the object of the members of the Asso-

Digitized by Google

'ciation frustrated.' Lord Moncreiff referred with approval to the judgment of Vice-Chancellor Malins in the case of *Clover* v. *Royden*, Dec. 18, 1873, L.R. 17 Eq. 190.

Merchant Shipping Acts, 1854 (17 & 18 Vict. c. 104), secs. 307, 312, and 318; 1872 (35 & 36 Vict. c. 73), sec. 13; 1876 (39 & 40 Vict. c. 80), secs. 14 and 15.

By the Merchant Shipping Act of 1854, and the Amendment Act of 1872, the *survey of passenger ships* by the Board of Trade was made obligatory. The Amendment Act, 1876 (sec. 14), provided for appeal to the Court of Survey, instituted by the Act, 'if a shipowner feels aggrieved' by a surveyor's declaration respecting a passenger steamer, or by his refusal to give such declaration; and (sec. 15), for reference, to scientific persons, of such appeals as involve 'a question of construction or design, or of scientific diffi-'culty or important principle.' Head 88 of Instructions issued by the Board of Trade, in 1878, to their inspectors, required that the out-let of all soil and scupper pipes, below the weather-deck, should 'be an elbow of good 'substantial metal, other than cast-iron or lead, extending 'above the load water-line.' As the builders failed to comply with this requirement, in the construction of the passenger steamer *Buenos Ayrean* the Board of Trade refused to give a declaration. The builders and owners brought an action for declarator that the instructions given by the Board to their surveyors were *ultra vires* of the Board. The First Division of the Court of Session *held*, that the proper remedy was by appeal to the Court of Survey or the scientific referees, under sec. 14 of the Act of 1876, and that the jurisdiction of the Court of Session was *in hoc statu* excluded, whether the Board had gone beyond its powers or not. The *opinion* was expressed by Lord Deas and Lord Shand that the Board of Trade were within their powers in issuing the instructions complained of (*Denny Brothers, &c.* v. *Board of Trade, &c.*, '*Buenos 'Ayrean*,' June 25, 1880, 7 R. 1019).

Digitized by Google

CHAPTER II.

THE OWNERS—MANAGING OWNER—MASTER—AND SEAMEN.

OWNERS—POWER OF MAJORITY TO BIND MINORITY—DISPUTE BETWEEN CO-OWNERS—TRUSTEE IN SEQUESTRATION—CHARTERER'S AGENT'S POWERS WHEN ACTING AS OWNERS' AGENT—PASSENGERS' LUGGAGE — SAFETY OF PUBLIC — MANAGING OWNER—REMUNERATION—COMMISSION—DISBURSEMENTS—REPAIRS—SEQUESTRATION OF SHIP'S HUSBAND—HIS HYPOTHECATION OF FREIGHT—POWERS OF A GENERAL MANAGER.

FROM the consideration of the ship, its building, repair, or sale, we come now to consider the recent decisions of our Courts relative to the *persons whose business is immediately connected with the ship*—viz., the owners; the ship's husband or managing owner; the shipmaster or captain; and the seamen. It is true that this list might be considerably extended if charterers, shippers, consignees, and underwriters were to be dealt with here, but it is thought preferable that the first three excepted classes should be dealt with incidentally under the general heading 'Affreightment,' and a chapter on marine insurance will include any cases which might have otherwise been grouped here under the heading of underwriters.

THE OWNER.

Bennett v. *Maclellan; M'Phail* v. *Hamilton; Roy* v. *Hamilton; Mackessack & Son* v. *Molleson; Henderson and Others* v. *Stevenson; Monaghan* v. *Buchanan; Lightbody's Trustee* v. *J. & P. Hutcheson; Manners* v. *Raeburn & Verel; Robertson* v. *Dennistoun; Carswell & Son* v. *Finlay; Steel & Co.* v. *Dixon; Lindsay* v. *Adamson & Ronaldson; Macgregor's Trustee* v. *Cox, &c.; Ross, Skolfield & Co.* v. *State Line Steamship Company, Limited.*

Digitized by Google

Although old writers generally speak of 'the owner,' the increased cost of shipbuilding, and the convenience of dealing with shares, has led to almost all vessels being owned by numerous owners. In a case where the liability of owners *inter se* as contributories was the point, the power of the majority to bind the minority was affirmed.

Majority may bind minority.

All the owners of the s.s. *Austria*, except A, who had one share, were resident in England, and in an action in the English Courts were found liable to owners of cargo in damages caused by her loss on Ailsa Craig, on 16th October, 1884. A, who resided in Glasgow, was informed of the action, but declined to join in the defence. The manager of the vessel had insured her with the United Kingdom Mutual Steamship Assurance Association, Limited. The manager was a member of the association, and he alone as a member was entitled to recover from the association, and in his name the owners brought an action of relief in England against the association for the liabilities occasioned by the loss. They were unsuccessful, and an appeal was taken, but, on the advice of counsel, it was abandoned, and the action compromised for a money payment by the association. In an action in Scotland against A, at the instance of the other owners, to have him found liable to contribute his share of the ship's liabilities, he pleaded that he had been impliedly discharged by the compromise, as he had never been consulted. The First Division of the Court of Session repelled the defence, and granted decree (*Bennett* v. *Maclellan*, '*Austria*,' May 27, 1890, 17 R. 800). Lord President Inglis remarked :—'The 'question is, has the defender any solid ground of complaint in respect of what was done in effecting a compromise? On the contrary, I think he ought to be very 'pleased that his liability has been so much reduced,' p. 807. See also the *Vindobala*, Dec. 20, 1887, L.R. 13 P.D. 42, as to the liability of a minority of co-owners, and *Manners* v. *Raeburn & Verel*, '*Kremlin*,' June 6, 1884, 11 R. 899, *infra*, p. 32, as to the power of a single owner to sue under certain circumstances.

Merchant Shipping Act, 17 & 18 Vict. c. 104, sec. 65.

In cases of dispute between fellow-owners of a vessel, it has been held incompetent to take advantage of the

provision of the Merchant Shipping Act, 1854, sec. 65, which empowers the Court to restrain any dealing with a particular ship for a time to be named.

Disputes between part-owners.

The s.s. *Earnholm* was built for H. M'Phail and J. Hamilton, and was owned by the joint-adventurers as part-owners. M'Phail presented a petition under the above section of the Merchant Shipping Act, 1854, which authorises the Court 'upon the summary application of 'any interested party,' 'to issue an order prohibiting for 'a time to be named in such order, any dealing with any 'ship or share of a ship.' The respondent objected to the competency of the application and referred to the case of *Roy* v. *Hamilton & Co.*, March 9, 1867, 5 Mac. 573; 39 Scot. Jur. 288; '*Lucetta*,' '*St. George*,' '*Araminta*,' and '*Hay-'ward*,' where it had been held that the 65th section applied only to cases where it was desired to prevent a sale by the Court under sections 62 to 64 of the statute of a ship or share of a ship which had become vested in a person not qualified to be the owner of a British vessel, and that it did not apply to the case of a personal creditor seeking to prevent his debtor, a British ship-owner from selling or mortgaging a ship. The petitioner requested the Court to reconsider their judgment in *Roy's* case, with special reference to the Merchant Shipping Acts, &c., Amendment Act, 1862, sec. 3, and contended that though the 65th section of the Act of 1854 might not apply to the case of a mere personal creditor of the shipowners, it was not intended to have the very limited application to which the grounds of judgment of the majority of the Court in *Roy's* case would necessarily confine it. The First Division of the Court of Session *held* (Lord Shand dissenting), that the petition was incompetent, *Roy's* case being directly in point (*M'Phail* v. *Hamilton*, '*Earnholm*,' July 5, 1878, 5 R. 1017). Lord Shand summarised his reasons for dissent as follows:—'My 'opinion is that *Roy* v. *Hamilton* does not apply here; 'that section 65 applies to a large class of cases in which 'persons can qualify a direct interest in a ship, and is not 'limited in its operation in the narrow way to which your 'Lordships' judgment restricts it; that the petitioner is an

Digitized by Google

'interested person within the meaning of the Act, and 'that the application is competent,' p. 1022.*

Trustee in Sequestration.

The position of an owner as regards responsibility may be taken up by a trustee in sequestration, as, for example, when it appeared that the charter-party and bill of lading of the vessel *Jeanie Hope* though not specially authorised by the trustee in a sequestration were, in fact, entered into under his general authority and for behoof of the estate, and that he was the true exercitor of the vessel, the trustee was held liable for fulfilment of the contract, and for damages arising from a breach thereof (*Mackessack & Son* v. *Molleson*, '*Jeanie Hope*,' Jan. 15, 1886, 13 R. 445). Such a trustee appears practically to be in the position of a mortgagor in possession who has all the powers of an ordinary owner. See Scrutton, p. 35.

Charterer's agent may act as owner's agent.

When a charterer's agent collects freight from consignees, he acts as the owner's agent, but he has no authority to compromise claims. See *Broadhead* v. *Yule*, '*Puck*,' June 29, 1871, 9 Mac. 921.

Passenger's Luggage.

It was held by the House of Lords in the case of *Henderson & Others* v. *Stevenson*, '*Countess of Eglinton*,' June 1, 1875, 2 R. (H. of L.) 71 (a case not falling within the provisions of the Railway and Canal Traffic Act, 1854), that special conditions, limiting the common law liability of a carrier, were not imported into a contract of carriage, by merely printing them on the back of the ticket delivered by the carrier in exchange for the fare, the person receiving the ticket not having actually read the conditions, and not having had his attention directed to them by anything printed on the face of the ticket, or by the carrier himself when issuing it. The circumstance was that a passenger from Dublin to Silloth lost his luggage, owing to the steamer *Countess of Eglinton* being wrecked. His ticket bore on the back this condition :—'The company incurs 'no liability whatever in respect of loss, injury, or delay 'to the passenger or to his or her luggage, whether arising 'from the act, neglect, or default of the company or

* Nor will the Admiralty Court in England exercise the power of sale conferred by 24 Vict. c. 10, sec. 8 (2), unless a part-owner makes out a very strong case, see *The Marion*, Dec. 2, 1884, L.R., P.D. 4.

Digitized by Google

'their servants or otherwise.' It was *questioned* by the House whether such limitation of the company's common law liability was legal, and whether, if a passenger declined to agree to the condition, they could refuse to carry him. The opinion was given by Lord Chelmsford that the company who owned the vessel could discharge themselves of liability for negligence, or even for the wilful misconduct of their servants, by notice, assented to by the passenger, but that the exclusion of such liability could not be established without very clear evidence of the notice having been brought to the knowledge of the passenger, and of his having expressly assented to it.

Safety of public.

The responsibility undertaken by owners in the interests of the safety of the public is shown in the following case relative to the starting of a river steamboat.

The master of the Clyde river steamer *Benmore*, on July 1, 1885, at the Broomielaw, Glasgow, after the sailing-bell rang, ordered the gangway to be hauled away and to cast off the bow-rope, in the same breath. The bow-rope was cast off, and owing to the flood-tide running, the bow of the vessel began to sheer off the quay. The men in charge of the shore-end of the gangway, on receiving the order, applied themselves instantly to haul away the gangway. But before they got it started they were interrupted by a rush of four passengers for the boat. The first two got safely on board, but those in charge failed to stop the third in time, and as the vessel parted from the gangway he was still on it, and was precipitated into the water and injured. The fourth passenger was stopped. The Court (Second Division), *held* (Lord Craighill dissenting), that the master was in fault in casting off his bow-rope before the gangway was completely withdrawn, and that the owner of the *Benmore* was therefore liable in damages, negativing the defence of contributory negligence (*Monaghan* v. *Buchanan*, March 20, 1886, 13 R. 860). The case was entirely as to matters of fact, about which there was a considerable conflict of evidence. See the *Bernina* (2) L.R. 12 P.D. 58, *infra*.

Carrier's contract.

The liability of owners for the safe conduct of goods, and the clauses by which they may seek to relieve them-

Digitized by Google

selves from liability, will be discussed elsewhere but reference may here be made to the case of *Lightbody's Trustee* v. *J. & P. Hutcheson*, '*Clara*,' October 16, 1886, 14 R. 4, where the question was raised whether a printed circular post-card sent by shipowners to possible shippers of goods in Galway, stating that the s.s. *Clara* would sail from Glasgow to Galway on a date named, containing this intimation: 'All goods carried on conditions as per sailing bills,' which conditions relieved the shipowners from all liability for the consequences of their own or their servants' faults, could be held to apply to the return voyage of the *Clara* from Galway to Glasgow, so as to import the conditions on the sailing bills into a contract for that voyage. It was not necessary to decide the point, but Lord Young indicated an impression 'approximating at all events to an 'opinion which I myself have,' that the question would be answered in the negative—*i.e.*, that these conditions would not be imported into the return voyage, for 'I should say,' observed Lord Young, 'that, as a general proposition, the 'carrier of goods, whether by land or sea, who wishes to 'free himself from the common-law rules of liability, ought 'to make a special contract for the purpose.' Lord Craighill and Lord Rutherfurd Clark gave opinions concurring with Lord Young.

As to the non-liability of owners for a larger quantity of goods than is actually shipped, irrespective of quantity stated by master in bill of lading, see *M'Lean & Hope* v. *Munck*, '*Sophia*,' June 14, 1867, 5 Mac. 839. (*Infra*, p. 108.)

MANAGING OWNER.

Ship's husband.

A person appointed to act on behalf of a number of owners of a ship was formerly termed the 'ship's husband,' Abbott, pp. 62, 63. This name has now been generally superseded by that of *managing owner*. The term seems to have come from America, where the registration statutes speak of the ship's husband as managing owner, Foard, p. 48. See as to the duties and responsibilities of his office, Story on Agency, sec. 35, p. 41; Bell's Prin. 449.

Digitized by Google

Remuneration.

He is entitled to remuneration (*The Meredith*, March 11, 1885, L.R. 10 P.D. 69).

A *managing owner* must give his fellow-owners the full benefit of any agreements relative to the ship. Any agreement for secret remuneration is void.

Commission to be shared.

A majority of the owners of the s.s. *Kremlin*, of Glasgow, passed a resolution 'that the commission for 'managing the boat remain as before—viz., 7½ per cent. 'on the gross freight, the ship's husband paying out of 'this all commissions to brokers or otherwise.' There had been no prior arrangement as to the rate of remuneration; but the managers had charged 2½ per cent. on the gross freight in name of their own commission, and entered the gross sums nominally paid to brokers, without stating the rebates which they had received from these brokers. Their own commission and the commission nominally paid to the brokers amounted almost exactly to 7½ per cent. on the gross freight. One of the minority of the owners having brought an action against the managers for an accounting for the rebates, they contended that the resolution barred him from suing the action. The Second Division of the Court of Session held that the pursuer, though a single owner, had a title to sue an action calling on the ship's husbands to account for the rebates; that the resolution was not binding on the pursuer in regard to voyages previous to its date; and that the defenders were bound to credit the ship with the rebates (*Manners* v. *Raeburn & Verel*, '*Kremlin*,' June 6, 1884, 11 R. 899). A ship's husband is bound to communicate to his co-owners the benefit of a deduction allowed by a broker on the commission for the charter-party (*Robertson* v. *Dennistoun*, '*Elizabeth* '*Walker*,' May 23, 1865, 3 Mac. 829).

His disbursements.

A person who acquires an interest in a ship by bill of sale, undisclosed and unintimated, is not responsible in the event of the loss of the ship before freight has been earned, for disbursements made by the *managing owner* before the date of the bill of sale (*Carswell & Son* v. *Finlay*, '*Arran*,' July 8, 1887, 14 R. 903). 'Even if intimation of the bill 'of sale had been made to the ship's husband and the

Digitized by Google

'co-owners,' observed Lord Shand, p. 910, 'the result of 'the facts and the admissions would have been the same. 'When the defender acquired his shares, it was not 'specially stipulated that he should undertake liability 'for furnishings and repairs already made, and so he 'bought a share in a ship which was victualled, provi-'sioned, and ready for sea as between him and the person 'who sold to him, and in that state of fact there is no 'ground for holding that he became responsible to the 'ship's husband. It is quite true that, if freight had been 'earned, the ship's husband would have been entitled 'to retain, even against the defender, the advances he 'had made to enable it to be earned. That follows from 'the relation of the ship's husband to the ship, and those 'on whose credit he made the advances, and the right 'arises from the doctrine of retention. He would retain 'against the ship what he had paid out for the ship. But 'that is a different thing from the assertion of an active 'right to sue the defender personally, or recover from him 'as personally liable for them, advances made before he 'had anything to do with the ship. In the state of matters 'which has actually occurred, there is no freight. What 'remedy, then, has the ship's husband? Plainly his 'remedy is to have recourse against the former proprie-'tor of the defender's shares for the proportion due in 'respect of these shares, and that because it was on his 'credit and employment that the liability was undertaken.' But where the sale of a share in a ship has been fully carried out, a purchaser of such shares, while she is on a voyage, is liable for the expenses of this voyage and of the vessel's outfit for it, besides being entitled to a share of the freight. See too, *The Vindobala*, Dec. 20, 1887, L.R. 13 P.D. 42 (observations by Butt, J., at p. 46); and Abbott on Shipping, 66.

Repairs.

It was decided in the case of *Steele & Co.* v. *Dixon, &c.*, '*Brazilian*,' July 8, 1876, 3 R. 1003, that when a vessel is in a home port, and the owners easily accessible, a managing part-owner cannot, without specific authority, bind his co-owners for extensive structural alterations. The *Brazilian* lay at Greenock; the owners were all in England.

D

Digitized by Google

Sequestration. The *ship's husbands* of the s.s. *Mikado* who were also part-owners, got an advance from a firm of London shipping agents upon the inward freight, the vessel being then abroad. On 3rd November, 1877, the ship's husbands wrote to those shipping agents: 'In consideration of your 'having made advances . . . we hereby place the steamer 'in your hands to collect the amount of freights, and 'thereout to repay yourselves the amount of your 'advances.' On her arrival at the home port, the ship's husbands were asked by the London shipping agents who had made the advance, to receive and remit the freight. They remitted by cheques on 4th December to the amount of the bills. At that date they were insolvent, and they were sequestrated on 11th January following. The trustee on their estate raised an action against the lenders to have the payments in question reduced under the Act of 1696. The First Division of the Court of Session *held*, that that Act did not apply, the facts of the case showing merely the specific implement of the original agreement, which had been undertaken more than sixty days prior to bankruptcy (*Lindsay* v. *Adamson & Ronaldson*, '*Mikado*,' July 2, 1880, 7 R. 1036). Lord Shand observed that a question might perhaps have been raised by the owners of the vessel with the ship's husbands, Macgregor & Co., as to their power to impledge the freights. 'But we have no 'such question here. And I can only say that if that 'question were raised upon the evidence we have, it would 'appear to me that Macgregor & Co. were quite entitled to 'impledge the freight. For we have the direct and uncon-'tradicted evidence of Mr. Macgregor to the effect that at 'the time when he placed the vessel in the hands of the 'defenders as agents to receive the freight, and to retain out 'of it the amount of their advances, the shipowners were 'largely in debt to his firm. I have no doubt, therefore, 'that Macgregor & Co. even in a question with the owners 'of the vessel were entitled to pledge the freight,' pp. 1045-6. In concluding his judgment, his Lordship observed: 'I may 'add that in the view which I take of this case, it does not 'appear to me that it would make any difference that the 'original transaction had even been within the sixty days.

Digitized by Google

'If a merchant, in the ordinary course of business, advances 'money to another a month before bankruptcy, on the 'footing that it will be repaid within a fortnight or so, and 'at the same time gets a security that will enable him to 'recover the amount of his advance, and recovers the 'amount through that security, it appears to be unchal-'lengeable under the statute,' p. 1047.

Lord Shand's hint as to the possibility of a question arising between the owners and the trustee as to the powers of the ship's husband, apparently resulted in the case coming before the Court in another shape—viz., as to the responsibility of the agents appointed by the ship's husband. (See Bell's Prin. 233, 575.)

The brokers had as above stated received the freight, and retained it in repayment of advances. The trustee on the ship's husband's sequestrated estate brought an action against the owners for payment of disbursements on account of the ship. The owners pleaded compensation in respect of the freight collected by the broker. In reply, the trustee contended that as the advances against freight were *ultra vires*, the freight was to be regarded as still in the hands of the broker. The Second Division of the Court of Session held that the receipt of the freight by the broker as agent before the ship's husband's sequestration was equivalent to receipt by the ship's husband; that the pursuer as trustee had no higher or other right than the bankrupt; and that therefore the plea of compensation fell to be sustained (*Macgregor's Trustee* v. *Cox, &c.*, '*Mikado*,' June 21, 1883, 10 R. 1028).

Powers of a General Manager.

The powers of the manager of a shipping company were examined with some fulness in the following case:—

The principal agent or manager of the State Line Steamship Company, Limited, who had charge of the whole of the Company's trading business at home and abroad, and who guaranteed the freight earned by the company's ships, but whose appointment did not confer an express power of drawing or accepting bills on behalf of the company, appointed a sub-agent at Liverpool to collect the freights payable there. The manager drew bills upon the sub-agent in anticipation of freight to be earned by

Digitized by Google

the company's ships, which, being accepted by the sub-agent, were discounted by the manager; the sub-agent retired them at maturity out of the freight he had collected in the interval. The amount was debited to the company in accounts rendered by the sub-agent to the manager. The manager did not enter the bills in the company's books in such a way as to show the true nature of the transaction, but this could have been seen from the accounts placed before the auditor of the company. The manager ceased to hold office when two of the bills were current, and shortly after became bankrupt. The company refused to allow the sub-agent credit for the amount in the bills, and he sued the company. The Second Division of the Court of Session *held*, that the manager had not authority from the company to receive and discharge payments in anticipation of freight; that the pursuer had failed to prove by the books or otherwise that the directors of the State Line were aware or ought to have been aware of the course of dealing; or that, in fact, the proceeds of the bills had been received by the company; and that the pursuer had, therefore, failed to establish liability against the company (*Ross, Skolfield & Co.* v. *State Line Steamship Company, Limited*, Nov. 17, 1875, 3 R. 134). It was *questioned* by the Judges how far the books kept for the company by the manager were evidence against the company in a question with the sub-agent.

SHIPMASTER.

SHIPMASTER—HIS FIRST CHARGE IS SAFETY OF CARGO—DUTY AS TO PERISHABLE CARGO—ONUS, WHEN CARGO DAMAGED—SUING MASTER FOR SUPPLIES ORDERED BY HIM—MASTER CANNOT RENDER OWNERS LIABLE FOR MORE GOODS THAN SHIP RECEIVES—RESPONSIBLE FOR ACCURACY OF DATES OF SHIPMENT IN BILLS OF LADING—BOTTOMRY BONDS—ADVANCES BY CHARTERER'S AGENTS TO MASTER, &C.—APPREHENSION OF DESERTER—MASTER'S CERTIFICATE—JETTISON BY NEGLIGENCE OF MASTER—FAILURE TO RECORD DRAUGHT IN LOG.

Strickland, &c. v. *Neilson & Mackintosh; Garriock* v. *Walker; Williams* v. *Dobie; Meier & Co.* v. *Küchermeister; Drain &*

Digitized by Google

Co. v. *Scott; M'Lean & Hope* v. *Munck; Stumore, Weston & Co* v. *Breen; Anderston Foundry Co.* v. *Law; Dymond* v. *Scott; Miller & Co.* v. *Potter, Wilson & Co.; O'Neil* v. *Rankin & Sons; Ranking & Co.* v. *Tod; Benn & Co.* v. *Porret; Hislop* v. *Cadenhead; Ewer* v. *Board of Trade; Brown* v. *Board of Trade; Board of Trade* v. *Brown; Wights* v. *Burns.*

Powers of Shipmaster.

THE powers of the shipmaster or captain were formerly of a very large kind; but owing to the extensive use of the electric telegraph at the present day, there are few important circumstances in which the master would be justified in undertaking serious responsibility without communicating with the owners of his ship. The obligation by which shipowners are presumably bound for contracts entered into by the master 'is truly grounded,' Erskine observes, Instit. bk. iii.; tit. 3, sec. 43, 'on the 'mandate which is presumed to be given by the exercitors to the master whom they set over the ship, to contract in their name for whatever may be necessary for 'upholding her in a condition fit for service.'

The safety of his ship's cargo demands the master's utmost care. If a master deviates from his charter-party, except for the sake of the safety of his ship, he acts *ultra vires* (*Strickland and Others* v. *Neilson & Macintosh*, '*Tornado*,' Jan. 20, 1869, 7 Mac. 400). 'He must have 'ever in mind that it is his duty to convey it uninjured to 'the place of destination. This is the purpose for which he 'has been entrusted with it, and this purpose he is bound 'to accomplish by every reasonable and practical method,' Abbott, 310.

Duty as to perishable cargo.

The extent to which, however, the discretion of a master may still go, cannot be better set forth than in the case following. The ship *Petrel* of Lerwick, laden with a cargo of whale blubber and heads, on a voyage from Uyea Sound to Peterhead, was obliged to put into Lerwick owing to stormy weather, and was detained there so that the cargo became partially decomposed, so that the voyage could not be prosecuted in safety either to the cargo or the vessel. The owner of the cargo was resident at Peterhead, but refused to give the master of the *Petrel* any

Digitized by Google

instructions as to the course he should pursue in regard to the cargo, or to relieve him of responsibility. The master, therefore, acting upon the best advice he could get, unloaded the cargo, subjected it to certain operations, and finally continued the voyage, and delivered the cargo to the owner's consignee. The Second Division of the Court of Session held that the owner of the cargo was bound to reimburse the owners of the *Petrel* for the expense incurred in the operations upon the cargo, in respect that these operations were necessary for carriage, and had proved beneficial to the owners of the cargo, and that the master was entitled to perform them, as the owner of the cargo, although on the spot, refused to give any instructions in the matter (*Garriock* v. *Walker*, '*Petrel*,' Oct. 31, 1873, 1 R. 100). Lord Benholme observed: 'That if it had been 'shown that the master had done anything merely bene- 'ficial to the cargo, and not necessary to enable him to 'transport it to its destination, he would not have been 'entitled to recover the outlay so made.' The note of the Lord Ordinary (Lord Shand), whose judgment was confirmed in every respect, contains a very full and learned review of the law relating to the duty of a master at an intermediate port, pp. 103-112. 'Where a cargo is so 'much injured that it will endanger the safety of the 'ship or cargo, *or become utterly useless*, it is the duty of 'the master to land and see it at the place where the 'necessity arises, even although it might have been carried 'to the port of its destination and there landed' (Abbott, footnote, p. 312, citing *Jordan* v. *Warren*, Ins. Co., 1 Story, C.C. 342, cited in Perkin's American edition of 'Abbott, by Story and Shee,' p. 447). According to those authorities, therefore, the master of the *Petrel* would have been justified in disposing of his cargo at Lerwick instead of seeking to preserve it.*

* The *August*, a German ship, with pepper, the property of British subjects, on a voyage from Singapore to England encountered bad weather, and put into Table Bay. There, on a survey being made, it was recommended that part of the cargo should be sold. By Art. 504 of the German Mercantile Code, and decisions of the German Courts, such a sale is justifiable if the master acts under the best advice, even though it may afterwards appear in

Digitized by Google

Onus, when cargo damaged.

In the case of *Williams* v. *Dobbie et e contra*, June 27, 1884, 11 R. 982, which had reference to *injury done to a cargo* of cement when on a voyage from Rochester to Dumfries in the schooner *Agnes and Helen*, of Beaumaris, the First Division of the Court of Session held that when a cargo shipped in good condition is delivered damaged by sea water, the *onus* lies, in the first instance, on the *master of the ship* to show that he met with weather of such severity on the voyage as would be sufficient, *prima facie*, to account for the damage to the cargo; but thereafter the *onus* of proof is shifted, and it rests with the owner of the cargo to prove that the damage was caused by the fault of the master, and not through stress of weather. The master, in support of his contention as to the shifting of *onus*, which the Court sustained, relied on *Czech* v. *General Steam Navigation Co.*, Nov. 9, 1867, L.R. 3 C.P. 14; and *Ohrloff* v. *Briscall*, June 20, 1866, L.R. 1 P.C. App. 231. Lord Shand observed that the evidence as to severe weather 'is corroborated by the log-book, by the returns 'from the keepers of lighthouses, and by the meteorological 'returns, a class of evidence which is quite legitimate in 'such an inquiry as this,' p. 988. See also *Shankland* v. *Athya & Co.*, '*Indiana*,' March 28, 1865, 3 Mac. 810, as to *onus* on a master who acknowledges receipt of goods in bags, to show why he should not deliver the same bags *in forma specifica*.

Suing master.

It is open to a creditor, who has ground of action against the owner and the master of a ship, to sue one or the other. But when the debtor is selected, he alone must be sued. This doctrine of election is, however, qualified by the decision in the case of the *Jacob Rothenburg*, a German vessel, which related to disbursements for which certain shipbrokers took bills for the amount from the *master*, drawn upon the

reality to have been prejudicial to the cargo-owners. The master sold part of the pepper. The remainder was carried to London, where damages were claimed by the cargo-owners for the alleged improper sale at Table Bay. It would in fact have been better to have brought the pepper to this country, and have sold it. The Court held that the contract was to be determined by German law, and therefore the shipowners were not liable. The *August*, Adm. Div., March 24, 1891, not yet reported.

Digitized by Google

owner. The owner returned the bills unaccepted. The brokers then sued the master in the German Courts, but failed in obtaining decree, on the technical plea that the action was not brought within three months. They then raised an action in the Court of Session against the owner on the original debt. The defender pleaded that the pursuers, by electing to take the master as their debtor, were barred from suing the owner. The Second Division *held* (reversing the judgment of the Lord Ordinary, Rutherfurd Clark), that the doctrine of election did not apply, as the pursuers had not obtained a judgment (*Meier & Co.* v. *Küchenmeister*, '*Jacob Rothenburg*,' March 17, 1881, 8 R. 642). The Lord Ordinary had followed the principles recognised in *Priestley* v. *Fernie*, June 23, 1865, 34 L.J. Exch. 172. But the Second Division did not consider that that case applied. The Lord Justice-Clerk observed: 'Where the master has not been sued to judgment, or the 'action fails from technical reason or another . . . the fact 'of the pursuer having sued the wrong man will not bar 'him from suing the right one. And the same rule must 'apply if he have failed to recover. That rule seems to 'be clearly laid down in the case of *Curtis* v. *Williamson*, 'Dec. 10, 1874, L.R. 10 Q.B. 57. It is clear from the 'language used by Bramwell, B., in delivering the judg'ment of the cause, that it was considered that whilst 'judgment against the agent, even without satisfaction, 'would constitute a conclusive election, yet that no legal 'proceedings short of judgment would have that effect, for 'he distinctly pointed out that by the word "sue" he means '"sue to judgment." I apprehend that means successful 'judgment,' p. 645. As regards the law of agent and principal, Lord Young observed that 'the case of a master 'of a ship is exceptional; he is an agent acting for a 'known and registered owner, and yet he incurs personal 'liability. Now, I am not prepared to assent to the 'doctrine that a person who furnishes supplies to a ship on 'the order of the master must elect to sue either the master 'or the owner. I should have thought it was a joint 'liability, and that the creditor could sue both. In this 'case, however, this point does not arise, as there was no

Digitized by Google

'proceeding to judgment, and I only referred to the other 'ground because your Lordship had exhausted this part 'of the case. I do not think that suing to judgment means 'to judgment of absolvitor. I am of opinion that the 'judges in *Priestley's* case never contemplated that their 'language should be construed to mean a judgment on a 'technical plea. The true meaning is, if the creditor has 'converted the liability of the master into a 'judgment '"debt" then his claim against the owner shall cease, as he 'will be liable in relief,' p. 646.

Goods supplied must be necessaries.

The goods supplied to the master must be necessaries, otherwise owners will not be liable for debts contracted by a master, though nominally for the benefit of their ship (*Drain & Co.* v. *Scott*, '*Hyndeford*,' Nov. 25, 1864, 3 Mac. 114).*

Bill of lading.

In the well-known case of *M'Lean & Hope* v. *Munck*, '*Sophia*,' June 14, 1867, 5 Mac. 893, it was held, following the established principles of the English Courts, that the owners of a ship were not bound for a larger quantity of goods than is actually fixed, although the bill of lading granted by the master states a greater quantity. 'It is idle,' observed the Lord Justice-Clerk (Patton), 'to speculate at this time of 'day upon the question as to innocent indorsees being 'entitled to depend upon such assurances, and as to the

---

* Where a shipmaster has incurred liabilities for necessaries for his ship, he is entitled to sue the owners (or mortgagees where they defend the action) for 'disbursements,' though at the time the action is raised he has made no payment in respect of those disbursements (*The Sara*, June 20, 1887, L.R. 12 P.D. 159; *The Chieftain*, Br. & L. 104; and *The Edwin*, Br. & L. 281 were overruled). *The Chieftain* and *The Edwin* were also considered by Sir Robert Phillimore in the earlier case of *The Fairport*, December 12, 1882, L.R. 8 P.D. at p. 54, where that learned Judge referred to his observations in *The Feronia*, 1864, L.R. 2 A. & E. 65, as correctly laying down the law that money earned as freight having been paid into Court, the liabilities incurred by the master for the benefit of the ship were to be regarded as disbursements, and were to be discharged out of the fund in Court. See also as to the liability of mortgagees in possession for goods supplied to a ship by merchants in a foreign port (*Havilland, Routh & Co.* v. *Thomson*, '*Elizabeth Jane*,' Dec. 24, 1864, 3 Mac. 313). The master has a maritime lien on the ship for disbursements (Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, sec. 191), see *The Sara*, *supra*; *The Mary Ann*, L.R. 1 A. & E. 8; and *The Glentanner*, Swa. 415, approved.

Digitized by Google

'implied authority of *masters* to bind their owners in such 'a matter. The question has received full consideration, 'and must be held to have been fixed. The case of '*Grant* v. *Norway* affirms the principle that a bill of lading 'for goods not put on board does not bind the owner; 'that of *Hubbersty* v. *Ward* that a master cannot charge 'his owner by signing two bills of lading,' p. 398.

He is responsible to his owners for the accuracy of dates of shipment in bills of lading signed by him—the mere employment by the owners of a broker at a foreign port to find a cargo for the ship, and to adjust terms of carriage, does not relieve the master from such an obligation (*Stumore, Weston & Co.* v. *Breen*, '*Lilburn Tower*,' Dec. 10, 1886 (H. of L.), L.R. 12 App. Cas. 698).

Bottomry.

The power of granting bonds of bottomry and respondentia is one by which a *master* effectually binds the shipowner. The question of whether a master was justified in hypothecating cargo as well as the ship was considered in the case of the *Black Eagle*. The master hypothecated the cargo and vessel for repairs executed at Rio de Janeiro, when the vessel was on a voyage to Bombay *viâ* Melbourne. At Melbourne the bond-holders sold the ship and cargo. The shippers raised an action against the shipowners for the value of the cargo sold. The First Division of the Court of Session *held* the shippers were entitled to recover (*Anderston Foundry Co.* v. *Law, &c.*, '*Black Eagle*,' May 29, 1869, 7 Mac. 836). This decision followed the judgment of Patteson, J., in the Exchequer Chamber in *Benson* v. *Duncan*, 1849, 18 L.J. Exch. 169, where it was settled on the assumption that the hypothecation of the cargo was within the master's power, that the owners must indemnify the shippers. A point was raised in the *Black Eagle's* case whether the master was entitled to hypothecate goods for a bottomry bond payable at Melbourne, when the port of destination was Bombay. The Court held that what might be the invalidity of the bond as between the holders and the shipowners did not affect the liability of the latter to the shippers. The validity of such a bond was observed upon, the Lord President saying that its invalidity must not be assumed: 'There is no authority for holding that a respon-

Digitized by Google

'dentia bond granted in such circumstances, and embrac- **Bottomry.**
'ing within the hypothecation goods destined for a port
'beyond the port of payment of the bond, is invalid either
'in whole or in part. The question is admittedly alto-
'gether new,' p. 844. Lord Deas thought the bond was invalid. See Scrutton, 198.*

The *Anna Alida*, on a voyage from Newcastle to Libau, came into collision with another vessel, and put into Leith for repairs. The captain and the mate were the owners of the ship, and the first named incurred a debt of £580 to a shipbroker. This sum included damages payable to the other vessel, the cost of repairs and other charges; only a small part of this sum was chargeable against cargo, the bulk of it being chargeable only against ship and freight. The captain granted a bond of bottomry over ship, freight, and cargo for £500. The cargo owners, who resided in Newcastle, got notice of his intention to hypothecate the cargo, but refused to consent. The ship was sold for £155; and the cargo was also sold. The First Division of the Court of Session *held*, that, except to the extent of the freight, the bondholder had no right to the price of the cargo, as the master, under the circumstances, had no right to hypothecate it (*Dymond* v. *Scott*, '*Anna Alida*,' Nov. 23, 1877, 5 R. 196). The only owners were the master and the mate, and they were apparently insolvent. The Lord President concluded this judgment as follows:—'This is a very special case, and it
'must be decided upon its own circumstances, rather than
'by any general rule of law,' p. 199.

For circumstances in which a bond granted by a master, could not be regarded as a bottomry bond, as the repayment of the amount advanced to the master was not made

* There is no obligation upon the holder of a bottomry bond to communicate the existence of the bond to mortgagees of the ship, and his rights are not affected by the owner concealing his bond from the mortgagees (*The Helgoland*, August 11, 1859, Swabey's Admiralty Cases, 491). A lender should make very sure that the money is actually required for the necessities of the ship; reasonable inquiries may show the lender's *bonâ fides*, but will not make a bond valid in respect of the items for which it is given, unless the expenditure was necessary; *The Pontida* (C. of A.), July 28, 1884, L.R. 9 P.D. 177.

Digitized by Google

Bottomry.

concurrent on the arrival of the ship at her final port, see *Miller & Co.* v. *Potter, Wilson & Co.*, '*Pareora*,' Nov. 9, 1875, 3 R. 105. See Scrutton, 199; Foard, 211; Abbott, 109 (note i.)

Endorsees of a bill of lading, the cargo having been imported in a vessel under bottomry, are not entitled to deduct contents of bottomry bond, from freight in their hands arrested at the instance of creditors of the shipowners and master, and to which bond they had acquired right, subsequently to the arrestments (*Ranking & Co.* v. *Tod*, '*Reggente*,' June 29, 1870, 8 Mac. 914).

Power of master to grant obligations.

While charterer's agents were held bound, in the case of the *North-Western Bank* v. *Bjornstrom*, Nov. 9, 1866, 5 Mac. 24, to make certain advances on account of freight, the master is entitled to grant an obligation for such advances if the agents will not make them without such security. Thus the charter-party of the *Cereal* stipulated that the disbursements of the ship at Bahia should be advanced by the charterer's agents to account of freight. Subsequently the charterer's agents, who had none of his funds, told the master that they would make advances only on receiving a bond over the ship, but subsequently they took an obligation for the advances from the master which bound him to pay them from the freight on arrival at the port of discharge. The Court of Session *held*, that in the circumstances it was necessary and competent for the master to grant such obligations, and that the owners and master were jointly and severally liable to the charterer's agents for the amount of their advances (*Benn & Co.* v. *Porret*, '*Cereal*,' March 11, 1868, 6 Mac. 577). This logically follows, from regarding the master as agent of the shipowner, and thus empowered under special circumstances to borrow money on his behalf, even from the shipper (Foard, 202; *Richardson* v. *Nourse*, 3 B. & A. 237; *The Australian Steam Navigation Co.* v. *Morse*, 4 L.R., P.C. 222). 'The present case,' observed Lord Benholme, 'is distinguished from the *North-Western Bank* v. '*Bjornstrom*, by the fact that in that case the agents had 'funds belonging to the principal in their possession,' p. 588.

Digitized by Google

A similar example of the power of a captain to bind owners is the following :—

A firm of shipowners ordered the s.s. *Pareora* on commission for a Colonial Navigation Company, advanced money on her outfit, and appointed a captain. The ship was originally registered in their name, but before she sailed the title was transferred to the manager of a bank for the purpose of securing an advance by the bank. On her voyage to New Zealand the *Pareora* suffered damage, and put into Paramaribo to re-fit. The captain, for sums advanced to him for necessary repairs, granted a bond binding himself, his heirs, executors, and administrators, and the ship, and the freight to be earned, and drew bills, payable thirty days after sight, on the shipowners for the amount in the bond. The Colonial Navigation Company having become insolvent, the shipowners obtained from the bank a transfer of the *Pareora*, and sold her. The holders of one of the bills granted by the captain, raised an action against them for the amount of the bill, which they refused to accept; the Second Division of the Court of Session held, that as the shipowners were the employers of the captain, and at the date of the repairs had the control of the ship, and were virtually the owners, they were liable for the sum sued for, there being no dispute as to the necessity for the advance, and that this liability was not affected by the captain having granted the bond as an additional security; but it, the majority of the Court were of opinion, was not a valid bottomry bond at all. *Miller & Co.* v. *Potter*, *Wilson & Co.*, *Pareora*, Nov. 9, 1875, 3 R. 105. The so-called bottomry bond granted by the master is given in a footnote to p. 106. Lord Gifford's reasons for not regarding it as such a bond, are given with fulness on p. 114. The circumstances would have entitled the master to grant a bottomry bond, but if it was to be represented as such it was void, in respect that the repayment of the sum advanced was not made contingent on the safe arrival of the *Pareora* at her destination. For the Lord Justice-Clerk's (Moncreiff) observations on the English cases of *Stainbank* v. *Fenning*, May 30, 1851, 11 Scott's C.B. Rep. 51 ; and *Stainbank* v. *Shepard*, Feb. 14,

Digitized by Google

1853, 13 Scott's C.B. Rep. 418, see p. 116. A master at a foreign port cannot bind the owners of his ship by drawing a bill upon them (*Drain & Co.* v. *Scott*, '*Hyndeford*,' Nov. 25, 1864, 3 Mac. 114).

17 & 18 Vict. c. 104, sec. 246.

The *master* acts on his own authority and not on behalf of the owners, when acting under the powers conferred by section 246 of the Merchant Shipping Act, 1854.

In an action at the instance of the cook or steward of the brig *Earl Grey*, of Liverpool, against the owners of that vessel, to recover damages for certain proceedings taken against him by the master of the vessel at Kirkcudbright, when the ship was about to sail for Portugal, it was *held* by the First Division of the Court of Session that the powers which the above section confers on 'the 'master, or any mate, or the owner, ship's husband, or 'consignee' of a vessel, to apprehend a seaman who deserts, provided that if the apprehension is made on improper or insufficient grounds, the person who makes the same, or causes it to be made, shall incur a penalty, which, if inflicted, shall 'be a bar to any action for false imprison-'ment in respect of such apprehension,' were conferred upon such masters, &c., in their individual capacity, and not as acting for the owners, and consequently that the owners were not responsible for any misuse of these powers (*O'Neil* v. *Rankin & Sons*, '*Earl Grey*,' March 18, 1873, 11 Mac. 538). The Lord President reviewed the decisions in *M'Naughton* v. *Halbert*, '*Samarang*,' Nov. 29, 1843, 6 D. 104; *M'Naughton* v. *Allhusen & Co.* (also the *Samarang*), Dec. 11, 1847, 10 D. 236; and *Gowans* v. *Thomson*, '*Renown*,' Feb. 6, 1844, 6 D. 606.

Master's Certificate.

17 & 18 Vict. c. 104, sec. 136.

(1.) The Merchant Shipping Act, 1854, sec. 136, is in the following terms:—'No foreign-going ship or home-trade 'passenger ship shall go to sea from any port of the 'United Kingdom unless the master thereof, and in the 'case of a foreign-going ship, the first and second mates, 'or only mate, as the case may be, and, in the case of 'a home-trade passenger ship, the first or only mate, as

Digitized by Google

'the case may be, have obtained and possess valid 'certificates. . . . Every person . . . who employs any 'person as master, or first, second, or only mate of 'any foreign-going ship, or as master, or first, or only 'mate of a home-trade passenger ship, without ascertain-'ing that he is at the time entitled to and possessed of 'such a certificate, shall for each such offence incur a 'penalty not exceeding £50.'

The following case related to the qualification of an *ice-master.* The owner of a whaling-ship called the *Catherine* was charged in the Sheriff-Court at Aberdeen with having contravened the above section, and it was held proved by the Sheriff that he had employed on board the *Catherine*, nominally as ice-master, a person who possessed great experience as a navigator among ice and as a whale fisher, but who had no certificate under the Merchant Shipping Acts, and also another person, nominally as master, who held a master's certificate, but who was without experience as a navigator among ice or as a whale fisher; and that acting under the instructions of the owner, the ice-master assumed the command of the *Catherine* from the time she left Scotland till she was abandoned in the Arctic Seas; that he occupied the master's berth, and gave almost all the orders, but he also found it proved that it was necessary that the master of the vessel, whoever he might be, should have special knowledge of ice navigation, without which no certificated master, however good, could have safely taken the *Catherine* to the north, and that the certificated master was entered on the ship's books as master and signed the articles as such, the ice-master being designed as 'ice-master in full charge.' The Sheriff convicted the owner, and fined him £10. He took a case, and the Court of Justiciary (Lord M'Laren dissenting) quashed the conviction (*Hislop* v. *Cadenhead*, '*Catherine*,' June 4, 1887, 14 R. (Just. Cases), 35).

42 & 43 Vict. c. 72, sec. 2.

The master of the *Carfin*, while in charge of his vessel passing through a narrow channel, left the bridge, where the first mate was at the time, to call the second mate; before his return the vessel ran upon rocks. The master's

Digitized by Google

certificate was suspended by the decision of a Board of Trade Inquiry. The master appealed against this decision under the provisions of The Shipping Casualties Investigation Act, 1880, 42 & 43 Vict. c. 72, sec. 2, the Court, after a conference with two nautical assessors, held, that the rule that an officer in such a position must not leave his post except from unavoidable necessity must not be relaxed, and the decision was affirmed accordingly (*Ewer* v. *Board of Trade*, '*Carfin*,' June 1, 1880, 7 R. 835).

17 & 18 Vict. c. 104, sec. 242.

A master who through unreasonable panic left a ship without taking means to endeavour to stop a leak, had his certificate suspended for 'default' in terms of section 242 of the Merchant Shipping Act, 1854. He appealed to the Court of Session, and argued that all that was proved against him was an error of judgment, not culpable negligence, and referred to the cases of *The Fairenoth*, May 18, 1882, L.R. 7 Prob. Div. 207), and the *Vicksburg* (*Watson* v. *Board of Trade*, October 29, 1884, 22 S.L.R. 22). The Court refused the appeal. The Lord President observed that the cases, above cited, 'exhibit a contrast to the present. 'In each, the master, in a position of great peril and 'embarrassment, exercised his judgment calmly and to 'the best of his ability in deciding between two courses. 'In each, he committed an error of judgment, as was 'proved by the result. But he was absolved from all 'blame, because he adopted what in a case of great 'difficulty, his experience and judgment dictated to him 'as the better course of two. But here the fault is no 'error of judgment, but a failure by the master to exercise 'his judgment at all—a surrender of his judgment to the 'influence of an unreasonable panic. This is a fault 'unworthy of and inconsistent with the character of a 'British seamen' (*Brown* v. *The Board of Trade*, '*Ashdale*,' Dec. 18, 1890, 18 R. 291).

Jettison.

Jettison.

While the following recent case was an English case, it does not appear inappropriate to include it in this summary

Digitized by Google

of recent Scottish decisions as to the master's duties and responsibilities.

Lord Tenterden says (Abbott, Shipping, p. 499): 'The 'goods must be thrown overboard for the sake of all, not 'because the ship is too heavily laden to prosecute an ordi- 'nary course through a tranquil sea, *which would be the 'fault of those who had shipped or received the goods*, but 'because at a moment of distress and danger, their weight 'or their presence, prevents the extraordinary exertions 'required for the general safety.' In the after-cited case jettison of part of the cargo of the *Abington* was occasioned by the negligence of *the master*, and the Recorder of Rangoon *held*, that in consequence no claim for general contribution could be enforced. The Privy Council on appeal held that in any event innocent owners of jettisoned cargo are entitled to general average (*Strang, Steel & Co.* v. *A. Scott & Co.*, '*The Abington*,' 1889, L.R. 14 App. Cas. 601).

Lord Tenterden's definition was explained by Lord Watson (p. 610) to mean 'that there can be no proper jetti- 'son from an overladen ship, so long as ship and cargo 'are exposed to no peril whatever from the action of the 'sea, but are merely exposed to the inconvenience of being 'unable to reach their destination in the ordinary course of 'time.' Parsons in his Law of Insurance, vol. ii. p. 285, and his Law of Shipping, vol. i. p. 211, says, that 'when a jetti- 'son is justified by the circumstances in which it takes 'place, *and the circumstances are occasioned by the fault of 'the master, or his want of care or skill*, the jettison would 'give no claim for contribution; but the owners of the ship 'would be liable to the owners of the goods jettisoned for 'the damages caused by the wrong-doing of the master.' This appears to be no longer regarded as the law. 'These 'treatises,' observed Lord Watson, 'are justly regarded as 'of great authority in questions of maritime law; but their 'Lordships are constrained to say that, in their opinion, 'the text above cited is inaccurate, in so far as it bears 'that no claim of contribution will arise to the owners of 'jettisoned cargo in the case supposed, and is unsupported 'by the decisions upon which it is founded, which, all of 'them, relate to one or other of the exceptions already

Digitized by Google

'noticed—*i.e.*, already noticed in his Lordship's judg-
'ment.'*

Miscellaneous.

34 & 35 Vict. c. 110, sec. 5.

Section 5 of the Merchant Shipping Acts Amendment Act, 1871, 34 & 35 Vict. c. 110, provides that the master of a sea-going ship shall, upon leaving any port 'for the 'purpose of proceeding to sea,' record the ship's draught in the official log-book.

Log. 34 & 35 Vict. c. 110, sec. 5.

The master of the *Abercarne* of Greenock on a voyage from Cardiff to Batavia, and back to the United Kingdom having discharged his cargo at Batavia, proceeded to other ports on the coast of Java, at a distance of five hundred miles from Batavia, to take in his homeward cargo. He did not record his ship's draught of water when leaving these ports, or until he finally sailed for home.

The Sheriff before whom the complaint of contravention was brought *assoilzied* him, and the High Court of Justiciary refused to disturb this judgment; the ground of the judgment was that the Sheriff had better means of information than the Court, and had made full inquiry (*Board of Trade* v. *Brown*, May 28, 1886, 13 R., Just. Cases, 58).

Power to chastise.

A master may chastise his apprentice. See *infra*, p. 57, *Wights* v. *Burns*, Nov. 30, 1883, 11 R. 217.

A master in discharging cargo in absence of a bill of lading does wrong, but his wrongful act does not render the bill ineffective. See *Pirie & Sons* v. *Warden et al.*, Feb. 11, 1871, 9 Mac. 573; also *Short* v. *Simpson*, 1866, 35 L.J., Com. Pl. 147.

---

* Merchant Shipping Act, 1854, secs. 187 and 191, a master is not entitled to the double pay for delay in the payment of wages which a 'seaman' may recover under the former section (*The Arina*, March 28, 1887, 12 P.D. 118 (*The Princess Helena*, Lush. 190, overruled).

Merchant Steamer, Payment of Wages Act, 1880, sec. 4, a master is not entitled under this section to wages up to the final settlement of his claim (*ibid.*).

Digitized by Google

SEAMAN.

SEAMAN—PROOF OF DESERTION—WAGES—NEGLECT OF DUTY—INJURIES—APPRENTICE MAY BE CHASTISED.

Seward v. *Ratter; Sharp* v. *Rettie; Lord Advocate* v. *Grant; Rothwell* v. *Hutchison; Bruce* v. *Barclay; Wights* v. *Burns.*

(1.) *Desertion.*

17 & 18 Vict. c. 104, sec. 249.

The Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, sec. 249 provides:—'In all cases of desertion from any 'ship in any place abroad, the master shall produce the 'entry of such desertion in the official log-book to the 'person or persons hereby required to endorse on the 'agreement a certificate of such desertion; and such per-'son or persons shall thereupon make and certify a copy 'of such entry, and also a copy of the said certificate of 'desertion; . . . and such copies, if purporting to be so 'made and certified as aforesaid . . . shall in any legal 'proceeding relating to such desertion be received as 'evidence of the entries therein appearing.'

Thomas Seward, a seaman on board the s.s. *Teddington*, a British ship, and under an engagement to return with her to the United Kingdom, left her at New York without leave on 22nd December. He came on board on the 26th, and left without leave on the same day, taking some of his clothes with him. On the 28th he was apprehended on shore on a police charge, and was kept in custody till the 30th. The *Teddington* sailed that day before he was set at liberty. The captain knew he was in custody. The captain entered his name in the log on the 29th, with a note that he considered he had deserted, and on the 30th he made this entry, 'T. Seward, f'man, not having come to this ship 'and she is now ready for sea, I proceed on voyage, leaving 'him behind.' The captain did not obtain a certificate of desertion from the consul as he should have done. In an action raised by Seward for wages due to him, it was pleaded in defence that he had forfeited his claims by desertion. The First Division of the Court of Session held, that in the circumstances desertion had not been proved, and that the claim for wages was not therefore forfeited

Digitized by Google

(*Seward* v. *Ratter*, Dec. 6, 1884, 12 R. 222). Lord Shand observed:—'There is one circumstance that might have 'been conclusive if it had been distinctly proved. If it 'had been shown that when he went away the second time, 'the pursuer took all his clothes with him, that might have 'been sufficient [proof of intention to desert],' p. 227.

In the case of *The Great Northern Steamship Fishing Co.* v. *Edgehill*, June 6, 1883, 11 Q.B.D. 225, it was held that section 243 of the Merchant Shipping Act, 1854, which enables a seaman, who neglects, without reasonable cause, to join his ship, to be punished, upon proceedings before a court of summary jurisdiction, with imprisonment, and forfeiture of part of his wages, by implication takes away any other remedy against the seaman for breach of contract, and the shipowners cannot, where the amount which he claims does not exceed £10, take proceedings for the recovery of damages. The pursuers in the following case, founded on the interpretation of the section given in that case. The circumstances were as follows:—

Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, secs. 243, 244. Merchant Shipping Amendment Act, 1862, 25 & 26 Vict. c. 63, sec. 11.

The engineer of the s.s. *Escurial* raised an action for payment of wages against the owners, who pleaded their right to retain the wages to meet a claim of damages, as against the engineer, for injuries to the boilers and engines, caused by his continued misconduct and neglect of duty. The pursuer, in reply, maintained that any claim for damages at common law was superseded by the statutory remedy provided by the above section,* and that in any view, by section 244 of the same Act, proof was excluded of the averments of wilful neglect of duty, of which entries had not been made in the log-book, and read over to the pursuer. The First Division of the Court of Session *held*—(1) that the statute did not by implication exclude a claim for damages at common law, and (2) that the provisions of section 244 excluding proof of misconduct not entered in the log-book, applied only to criminal proceedings under section 243 (*Sharp* v. *Rettie*, '*Escurial*,' March 19, 1884, 11 R. 745).

* 'Whenever any seaman who has been lawfully engaged, or any apprentice 'to the sea service, commits any of the following offences, he shall be liable to

Digitized by Google

The Lord President in giving judgment in the case before us said: 'It certainly makes one hesitate a little 'to find that apparently in a case decided by the Queen's 'Bench Division an opposite conclusion was reached. 'The facts are not well given in the report, and have 'to be gathered from the leading judgment, and I am 'not quite sure that I understand what they were. I 'can only say, after reading the judgment, that if it is 'applicable to a case like the present I am totally 'unable to come to the same conclusion.' Lord Shand also referred to Mr. Justice Field's argument in above case, that the remedy at common law was inconsistent with the new legislation. 'I confess I am unable to 'concur in that view. I do not think the general 'remedy is inconsistent with the new legislation. In the 'first place, as your Lordship has pointed out, the remedies 'are not parallel, the one is a criminal prosecution for a 'misdemeanour, the other is a civil action of damages. In 'the second place, as was remarked at the bar, the two 'remedies are not commensurate, for in the case of a for-'feiture of wages, the forfeiture might be a very small sum, 'while the claims for damages might be very large. Yet it 'is said that by this provision for the forfeiture of wages, 'the owner has lost his right to possibly several hundreds 'or thousands of pounds. That would require very clear 'words in the statute, and I confess I cannot find them. 'As, however, the statute does not authorise a forfeiture, if 'it should appear that the shipowner has got some relief 'under a forfeiture which he has already enforced, I can-'not suppose that he would be entitled to claim the same 'forfeiture a second time. The forfeiture must be once for 'all. On the whole matter I am of opinion that these 'provisions of the Merchant Shipping Act relate to criminal

'be punished summarily as follows (that is to say). . . . (5.) *Continued dis-'obedience.*—For continued wilful disobedience to lawful commands, or con-'tinued wilful neglect of duty, he shall be liable to imprisonment for any 'period not exceeding twelve weeks, with or without hard labour, and also at 'the discretion of the Court forfeit for every twenty-four hours' continuance of 'such disobedience or neglect, either a sum not exceeding six days' pay, or 'any expenses which have been properly incurred in hiring a substitute.'

Digitized by Google

'offences alone, and that it is in regard to those offences 'alone, that entries are required to be made in the log,' p. 755. An opinion was expressed by Lord Mure that it was doubtful whether, since the passing of the Merchant Shipping Amendment Act, 1862, sec. 11, the provisions of secs. 243 and 244 of the Act of 1851, were applicable to the case of a certificated engineer of a steamship, as the engineer is placed by the 1862 Act, sec. 11, in the same position as the master and mates in regard to inquiries to be made by the Board of Trade, 'but that was a question which it was not 'necessary to deal with in disposing of the present case.'

(3.) *Injuries.*

17 & 18 Vict. c. 104, sec. 228.

That an injury received from the occurrence which renders his ship a wreck is 'an injury received in the service of 'the ship to which he belongs' in the sense of sec. 228 of the Merchant Shipping Act, 1854, was decided in the case of an injury to a seaman of the barque *Craigellachie,—Lord Advocate* v. *Grant,* Feb. 4, 1874, 1 R. 447. Lord Neaves observed: 'It appears to me that the true construction of 'the provision (of the 228th section) is, that if in the course 'of his service, and up to the final abandonment of the 'vessel as a total wreck, any seaman meets with an injury, 'the expense of medical attendance and of his subsistence is 'chargeable against the owner of the ship. This liability, so 'begun, terminates on one of three occurrences, either, first, 'on the seaman's cure; or, second, on his death; or, third, 'on his being brought back to some port in the United 'Kingdom or in the British possessions from which he 'shipped. The liability continues until one of these three 'things happens. In this case the liability began on the 'injury of the seamen, but terminated on their being 'cured. Therefore, the plea stated against all liability 'whatever, cannot be entertained. In support of it, it 'was argued that a wreck terminates the contract of 'service between the seamen and the owners of the ship, 'and that, therefore, the owners are not liable in respect 'of any injuries suffered by their seamen on the occasion 'of the wreck. That contention is, I think, wholly

Digitized by Google

'untenable. The contract of service subsists until the 'very last act of abandonment of the ship. The master, 'as representing the owner, is entitled to command the 'service of his men up to the very end. They are not 'discharged because there is an absolutely impending 'shipwreck. They are bound to exert themselves to the 'utmost so long as there is any hope, and until it becomes 'necessary finally to abandon the ship,' p. 449.*

Known Danger.

The common law rule that a servant continuing to work in the face of a known danger is not entitled to claim damages in the event of an accident occurring, does not apply to the case of a seaman on board ship (*Rothwell* v. *Hutchison, &c.*, Jan. 21, 1886, 13 R. 463). In this case, Philip Rothwell, a seaman on board the s.s. *Neptune*, was steering the ship in a rough sea on the 26th January, 1884, when he was lifted by the wheel and lost his footing, the result being that his left hand was caught in the steering gear and severely injured, so that the thumb and fore finger had to be amputated. He brought an action of damages for the injuries thereby sustained, against the owners of the *Neptune*, and it was proved that the accident was chiefly due to the want of one of the spokes on the wheel, which made the man steering apt to lose grip of the wheel in a rough sea. The Sheriff-substitute before whom the proof was taken found the defenders responsible for the want of the spoke, and liable therefore, and assessed the damages. On appeal, the Sheriff adhered. Defender appealed to the Court of Session, and, *inter alia*, argued that on the assumption that the spoke was broken when the voyage began, the pursuer had continued to work in the face of a known danger, and he could not therefore recover, citing *M'Gee* v. *Eglinton Iron Co.*, June 9, 1883, 10 R. 955; *Griffiths* v. *London and St. Catherine's Docks*, March 25, 1884, 12 Q.B. Div. 493. The Court *held* that the common law rule that a servant continuing to work in the face of a known danger is not entitled to claim damages from his master in the event of accident, does not apply to

* See *The Justitia*, May 11, 1887, for award to seamen for hardships incurred through vessel being employed for purposes other than those contemplated by the agreement entered into by the seamen, L.R. 12 P.D. 145.

the case of a seaman serving on board ship, and adhered. The Lord President who gave the opinion of the Court, said:—'The attempt of the defenders to escape from 'liability upon the ground that the pursuer rushed into a 'known danger, cannot be listened to in a case of this 'description. . . . The case of a seaman on board a vessel 'is very different from that of the ordinary workman upon 'land. It is quite impossible to suggest that because a 'seaman sees something wrong with the gearing of the 'vessel, or with some of the appliances, he is therefore to 'strike work. The discipline of a ship is quite inconsistent 'with such a position, and I should suppose that if any 'man in the condition of a seaman on board a ship of the 'mercantile marine were to take that course, he would, in 'the first place, be put in irons by the master, and would 'probably be sent to prison when he came on shore.'*

43 & 44 Vict. c. 42.

The following case was decided under the Employers' Liability Act, 1880.

A contractor who had arranged to break up the hull of a 200 ton brig, the *Tagus*, which had been wrecked at the mouth of Stonehaven harbour, employed one of his steam traction engines for the purpose. A wire rope was carried from the drums of the engine (which stood upon the pier), to a chain round the beam to be drawn from the wreck. Steam was turned on, and if the first strain was ineffective, the steam was turned off, the strain, being still kept on, and the men eased the beam with hammers and pinches. The contractor who superintended the operations, explained them to the men, who approved of the plan. During the operations,

* It may perhaps be in place here to refer to the case of *The Bernina* (2) Jan. 24, 1887 (C. of A.), L.R. 12 P.D. 88, where Lord Esher set forth in great detail and with much clearness, the law applicable to a transaction in which a pursuer has been injured by negligence, and in the course of which transaction there have been negligent acts or omissions by more than one person. The cases of *Thorogood* v. *Bryan*, 18 C.B. 115; and *Armstrong* v. *Lancashire and Yorkshire Railway Co.*, L.R. 10 Ex. 47, were over-ruled. Thorogood's case had already been disapproved by the American Courts, and held unsatisfactory by the Scottish Courts in the case of *Adams* v. *Glasgow and South-Western Railway Co.*, Dec. 7, 1875, 3 R. 215 (injuries to a fireman), Lord Moncreiff at p. 223; Lord Ormidale at p. 278.

Digitized by Google

a workman was fatally injured in consequence of the sudden starting out of a beam. In an action by his widow against the contractor, it was *held* by the Second Division of the Court of Session—(1) that there was no fault on his part, in respect that the operations which led to the accident were neither improper, nor required special precautions, and that, assuming there was danger, those employed were quite as competent to judge of it as the defender; and (2) that the Employers' Liability Act had no application (*Bruce* v. *Barclay*, '*Tagus*,' May 30, 1890, 17 R. 811).

Apprentice may be chastised.

A master is entitled to chastise an apprentice seaman, 'provided his act is truly an act of chastisement, and not 'an act of wanton cruelty.'

David A. Wight sailed as an apprentice on board the *James Wishart* in October, 1880, being nearly sixteen years of age, and having already made a voyage. While the *James Wishart*, after a voyage to Rangoon, lay at Hamburg in September, 1881, the lad was accidentally drowned. On December 12, 1881, his father and his other personal representatives, raised an action against the master, for £250 as *solatium* and damages in respect of systematic cruelty shown towards Wight during the voyage to Rangoon. During the action Wight's father was decerned executor to him. The master denied cruelty, but admitted moderate chastisement on account of disobedience, &c. The Second Division of the Court of Session held that a master of a ship is entitled to chastise an apprentice, and the Court, on a claim for damages being made on the apprentice's behalf, will not inquire whether the master was right or wrong in inflicting chastisement, provided it was truly an act of chastisement, and not an act of wanton cruelty. Lord Adam, Lord Ordinary, *held* also that damages for personal injuries sustained by a person, since deceased, but which were not connected with the cause of death, might be sued for by his executor [apparently on authority of *Auld* v. *Shairp*, Dec. 16, 1874, 2 R. 191], but Lord Young, Lord Craighill, and Lord Rutherfurd Clark *reserved* their opinion on the point (*Wights* v. *Burns*, Nov. 30, 1883, 11 R. 217).

Digitized by Google

CHAPTER III.

CONTRACT OF AFFREIGHTMENT.

WHEN TERMS OF CHARTER-PARTY MAY BE VARIED IN BILL OF LADING—CLEAN BILL—MASTER IN SIGNING BILL OF LADING ACTS AS AGENT FOR CHARTERERS, NOT FOR OWNERS—DEVIATION—SEAWORTHY SHIP—APPARATUS—DEMURRAGE—CUSTOM OF PORT—DEAD WEIGHT—ACCIDENTS OF THE SEAS—'ERRORS OR NEGLIGENCE OF NAVIGATION,' &C.—LESSER CLAUSE—OBLIGATIONS OF SHIPPER, OR CONSIGNEES, OR ENDORSER OF BILL OF LADING TO PAY FREIGHT—PRIMAGE—LIEN—TIME FREIGHT—DEAD FREIGHT—ADVANCES BY CHARTERER'S AGENTS.

Arrospe v. *Barr; Delaurier* v. *Wyllie; Mitchell, &c.* v. *Burn, &c.; Steel & Craig* v. *State Line Steamship Co.; Cunningham* v. *Colvils, Lowden & Co.; Adam* v. *J. & D. Morris; Dall' Orso* v. *Mason & Co.; Bremner and Another* v. *Burrell & Son; Whites, &c.* v. *The Steamship 'Winchester' Co.; Holman* v. *Peruvian Nitrate Co.; J. & A. Wyllie* v. *Harrison & Co.; Hillstrom, &c.* v. *Gibson & Clark; Clacevich* v. *Hutcheson & Co.; La Cour, &c.* v. *Donaldson & Son; Hansen* v. *Donaldson; Dickinson* v. *Martini & Co.; Avon Steamship Co., Limited v. Leask & Co.; Strickland and Others* v. *Neilson & Macintosh; Donaldson Bros.* v. *Little & Co.; Gifford & Co.* v. *Dishington & Co.; Davidson* v. *Bisset & Son; Leduc & Co.* v. *Ward and Others; British Shipowners Co., Limited* v. *Grimmond; Johnstone & Sons* v. *Dove; Mackill & Co.* v. *Wright Brothers & Co.; Seville Sulphur and Copper Co., Limited* v. *Colvils, Lowden & Co.; Cunningham* v. *Colvils, Lowden & Co.; Adam* v. *J. & A. Morris; Salvesen & Co.* v. *Grey & Co.; Gardiner* v. *Macfarlane, M'Crindle & Co.; Beynon, &c.* v. *Kenneth; Hough et al.* v. *Altiya & Son; Moes, Moliere & Tromp* v. *Leith & Amsterdam Shipping Co.; M'Lean & Hope* v. *Munck; M'Lean & Hope* v. *Fleming; Craig & Rose* v. *Delargy; Grieve, Son & Co.* v. *Konig & Co., &c.; Owners of the 'Immanuel'* v. *Denholm & Co.; Howitt* v. *Paul, Sword & Co.; Broadhead* v.

Digitized by Google

Yule; Simey v. *Peter; Lamb, &c.* v. *Kaselack, Olsen & Co.; Youle* v. *Cochrane; Leitch* v. *Wilson; Hogarth* v. *Miller Bros. & Co.; North-Western Bank* v. *Bjornstrom; Watson & Co.* v. *Shankland et al.; Pirie & Sons* v. *Warden et al.; M'Leod & Co.* v. *Harrison.*

English cases cited:—*Wagstaff* v. *Anderson; Sewell* v. *Burdick; Rodocanachi* v. *Milburn; Wegener* v. *Smith; Porteous and Others* v. *Watney; Chappel* v. *Comfort; Russell* v. *Niemann; Schuster* v. *M'Kellar; Kopitoff* v. *Wilson; Phillips* v. *Clark; Hamilton, Fraser & Co.* v. *Pandorf & Co.; Carmichael* v. *Liverpool Sailing Shipowners' Mutual Indemnity Association, 'The Glenfruin'; Grant & Co.* v. *Coverdale, Todd & Co.; Tapscott* v. *Balfour; Harris* v. *Jacobs; Pyman Bros.* v. *Dreyfus Bros. & Co.; Nielsen* v. *Wait; Ford* v. *Cotesworth; Postlethwaite* v. *Freelands; Cochrane* v. *Retberg; Brown* v. *Johnston; Miman* v. *Moss; Thiis and Others* v. *Byers; Randall* v. *Lynch; Budgett & Co.* v. *Binnington & Co.; Alston* v. *Herring; Wright* v. *New Zealand Shipping Co.; Tillett* v. *Cwm Avon; Fowler* v. *Knoop; Marshall; Davies* v. *Garrett; Leduc & Co.* v. *Ward and Others, 'Austria'; Leishman* v. *Christie & Co.; 'The Glamorganshire'; Nettebohn* v. *Richter; Carnegie* v. *Conner; Kay* v. *Wheeler; &c., &c.*

THE contract of affreightment is expressed by charter-party and bill of lading. Until modern times, the former document was usually very brief, and the latter contained a long series of clauses which required the closest attention of parties to be clearly understood. The tendency is at present to make the conditions in both writings practically identical. It has, therefore, been felt that it was not desirable if indeed it were easily practicable, to deal with charter-parties and bills of lading under separate heads.

It is scarcely necessary to observe that as between shipowners and charterers, where there is any disconformity, the charter rules and over-rides the bill of lading—(1 Bell's Com. 590, M'Laren's Ed.; *Wagstaff*, L.R. 5 C.P.D. 171-177; *Sewell* v. *Burdick*, '*Zoe*,' Dec. 5, 1884, L.R. 10 App. Cas. 74-105; *Delaurier* v. *Wyllie*, '*George Moore*,' Nov. 30, 1889, per Lord Kyllachy, p. 192)—as Lopes, L.J., observed in *Rodocanachi* v. *Milburn*, Nov. 25, 1886, 18 Q.B.D. 67:—'When there is a charter-party, as between 'charterers and shipowners, the bill of lading operates

Digitized by Google

'*primâ facie* as a mere receipt for the goods, and a docu-
'ment of title which may be negotiated, and by which
'the property is transferred, but does not operate as a
'new contract, or *alter* the contract contained in the
'charter-party,' pp. 79, 80.

Clean Bill of Lading.

While in general, the master has no right to vary the contract set forth in the charter-party, by signing bills of lading differing from the charter, yet where he has express instructions to sign bills of lading as presented to him, he must do so.

The charter-party of the Spanish ship *Victoria* provided that she should load a full cargo to be delivered at Barcelona on payment of certain freight, 'the captain 'to sign bills of lading as presented at any rate of 'freight, without prejudice to this charter-party.' For payment of freight, dead freight, and demurrage, a lien was given over the cargo. When the lay-days expired the vessel was thirty-five tons short of her full cargo. The master claimed dead freight and demurrage, and refused to sign bills of lading, unless qualified by a reference to the conditions in the charter-party. It was, however, subsequently arranged that the charterer should fill up the ship, and that the captain should sign 'clean bills of 'lading, but under protest for three days' demurrage in-'curred here, to be settled at the port of discharge.' The captain still declined to sign bills of lading without the addition of the words, 'and all conditions as per charter-'party.' The demurrage days were exhausted upon 12th October, 1880, and, on the 13th, an action was brought by the master against the charterer, in which he craved warrant to discharge and land the cargo, and to deposit it in neutral custody, and further asked damages. The First Division of the Court of Session held, that while, prior to the agreement, the master was justified in declining to sign the bills, he was thereby bound to sign clean bills — *i.e.*, such as neither contained nor implied any reference to matters previously in dispute between the parties—and was not entitled to insist on the bills of lading containing a reference to the conditions of the charter-party (*Arrospe* v. *Barr*, '*Victoria*,' March 11, 1881, 8 R.

Digitized by Google

602). The Lord President observed:—'The question 'appears to be, what is meant by the obligation on the 'captain "to sign bills of lading as presented at any rate '"of freight"? It is said that that gives the charterer an 'absolute power to make the bills of lading in any form 'he likes, not merely that he may alter the rate of freight 'from that stipulated in the charter-party, but that he 'may insert conditions to abrogate those stipulated in 'favour of the ship by the charter-party. For example, 'he might stipulate that the lien upon the cargo 'expressly stipulated for by the charter-party should 'be abrogated by a clause in the bill of lading. Now, 'I do not so read those words. On the contrary, 'I think the fair meaning of them is that he has 'to sign the bills of lading as presented, though the 'rate of freight shall be other than that in the charter-'party. That construction seems to me completely to 'satisfy the words which are here used; and it would be 'very unreasonable to construe them in any other way, as 'I think is illustrated by the circumstances of this case. 'The master not having obtained a full cargo was entitled, 'when he arrived at the port of destination, upon delivery 'of that imperfect cargo, to demand payment of dead 'freight, and to retain the cargo until that dead freight as 'well as the freight for the cargo itself should be paid. 'It certainly never could be intended by the parties to 'that original contract of charter-party that one of them, 'by presenting bills of lading in a particular form, should 'escape from the obligations which he had thereby 'incurred, and that the master should be deprived of the 'security of lien which was there stipulated,' pp. 605, 606. Therefore his Lordship proceeds: 'The master was right 'on 4th October, at least, as regards the matter of dead 'cargo and dead freight, whether he was right or wrong 'in claiming demurrage as against the consignee of the 'cargo or the indorsee of the bill of lading at the port of 'delivery — that demurrage having occurred before the 'voyage commenced (a question not determined by the 'Court)—but on 5th October, an agreement had been 'come to that the ship was to be filled up so as to

Digitized by Google

'complete the cargo. "Well, that put an end to the '"complaint of deficient cargo, and it put an end also to a '"prospective claim for dead freight,"' p. 606.

As to the phrase '*to sign clean bills of lading*,' the Lord President observed: 'I do not think that that phrase has 'any technical meaning, nor do I think it is a legal 'phraseology at all. On the contrary I think it is a 'popular phraseology as amongst mariners. I do not 'attach any importance to the evidence that has been led 'before us as to what is called custom or understanding in 'this matter. I do not think there is any settled meaning 'of those words applicable to every conceivable case. In 'short, it appears to me that a clean bill of lading must be 'construed with reference to the circumstances of each 'particular case. If there is a matter in dispute between 'parties as to the conditions on which the voyage is to take 'place, and the goods are to be carried and delivered, then a '"clean" bill of lading will have reference to the subject of 'that dispute, and the meaning of it will be that the master 'will not cumber his bill of lading with any allusion to 'it. Other cases may be imagined in which difficulties are 'foreseen, not as subjects of regular dispute, but where these 'difficulties were anticipated, and if these form an element 'in the discussion between the parties, and the master 'signs the bill of lading, it will be understood that it is to 'exclude all reference to such difficulties. That appears 'to me to be the rational construction of this term. It 'can have no abstract meaning. It must have a meaning 'referable to the circumstances of each particular case. 'The bill is to be made clean of something—of something 'that is present to the minds of parties, and has either 'formed the subject of discussion or dispute, or at least 'has been anticipated as a difficulty,' p. 607. Lord Mure observed that 'A clean bill of lading must mean a bill in 'the ordinary uniform style recognised in all ports in this 'country, and without any special stipulations different 'from that ordinary style.'* That, I think, is the import

* Lord Mure's reference is to a passage in the Lord President's opinion in that case, where his Lordship observed that the bill of lading, the terms of which in question in that case 'was originally conceived in the ordinary terms,

Digitized by Google

of *Craig & Rose* v. *Delargy*, July 15, 1879, 6 R. 1269. Lord Shand observed upon the importance of the words, 'all other conditions as per charter party,' as keeping up the master's claim of demurrage, 'not against the 'charterer only, but against the cargo. I think it is 'clear on the authorities that if these words had been 'inserted they would have had that effect. This is 'matter of express decision,' and his Lordship then cited Justice Maule's opinion in *Wegener* v. *Smith*, 1854, 15 C.B. 285; and *Porteous and Others* v. *Watney*, L.R. 3 Q.B.D. 534, distinguishing the latter case from *Chappel* v. *Comfort*, May 29, 1861, 10 Scott's C.B. Reps. 802. See Scrutton, 49, 50.

'All other conditions as per charter.'

Several of the points raised in *Arrospe* v. *Barr* were more fully considered in a case decided eight years later (1889). A merchant in Glasgow bought 1000 tons of coal and thirty tons of iron to the order of a French merchant, and chartered, at his instructions (but in his own name), the *George Moore*, for the carriage of the coals to France, with the option of sending thirty tons of iron in addition. The charter-party contained a clause of exceptions from liability, for loss, 'even when occasioned by 'negligence, default, or error in judgment of the pilot, 'master, mariners, or other servants of the shipowners.' There were two bills of lading, the one for the coal contained a clause of exception from liability for accidents of navigation, and bound the shipowners to deliver the iron 'unto order, on being paid freight at the rate of four francs 'sixty centimes per ton of twenty cwts. delivered, *all other* '*conditions as per charter*.' The bill of lading for the iron, which, in the exercise of the option, was sent, was similar, but did not contain the words in italics. Neither contained any specific exception for negligence. The merchants on the day the *George Moore* sailed sent the French firm—(1) intimation of sailing; (2) the charter-party; (3) the

'without any special exception, or, in other words, it was what is called a clean 'bill of lading,' 6 R. at 1276.

In the case of the '*Restitution*' *Steamship Co.* v. *Pirie*, 61 L.T. 330, a clean bill of lading was defined as meaning a bill of lading which contains nothing in its margin qualifying the words in the bill of lading itself.

Digitized by Google

bill of lading for the coal; and (4) the bill of lading for the iron. They insured both the coal and iron on the same date. The vessel was lost by the negligence of the owner's servants, and the insurance was paid to the merchants. The French firm then raised an action against the shipowners for damages for failure to deliver the coal and the iron. Lord Trayner, Lord Ordinary, decerned against the shipowners, who reclaimed. The Second Division before whom the case came, 'in respect of the 'importance of the question submitted for determination,' appointed minutes of debate to be prepared for the opinion of the whole Court, who held that as regarded the coals, they became the French firm's property when shipped, or upon the endorsement of the bill of lading, no suspension of delivery till arrival in France, being implied in the merchants' obligation to pay insurance and freight (Lord Young dissented), and that the negligence clause of the charter-party had not been imported into the bill of lading of the coal by the words printed above in italics; the shipowners were therefore liable (Lord Lee dissented); as regarded the iron, eight Judges held that in the circumstances disclosed in the case the iron was bought on commission for the French firm by the merchants as their agents; that it was their property, and as such the indorsation of the bill of lading could only be regarded as a receipt for the iron shipped, not as transferring property in iron which was already their own; it was shipped by the merchants as the French firm's agents under the charter-party, and therefore the French firm 'taking the benefit of their agents' actings,' in Lord Shand's words, 'they were bound by the stipulation 'which the charter-party contained, that the shipowners 'should not be liable for the negligence of their servants 'navigating the ship.' 'But, further,' continued Lord Shand, 'I am of opinion that even if it should be held 'that the charter-party was not entered into by [the 'merchants] acting as the pursuers' agents in regard to the 'iron, and that the shipment was not made by the pursuers 'as principals through [those merchants], their agents, as 'having acquired right to the option stipulated in the

Digitized by Google

'charter-party, nevertheless the negligence clause in that 'document must apply to the iron in question.' Lord Kyllachy put this point as follows:—'No doubt the 'defenders are *primâ facie* liable to the owners of any 'goods which have been injured by their fault; but if 'they carry the goods under a contract which exempts 'them from such liability, and that contract is lawful '(which it undoubtedly is), and it is made with persons 'who are ostensible owners of the goods, and have, if not 'actual, at least apparent authority to deal with them, 'I fail to see how the true owner of the goods can have 'right to repudiate the contract on which alone the 'defenders accepted the goods. The answer must always 'be, that if he (the owner) chooses, instead of shipping the 'goods himself, to entrust them to the charterers, and 'allows them (the charterers) to ship them in their own 'name, his title to the goods is, and must be, qualified by 'the contract of affreightment which the charterers have 'lawfully made.' That is to say, that the undisclosed principals could have no higher right than the charterers themselves, who were bound by the terms of the charter-party. The decision of the Court therefore came to this, that the French firm were entitled to and obtained decree for the value of the coal undelivered, for which they were entitled to sue, but that they were not entitled to sue for the value of the iron undelivered (*Delaurier* v. *Wyllie*, '*George Moore*,' Nov. 30, 1889, 17 R. 167).

The phrase 'all other conditions as per charter' was before the English Court of Appeal a year later in a case where the bill of lading of the *John Banfield* contained those words. In the charter-party was the following,—'Negligence clause as per Baltic Bill of Lading, 1885.' That bill of lading excepted 'strandings and collisions, and 'all losses and damages caused thereby, even when 'occasioned by the negligence, default or error in judg-'ment of the pilot, master, mariners, or other servants of the 'shipowners.' Owing to the master's negligence the *John Banfield* was lost. The indorsees of the bill of lading (who were strangers to the charter-party) sued the shipowners for the loss of the goods, and it was held, follow-

Digitized by Google

lowing *Russell* v. *Niemann*, 17 C.B. (N.S.) 163, that 'all 'other conditions as per charter did not incorporate the 'negligence clause of the Baltic bill of lading, and that the 'shipowners were liable' (*Serraino & Sons* v. *Campbell and Others*, '*John Banfield*,' Dec. 19, 1890, L.R. 1891, 1 Q.B. 283).

Master signs bill of lading as agent for charterers.

The master in signing a bill of lading acts as agent for the charterers, not for the owners.

The charter-party of the *Northumberland* bore, 'Master 'to sign bills of lading as required, without prejudice 'to this charter-party, and if the draft for payment of coal 'freight is drawn to his order, to endorse the same, pay- 'able to charterers' order.' The charterers afterward entered into contracts at different rates of freight with shippers, and the master, at the request of the charterers, granted bills of lading to them. The First Division of the Court of Session held that the owners of the vessel had no direct action against the shippers for the freight due by them, and that, therefore, it could not be arrested in the hands of the shipper so as to found jurisdiction against the owners of the vessel (*Mitchell, &c.* v. *Burn, &c.*, '*Northumberland*,' May 21, 1871, 1 R. 900). 'The 'only contract,' observed the Lord President, 'to which 'the owners are parties is the charter-party. When the 'master signed the bill of lading, No. 20 of Process, he did 'so as agent and at the request of the charterers. The 'shipowners had nothing to do with that contract, and 'could not enforce it. The only contract they were con- 'cerned with was the charter-party. It appears to me 'that these two contracts stand distinct. To the one the 'parties are the shipowners and the charterers, and to the 'other the charterers and the shippers. Therefore, even 'assuming that, but for the fact that the cargo has been 'parted with, the owners might have had a lien over it, 'and even supposing that the shippers might have had a 'good right of action against the owners for damage to the 'cargo, still all this does not bring us any nearer what we 'must have in order to sustain our jurisdiction here—a 'direct right of action for the freight at the instance of the 'owners against the shippers—because no contract exists 'between them,' p. 905. The Lord President's assumption

Digitized by Google

that while the goods are under the control of the master (who is in possession of the ship as representing the owner) the owner has a lien on the goods for freight due under the charter is borne out by the English cases—*Schuster* v. *M'Kellar*, May 28, 1857, 7 E. & B. 704, 724; *Wagstaff* v. *Anderson*, March 1, 1880, L.R. 5 C.P.D. 171, per Bramwell, L.J. See Scrutton, 255.

Seaworthy Ship.

The first obligation upon shipowners, or those acting on their behalf, is that the ship which becomes the subject of contract is seaworthy. What this means was set forth in the judgment of the House of Lords, in the case of the *State of Virginia*. This is an important case, and the opinions given in the House of Lords are therefore referred to at some length. The bill of lading, after the obligation on the owners to deliver the goods, a quantity of wheat, in like good order and condition as when shipped, contained a clause stipulating that the owners should not be liable for the negligence of the crew. The shipper raised an action against the owners for damages, 'caused by and through the insufficiency of the hull 'and appurtenances of the vessel, or by and through 'the gross carelessness and negligence of those in charge 'thereof, for whom the defenders are responsible.' An issue was sent to trial whether the wheat was received in good order and condition, and whether the shipowners, in breach of the undertaking contained in the bill of lading, had failed to deliver it in the like good order and condition. The jury returned a special verdict, finding that the wheat had been damaged by sea water, due to the negligence of some of the crew in leaving one of the orlop-deck ports insufficiently fastened, and 'that in consequence 'the said sea water was thereby admitted to the hold, after 'the ship had been five days at sea.' The First Division of the Court of Session, in applying the verdict, held that the clause exonerating the shipowner from liability for loss caused by the negligence of his servants applied, and entered the verdict for the defenders (*Steel & Craig* v. *State Line Steamship Co.*, March 16, 1877, 4 R. 657). The House of Lords, in an appeal, *held* that the special verdict had not exhausted the case, as it did not find whether the ship

Digitized by Google

was or was not seaworthy at the commencement of the voyage, and that a new trial must take place (July 20, 1877, 4 R. (H. of L.) 103). 'By seaworthy, my Lords,' observed the Lord Chancellor (Cairns): 'I do not desire to point to any 'technical meaning of the term, but to express that the ship 'should be in a condition to encounter whatever perils of 'the sea a ship of that kind, and loaded in that way, may be 'fairly expected to encounter in crossing the Atlantic,' p. 105. Lord Blackburn observed that the duty incumbent on a person supplying a ship is that it 'shall be fit for its purpose.' 'That is generally expressed,' continued his lordship, 'by saying that it shall be seaworthy, and I think also in 'marine contracts—contracts for sea-carriage—that is what 'is properly called a 'warranty,' not merely that they 'should do their best to make the ship fit, but that the ship 'should really be fit. I think it is impossible to read the 'opinion of Lord Tenterden, as early as the first edition of 'Abbott on Shipping at the very beginning of this century, 'of Lord Ellenborough following him, and of Baron Parke 'also, in the case of *Gibson* v. *Small,* 4 H.L.C. 353, without 'seeing that these three great masters of marine law all con'curred in that, and their opinions are spread over a period 'of about forty or fifty years. I think, therefore, that it may 'be fairly said that it is clear that there is such a warranty 'or such an obligation in the case of a contract to carry 'on board ship. In the case of *Readhead* v. *The Midland 'Railway Co.* (L.R. 4 Q.B. 379), which was a case of a con'tract to carry passengers upon land, there had been a good 'deal of reasoning in the Exchequer Chamber to the effect 'that the obligation there was not to furnish a carriage 'which was absolutely perfect or landworthy, but only to 'furnish a carriage which was fit as far as they could 'reasonably make it, which is a different kind of contract 'from what is now supposed. In the case of *Kopitoff* v. '*Wilson* (L.R. 1 Q.B. Div. 377), where I had directed the 'jury that there was an obligation, I did certainly conceive 'the law to be that the shipowner in such a case warranted 'the fitness of his ship when he sailed, and not merely 'that he had loyally, honestly, and *bonâ fide,* endeavoured 'to make her fit. The Court, when it came to be con-

Digitized by Google

'sidered, had to see whether that did not clash with the 'reasoning in *Readhead* v. *The Midland Railway Co.*, and 'we all agreed it was immaterial to decide whether it did 'or not, because there was nothing in that case to raise 'the question whether there was an absolute warranty, or 'merely a duty to furnish it as far as could properly be 'done. Nor, in truth, do I think that here that question 'would in all probability really arise, for here, if there was 'such a defect as would make the ship not reasonably fit 'to carry the wheat across the Atlantic, there can be no 'doubt that it must have been owing to negligence on the 'part of the shipowners or of their servants, and cannot be 'said to have arisen from that kind of latent defect which 'no prudence or skill could perceive. Now, my Lords, 'taking that to be so, it is settled that in a contract where 'there are excepted causes—a contract to carry the goods, 'except the perils of the seas, and except breakage and 'except leakage—it has been decided both in England and 'in Scotland, that there still remains a duty upon the 'shipowners not merely to carry the goods if not pre-'vented by the excepted perils, but also that he and 'his servants shall use due care and skill about carrying 'the goods and shall not be negligent. That has been 'determined in several cases, of which *Phillips* v. *Clark*, '2 C.B., N.S. 156, is the leading one, and that decision 'has been followed in several cases. In the case of '*Moes* v. *The Leith & Amsterdam Shipping Company*, '5 Mac. 988, 39 Scot. Jur., 546, decided in Scotland, 'the same thing seems to have been determined—namely, 'that where there is such an exception, if the shipowner 'or his servants are guilty of negligence producing the 'misfortune, they are liable on that account. I think 'myself that the right and proper way of enunciating it 'would be, in such a case, to say, if, owing to the negli-'gence of the crew, the ship sinks while at sea, although 'the things perish by a peril of the sea, still, inasmuch as it 'was the negligence of the shipowner and his servants that 'led to it, they cannot avail themselves of the exception. 'It matters not whether that would be the right mode of 'expressing it or not; that is clearly established. They

Digitized by Google

'may protect themselves against that, and they do so in 'many cases by saying—these perils are to be excepted, 'whether caused by negligence of the ship's crew or the 'shipowner's servants or not. When they do so, of course 'that no longer applies. I think that exactly the same 'considerations would arise here as to the implied duty—'the duty which, though not expressly mentioned, arises 'by implication of law—on the part of the shipowner to 'furnish a ship really fit for the purpose. If that duty is 'neglected, and, in consequence of the ship not being fit, 'the ship sinks, as it did in the case of *Kopitoff* v. *Wilson*, 'or as in the case here, as it is alleged—I do not say that 'it is so, because that is a point not yet determined—the 'shipowner is liable. If, as is alleged here, a port gives 'way, and the seas come in and wet the wheat, and if it is 'in consequence of the ship having started unfit that that 'mischief is produced, it seems to me to be exactly like the 'case of *Phillips* v. *Clark*, where negligence not provided 'for by the contract occasioned the breakage or the leakage, 'which it was said was an exception, but which the Court 'determined was not an exception of which the shipowners 'could avail themselves, seeing that it was brought about 'by their negligence. So here I think that if this failure 'to make the ship fit for the voyage, if she really was 'unfit, did exist, then the loss produced immediately 'by that, though itself a peril of the sea which would 'have been excepted, is nevertheless a thing for which 'the shipowner is liable, unless by the terms of his 'contract he has provided against it' (pp. 111-113). This case was referred to by Lord Bramwell in *Hamilton, Fraser & Co.* v. *Pandorf & Co.*, *infra*, in dealing with the meaning to be attached to 'perils of 'the sea' (*infra*, p. 94).

In a case, decided in the same year by the Queen's Bench Division, where the facts were very similar to those in *Steel's* case, a cargo of wheat having been damaged by water getting access through a port-hole insufficiently secured, it was *held* that this damage amounted to 'impro-'per navigation of the ship,' within the articles of a mutual insurance association (*Carmichael* v. *Liverpool Sailing Ship-*

Digitized by Google

owners' Mutual Indemnity Association, May 19, 1877, '*Argo*,' 19 Q.B.D. 242).

Steel's case is, in fact, in all respects, a leading case. Butt, J., for example, in *The Glenfruin*, March 31, 1885, 10 P.D. 103, observed: 'I have always understood the 'result of the cases, from *Lyon* v. *Mells*, 5 East. 428, to '*Kopitoff* v. *Wilson*, L.R. 1 Q.P.D. 377, to be that under 'his implied warranty of seaworthiness, the shipowner 'contracts, not merely that he will do his best to make 'the ship reasonably fit, but that she shall really be 'reasonably fit for the voyage. Had these cases left any 'doubt on my mind, it would have been set at rest by the 'observations of some of the Peers in the opinions they 'delivered in the case of *Steel* v. *State Line Steamship Co.*'

In *Cunningham* v. *Colvils, Lowden & Co.*, Dec. 21, 1888, 16 R. 295, the defenders maintained that they were not bound under the special terms of the charter-party, of a ship which went between Seville and Swansea, to have a seaworthy ship starting from Seville, the voyage having really begun at Swansea. Lord Shand observed: 'I am 'of opinion that, though we have a voyage in one sense 'out and home, we have also a cargo voyage. . . . It 'appears to me that in every case where there is a pro-'vision for taking cargo on board, even on such a charter-'party as we have here, it is an implied term of that 'contract that the ship at the time she leaves with her 'cargo shall be seaworthy.' His lordship then made observations on the two leading cases on that point in 1876 and 1877—viz., *Kopitoff* v. *Wilson*, and *Cohn* v. *Davidson*, both cited above.

Apparatus.

In the case of the '*Jubilant*' (*Adam* v. *J. & D. Morris*, Nov. 26, 1890, 18 R. 153), where damage had been done to cargo by water, admitted by the sea-cock, which damage might have been prevented by the use of non-return valves, the owners of the cargo maintained that she was not sea-worthy, on the ground that she had not aids to navigation, and precautions against accident, on which charterers are entitled to rely. Lord Kyllachy, Lord Ordinary, observed that as to certain of those aids there might be an obligation, such as the mariner's compass, and the ordinary safety-

Digitized by Google

valve in steam-boilers; 'But I am not satisfied upon the 'proof,' he added, 'that the automatic appliances of whose 'absence the pursuer here complains are as yet universal, 'or even common in vessels of the class to which the 'defenders' vessel belongs. And it is, I think, noteworthy 'that, while the Board of Trade have, and exercise the 'power to stop vessels on the ground of unseaworthiness, 'they do not insist as a condition of seaworthiness upon 'the introduction of such appliances as those referred to,' p. 156.*

Charterer's Obligations.

A seaworthy vessel being provided, the business of charterer and shipowners concur in the operation of loading. 'When the charterer has tendered the cargo,' observed Lord Selbourne, L.C., in *Grant & Co.* v. *Coverdale, Todd & Co.*, '*Mennythorpe*' (H. of L.), March 24, 1884, 9 App. Cas. 470, 'and when the operation has proceeded to a 'point at which the shipowner is to take charge of it, 'everything after that is the shipowner's business, and 'everything before the commencement of the operation 'of loading—those things which are so essential to the 'operation of loading, that they are conditions *sine quibus* '*non* of that operation—everything before that is the 'charterer's part only.' The charterer's general undertaking is to load or unload in a fixed time. The following cases illustrate the obligation lying upon him to proceed immediately to load or unload, immediately upon the ship being, in the terms of the charter, at his disposal for the purpose. The charterer, for example, is not released from his contract, because (*a*) the dock is full at which he desires the vessel should load, or (*b*) because foreign holidays interfere with the ordinary working of a ship.

Demurrage.

(*a*.) The charter-party of the *Presidente Washington* stipulated that the vessel should 'proceed to a loading berth in 'Leith docks, as ordered, and there load in ten working

* In the case of *The European*, patent steam-steering gear failed to act, and a collision resulted. The owners were held liable. Butt, J., observed that the act of using gear in a crowded river like the Thames, when it had already once failed to act, was 'the less justifiable, because there would have been no 'objection to the use of the hand-steering gear alone' (*The European*, March 24, 1885, 10 P.D. 99; Butt, J., at p. 103).

Digitized by Google

'days, as customary, a full and complete cargo of steam 'coals.' On 16th April, 1875, the ship was lying at a loading berth, and the master informed the charterers that she was ready to receive her cargo. They, however, had entered her in the dock-master's books for a crane berth, and for it the vessel had to wait till 3rd May. In an action for demurrage, the First Division of the Court of Session *held*, reversing the judgment of the Lord Ordinary (Lord Craighill), that under the charter-party, the charterers had the choice of a loading berth, but that the lay-days commenced to run from 17th April, when the loading might have been commenced (*Dall' Orso* v. *Mason & Co.*, '*Presidente Washington*,' Feb. 4, 1876, 3 R. 419). The Lord Ordinary had been of opinion that the case was to be decided on the precedent of *Tapscott* v. *Balfour*, Nov. 23, 1872, L.R. 8 C.P. 46. The Court held that without trenching upon that decision, it did not decide the point at issue. 'Were the defenders' contention to be sustained,' observed Lord Ardmillan, who gave the leading opinion, 'I see no reason why they should not keep the vessel 'for months instead of days, without rendering themselves 'liable in demurrage. Such a result is manifestly unjust, 'and contrary to well recognised principles of mercantile 'law. The rule of honourable dealing between man and 'man is what chiefly makes the law in regard to mercantile 'transactions, and it must have its due effect in this case,' p. 424. (See also, *Harris* v. *Jacobs*, '*Wimbledon*,' June 4, 1885 (C. of A.), L.R. 15 Q.B.D. 247.)

The same point was illustrated in the case of the *St. Fergus* which was chartered at Stettin to load a cargo of scrap iron, and 'therewith proceed to Grangemouth, or so 'near thereunto as she may safely get.' The cargo was to be brought to and taken from alongside the ship at the merchant's risk and expense. The *St. Fergus* arrived in the roads at the mouth of the river on which the port of Grangemouth is situated, on 10th September, 1876, but she could not get a berth. Two days later, being still unable to get into dock, the master brought the vessel into the river, and moored her off the entrance to one of the docks. On the 13th, the master intimated to the charterers

Digitized by Google

that he could now begin to discharge. Vessels frequently discharge cargoes of a similar character to that of the *St. Fergus* by means of lighters, but there was no practice as to cargoes of scrap iron, the trade in which was of recent introduction at Grangemouth. The First Division of the Court of Session held that on 13th September the *St. Fergus* had reached her destination, and that the charterers were bound to commence the discharge on the following day (*Bremner and Another* v. *Burrell & Son*, '*St. Fergus*,' June 19, 1877, 4 R. 934). Lord President Inglis observed:—'There is no difficulty in the rule of law which is recognised 'both here and in England. A vessel, where she under-'takes to go to a certain port, does not fulfil her obligation 'unless she goes either to the appointed place of discharge, 'or to a usual place of discharge. But I am of opinion 'that the obligation in this case was fulfilled, and that the 'charterers, though they desired to get the vessel into the 'railway dock for the purpose of discharging on to trucks, 'could not reasonably refuse to take delivery where the 'ship lay, when the result was to be to cause delay,' p. 937. See also *Pyman Bros.* v. *Dreyfus Bros. & Co.*, Oct. 25, 1889, 24 Q.B.D. 152, where the lay-days of the *Lizzie English* at Odessa were held to be computable from the time of the arrival of the vessel in the outer harbour, and the charterers were held liable for demurrage for delay beyond the 'twelve 'running days set forth in the charter-party.'*

* The case of *Nielsen* v. *Wait*, decided by the Court of Appeal four years earlier, Nov. 3, 1885, 16 Q.B.D. 67, contains a clear exposition by Lord Esher of lay days and demurrage days, and working days—' "Working days" mean 'days on which, at the port, according to the custom of the port, work is done 'in loading and unloading ships, and the phrase does not include Sundays. 'Merchants and shipowners have thought that this arrangement was not satis-'factory to them, and that the lay days ought to be counted irrespectively of 'that custom, so that the charterers should take the risk whether work is done 'on Sundays or holidays at the ports. They, therefore, introduced a new 'term, which is "running days." Now, "running days" were put in really as a 'mode of computation to be distinguished from "working days." "Days" were 'distinguished from "working days." "Days" include every day. If the word '"days" is put into the charter-party—so many days for loading and unloading '—and nothing more, that includes Sundays, and it includes holidays. '"Working days" are distinguished from "days." But I suppose, and take it, 'that there might be another dispute as to what "days" would mean. If

Digitized by Google

Foreign port —(1) Quarantine.

(*b*.) Even the lawful orders of the authorities of a foreign port do not set the shipowner free, thus in the case of *Whites, &c.* v. *The Steamship 'Winchester' Co.*, Feb. 5, 1886, 13 R. 524, the First Division of the Court of Session decided the general principle that the loss to a ship through an unexpected detention by quarantine on arriving at the port of loading falls upon the shipowner, even when the charter-party binds the charterer to load within a fixed period after the ship's arrival, for the reason that the ship cannot be regarded as having arrived at the port of loading until it is placed by the shipowner at the disposal of the charterer, thus carrying out the doctrine of *Barker* v. *Hodgson.* In the circumstances of the case, the *Winchester's* charter-party provided that she should sail from Port Said to three Turkish ports to load 'cargo to be supplied at the rate of 'not less than 140 tons per running-day, Sundays excepted.'

' "days" are put in, there is sure to come some discussion about what is the 'length of the day during which the charterer is obliged to be ready to take 'delivery, or the shipowner to deliver, because the length of days may vary 'according to the custom of the port. In some countries, for anything that 'I know, the custom of the ports may be to work only four hours a-day, 'and if "days" are put into the charter-party, there may be a dispute—'although I do not say it would be a valid contention according to English 'law—whether the day included more than four hours. And merchants and 'shipowners have invented this nautical term, about which there can be no 'dispute. They have invented the phrase "running days." It can be seen 'what it means. What is the run of the ship? how many days does it take a 'ship to run from the West Indies to England? that is the running of the 'ship. The run of a ship is a phrase well known. What are "running days." 'It is a nautical phrase. "Running days" are those days on which a ship in 'the ordinary course is running. It is true that when they are lay days, they 'do not take effect under the charter-party until the ship has done running; 'but the parties are describing the days about which they are talking—viz., 'days in a port, according to the phraseology which they use with regard to a 'ship at sea. "Running days," therefore, mean the whole of every day when 'a ship is running. What is that? That is every day, day and night. There 'it is as plain as possible. They are the days during which, if the ship were 'at sea, she would be running. That means every day. Now, Lord Abinger, 'C.B. in *Brown* v. *Johnson*, 10 M. & W. 331; 11 L.J. (Exch.) 373, pointed 'out that "days," insomuch as they are "working days," do in point of fact 'mean the same as "running days," because if so many days for loading and 'unloading are mentioned in a charter-party, not only working days are 'intended but every day, including Sundays and holidays. Therefore "run-'"ning days" comprehend every day including Sundays and holidays, and '"running days" and "days" are the same.'

Digitized by Google

At the time quarantine was in force for vessels coming to Turkish from Egyptian ports, but that was not known to either charterer or shipowner. At the first port the vessel took in cargo without remonstrance being made, but on entering Macri, the second port, she was stopped, and sent into quarantine fifty miles off. It was held that, as the vessel had not been placed at the disposal of the charterer till after quarantine, it was not before that date an arrived ship at the second port, and the lay-days could not therefore begin to run. Lord Shand gave the leading opinion, and observed, *inter alia*:—'The argument for the shipowners rests entirely on 'that clause of the charter-party which lays on the charterers 'the obligation to supply the cargo at the rate of not less 'than 140 tons per running-day. If the obligation had 'been to load with all despatch, or to load in the usual and 'customary manner, or in a reasonable time, it must be 'conceded that the shipowner must himself bear the loss 'arising from the enforcement of quarantine. This is 'plainly the result of the leading authorities applicable to 'charter-parties so expressed.* Nor will bad weather 'suffice to release the charterer from his obligation nor (as 'will be seen from the case) local holidays. It is sufficient

* Opinions were expressed by the Judges to the effect that the charterers had no claim against the owners for the non-implement of the terms of the charter-party by the quarantine, that failure being due to *vis major*. Lord Shand referred to *dicta* by Lord Blackburn in *Hudson* v. *Ede*, L.R. 2 Q.B. 578, and *Postlethwaite* v. *Freelands*, *infra*, as to quarantine, which would support the argument that his Lordship regarded detention from that cause as 'similar, 'in its legal consequences, to detention caused by ice, or other natural or ordi- 'nary impediments. But in the former of these cases his Lordship, in referring 'to quarantine, regarded it only from the point of view that this might prevent 'the charterer having his cargo forward, or bringing it alongside the ship, and 'does not seem to have had the case of the ship herself being disqualified to 'receive cargo in view; while the latter merely contains a reference to a prac- 'tice which has been sometimes followed, of providing that ship's quarantine 'or other impediments shall excuse the merchant. His Lordship has not said 'that in the case of quarantine, when the ship is directly affected, such a pro- 'vision is necessary for the charterer's protection. I believe that quarantine 'has sometimes been also included with perils of the sea and other risks excus- 'ing the shipowner, but little, if anything, of weight can be inferred from this. The present question has been argued with special reference to the peculiarity 'of quarantine as attaching a disability to the ship, and none of the cases or '*dicta* referred to in any way deal with the point,' p. 538.

Digitized by Google

'to refer to the cases of *Ford* v. *Cotesworth*, L.R. 4 Q.B. '127; L.R. 5 Q.B. 544; and *Postlethwaite* v. *Freelands*, 'L.R. 5 App. Cas. 599.'

(2) Holidays at Iquique.

The outward and homeward charter-party of the barque *Constantine* fixed a certain number of 'working 'days' for discharging the outward and loading the homeward cargo. In an action for demurrage by the owners it was held by the First Division of the Court of Session—(1) *reversing* judgment of Lord Ordinary (Lord Young) and Lord Deas *dissenting*, that days in which the work of loading and discharging vessels in the open roadstead of Iquique could not be carried on on account of the surf, and on which by local custom such work was stopped by order of the captain of the port, were 'working days' within the meaning of the charter-party; (2) (Lord Deas *dissenting*) that the feast of San Jose, kept as a national holiday in Peru, was not a working day (*Holman* v. *Peruvian Nitrate Co.*, '*Constantine*,' Feb. 8, 1878, 5 R. 657). It was observed, by the Court, that where a custom is purely local it cannot be taken to control or explain the words of a written instrument, unless it was known to both parties. The *Constantine* had been chartered to load a homeward cargo at a certain port or two adjacent by-ports. The Court held—(1) that it was within the powers of the master to agree to give the charterers four additional lay-days, in consideration of their giving up the option to load at two by-ports; (2) that it was not within his power to grant a discharge of any demurrage due to the owners except upon payment. Lord Shand's opinion contains a review of many shipping cases; his Lordship cited as to meaning of 'days' or 'lay-days' *Cochrane* v. *Retberg*, 3 Espinasse, 121; *Brown* v. *Johnston*, 10 M. & W. 331; *Miman* v. *Moss*, 29 L.J. 2 Q.B. 206. 'When the 'particular number of days or lawful days specified has 'elapsed a claim for demurrage arises. The rule laid 'down in the case of *Thiis and Others* v. *Byers*, 1876, 'L.R. 1 Q.B. Div. 249, in accordance with the authorities 'cited in the judgment, appears to me to be founded on 'principles of justice and expediency, and to be practically 'decisive of the present case—viz., " Where a given number

Digitized by Google

' " of days is allowed to the charterer for unloading, a con-
' " tract is implied on his part, that from the time when the
' " ship is at the usual port of discharge he will take the
' " risk of any ordinary vicissitudes which may occur to
' " prevent him releasing the ship at the expiration of the
' " lay-days. This is the doctrine laid down by Lord
' " Ellenborough in *Randall* v. *Lynch*, 2 Camp. 352, 355
' " which was upheld by this Court, and it has been accepted
' " as the guiding principle ever since. See *Lees* v. *Yates*,
' " 3 Taunt. 387 ; *Harper* v. *M'Carthy*, 2 B. & P. (L.R.) 258,
' " 267 ; *Brown* v. *Johnson*, 10 M. & W. 331, &c. The
' " obvious convenience of such a rule in preventing dis-
' " putes about the state of the weather on particular days,
' " or particular fractions of days, and the time thereby lost
' " to the charterers in the course of the discharge, makes
' " it highly expedient that this construction should be
' " adhered to, whatever may be the form of words used in
' " the particular charter-party." ' ' It was argued that
' because, according to the law of the port, surf days were
' not working days in the sense already explained, it
' followed that such days were not working days under
' the charter-party. It appears to me that the action of
' the authorities at the port can make no difference in this
' question. In the case of *Barker* v. *Hodgson*, 1814, 3
' Maule & Selwyn, 267, it was held by Lord Ellenborough
' to be no defence to an action of damages for failure to
' furnish a cargo at a foreign port, that in consequence of
' a malignant disease having broken out, the authorities
' had prohibited all public intercourse and communication
' from the shore. The interference of local authority to
' prevent or to delay the loading or unloading of a ship is
' a contingency for the consequence of which it appears to
' me the charterers and not the shipowner is responsible,'
pp. 662-3. As to a captain's power in a foreign port, his
Lordship, p. 665, cited *Grant* v. *Norway*, 1851, 10 Scott's
C.B. Reps. 687-8, quoted with approval by Lord Black-
burn in the case of *Reynolds*, 34 L.J., Q.B. 255.

The rule referred to in the above case with approval, as
laid down in *Thiis* v. *Byers*, was considered recently in
Budgett & Co. v. *Binnington & Co.*, June 28, 1890, L.R. 25

Digitized by Google

Q.B.D. 320, where it was held that, as the number of lay-days allowed for the discharge of the *Fairfield* at Bristol was fixed, the consignees were liable to pay demurrage, although by the custom of the port cargoes are unloaded by the joint act of the shipowner and the consignees, and the shipowners were unable owing to a strike of work to do their share of the unloading. 'The fact is,' said Vaugh William, J., 'that the obligation of the con-'signees to pay demurrage is "absolute," as was decided in '*Thiis* v. *Byers*.' If a consignee is relieved of his obligation where the lay-days are fixed, it must appear that he was prevented from discharging the ship within the proper time by the act of the master, or those for whom he was responsible. But it was the strike of the stevedores and dockers which prevented the master doing his part. 'If 'the strike of the stevedores had resulted from unreason-'able conduct of the master in refusing reasonable wages 'asked by the stevedores, the case might have been 'different, for then, perhaps, it might have said that the 'shipowners prevented the charterer performing the con-'tract, and that the act of the shipowner was the *causa* '*causans* preventing the charterer; but even in such a case 'the charterer would, in our opinion, have to show that he 'was actually prevented by the default of the shipowner—'*i.e.*, that there were no available means of performing the 'contract notwithstanding the default of the shipowners' (See *Alston* v. *Herring*, 11 Exch. 821). 'If such means 'were available, the charterer must avail himself of them 'to discharge the ship, and take his remedy by suing the 'shipowner for breach of contract, or he will be liable to 'demurrage.'

Custom of Port of Discharge.

Glasgow.

Any custom or practice of a particular port which the charterer cannot overcome by the use of reasonable diligence ought to be taken into consideration. Thus in *Postlethwaithe* v. *Freelands*, 1880, L.R. 5 App. Cas. 599, rails were to be delivered at a port where, according to custom, the discharge was by a warp and lighters, and those were

Digitized by Google

all otherwise in use. It was held that the charterer was only bound to use the means of despatch habitually used at the port, and having used those with all the diligence in his power, was not liable for demurrage (Scrutton, pp. 214-215). The following case is exactly in point:—

By the charter-party of the s.s. *Mandarin* her cargo was 'to be discharged as fast as steamer can deliver after 'being berthed as customary.' Glasgow was the port of discharge, and the custom of the General Terminus there was to deliver pig-iron (which was the cargo) by steam cranes into waggons brought alongside, working day and night. No pig-iron was permitted to be laid down on the quay. The supply of trucks was restricted. On the arrival of the *Mandarin*, due notice was given by the consignees to the railway company by whose line the cargo was to be forwarded, and who owned the necessary trucks, but delay was occasioned through their failure to supply sufficient trucks. It was held by the Second Division of the Court of Session that the consignees were not liable in demurrage (*J. & A. Wyllie* v. *Harrison & Co.*, '*Mandarin*,' Oct. 29, 1885, 13 R. 92). The Lord Justice-Clerk (Moncreiff) observed, 'The case is on all fours with 'that of *Postlethwaite* v. *Freelands*.'

Attention should however be given in this connection to the case of *Wright* v. *New Zealand Shipping Co.*, 1879, L.R. 4 Ex. D. 165 which cannot be read as bearing out the law set forth (*Postlethwaite's* case), and it was followed in *Tillett* v. *Cwm Avon*, 1886, 2 *Times* L.R. 675.

Greenock.

The ship *Frey* was chartered at Alexandria to take a cargo to a 'safe port' in the United Kingdom, 'or so near 'thereto as she can safely get, and lay afloat at all times 'of the tide, and deliver the same, and so end the voyage.' After the words 'deliver the same,' the words 'according 'to the custom of the port' standing in the printed form of the charter-party were deleted before signature. The master as directed took his vessel to the Clyde, but on her arrival at the Tail of the Bank, Greenock, an open roadstead, twenty-two miles from Glasgow Harbour, it was found that unless she was lightened she could not lie afloat in Glasgow Harbour at low tide. The shippers,

Digitized by Google

according to custom, lightened the vessel by taking delivery of a part of the cargo, and then required the master to deliver the remainder at Glasgow. This he did under protest, and then raised an action for demurrage. The First Division of the Court of Session held (Lord Deas *dissenting*), that demurrage was not due, Glasgow being the port of discharge, and the ship having been lightened merely to enable her to complete her contract by delivery of the cargo there (*Hillstrom, &c.* v. *Gibson & Clark*, '*Frey*,' Feb. 2, 1870, 8 Mac. 463). Lord President Inglis observed, that though he did not hold that the master was bound by the custom of the port in discharging the cargo, still the custom of the port was a material fact in the case, because it demonstrated the reasonableness of lightening the ship at the Tail of the Bank, p. 471. See also *Nielsen* v. *Wait* (C. of A.), Nov. 3, 1885, L.R. 16 Q.B.D. 67, which is the case of a vessel destined for Gloucester which was lightened at Sharpness.

Must be clear.

The custom of the port must however be clear and unquestionable. The Austrian barque *Una* was chartered to carry from Rosario to the United Kingdom a cargo of ash and bones. There was no stipulation in the charter-party as to lay-days or demurrage for discharge, but it was provided that 'the discharge of the cargo shall 'be according to the custom of the port of discharge.' The *Una* received from the charterers and loaded thirty-three tons of ash, about 397 tons of bones, and about twenty tons of horns, hoofs, and piths,—the piths being partly intermixed with the bones, and partly loaded on the top of them. The master granted bills of lading for thirty-three tons of ash and 417 tons of bones. On arrival at Plymouth the port of call, the *Una* was directed to proceed to Aberdeen. The master on the demand of the consignees there,—but under protest—separated the hoofs, horns, and piths from the bones before giving delivery, and brought an action against the consignees for four days' demurrage on account of the delay caused by this separation. For the defence it was pleaded that the hoofs, horns, and piths having been loaded separately, ought to be so discharged, and that in any case the custom of the port

Digitized by Google

of Aberdeen was that they should be separated from the bones by the ship before delivery. After a proof, from which it appeared, *inter alia*, that the trade in bones at Aberdeen was of only about thirty years' standing, and almost entirely in the hands of the defenders themselves, the Court held—(1) that the hoofs, horns, and piths had been tendered in bulk as part of a cargo of bones; (2) that delay had been caused by the separation; (3) that the defenders had failed to prove any custom of the port entitling them to require the ship to effect such separation; and therefore (4) that the pursuers were entitled to deliver the cargo in bulk as they received it, and to have decree for the sum sued for as demurrage (*Clacevich* v. *Hutcheson & Co.*, '*Una*,' Oct. 28, 1887, 15 R. 11). The Lord Justice-Clerk (Moncreiff), who gave the leading opinion, said: 'I am of opinion that the master 'was not bound to allow his ship to be used for the separa- 'tion of the cargo; if there was anything wrong in the 'mixture of the cargo, recourse should have been against 'the shippers who loaded it, there being no allegation of 'any failure to stow properly on the part of the ship- 'owners. I think that the shipowners were entitled to 'carry and deliver the cargo as it was tendered to them. 'The cargo was tendered as one of bones and ash, and as 'such was received by the shipowners. I think they were 'entitled to deliver it in bulk as they received it, and that 'the captain was not bound to allow the separation to be 'made on board his ship. I therefore think his claim for 'demurrage should be allowed,' p. 16. If there is no custom of the port it has been held in England that the implied contract in the bill of lading to deliver within a reasonable time prevails (*Fowler* v. *Knoop*, 1878, L.R. 4 Q B.D. 299).

Delivery on rafts.

By the charter of the steamship *Enniskillen* it was agreed that she, after being laden with railway sleepers, should proceed to South Alloa, 'or so near thereunto as 'she may safely get,' 'cargo to be brought to and taken 'from alongside at merchant's risk and expense. The 'steamer to be loaded and discharged as fast as she can 'load and deliver. Demurrage over and above the said

Digitized by Google

'lying days at £25 per day.' The port of South Alloa consisted of a roadstead in a tidal river, and of a quay along the river side. The *Enniskillen* on arrival not being able to get a berth at the quay (as they were all occupied), and not being able to lie alongside the quay for want of water, was moored to the quay about sixty yards out, another vessel lying between her and the quay. The custom of the port, so far as it went, was to discharge sleepers at the quay side, but when necessary upon rafts. The charterers agreed to take delivery on rafts of the deck cargo, with a view merely of lightening the vessel, but insisted on the vessel being brought to the quay side for the delivery of the remainder of the cargo. The First Division of the Court of Session held—(1) that the vessel, being moored as near the quay as was possible under the circumstances, she had reached her place of discharge; and (2) that as the charter-party contained a stipulation that the steamer should be discharged as fast as possible, the merchant, on being called on to take delivery of the sleepers on rafts, a recognised mode of delivery, was liable in demurrage for the delay caused by his refusal (*La Cour, &c.* v. *Donaldson & Son, 'Enniskillen,'* May 22, 1874, 1 R. 912). Lord President Inglis observed that if the merchant had not been expressly called on to take delivery on rafts he would not have been bound to offer to do so.

Demurrage.

The ship *Hilda* was chartered for a voyage from Drammen to South Alloa. On arriving there, the discharge occupied several days beyond the lay days stipulated in the charter-party, though the crew worked with diligence. It was impossible, however, for them without assistance to discharge the cargo within the stipulated time. In an action for demurrage at the instance of the master, it was held by the Second Division of the Court of Session—(1) That the consignee was liable for two days' delay caused by the vessel being unable to find a berth at the quay; but (2), that the consignee was not liable for subsequent delay, because there was an implied obligation on the master to give delivery within the time, and as he had failed to do so he could not claim demurrage (*Hansen*

Digitized by Google

v. *Donaldson*, '*Hilda*,' June 20, 1874, 1 R. 1066). The Lord Justice-Clerk (Moncreiff) referred to the opinion of Lord then Mr. Justice Blackburn in *Ford* v. *Cotesworth*, L.R. 4 Q.B. 127, as laying down very clearly the general principles upon which the second head of the decision was arrived at, p. 1070.

The steamer *Redewater* was chartered to 'proceed to 'a safe port in the United Kingdom, or so near thereunto 'as she may safely get always afloat at any time of the 'tide.' She was ordered to Glasgow, but owing to her draught of water had to discharge part of the cargo off Greenock before proceeding to Glasgow. In an action for demurrage it was held by the Second Division of the Court of Session that the voyage was completed at Greenock, so far as regarded the cargo discharged there, and that the time spent in lightening at Greenock was to be included in the lay days (*Dickinson* v. *Martini & Co.*, '*Redewater*,' July 11, 1874, 1 R. 1185. See *Nielson* v. *Wait* (C. of A.) Nov. 3, 1885, L.R. 16 Q.B.D. 67).

The charter-party of the *Avon* provided 'cargo to be 'loaded and discharged as fast as steamer can receive and 'deliver during usual working hours.' It was admitted that demurrage was incurred at the port of loading, but the charterers maintained, *inter alia*, that any claim therefor was sopited by extra despatch at the port of discharge. The Second Division of the Court of Session held that the time occupied in the two operations of loading and unloading could not be lumped, and that such obligations are separate, failure in the performance of either resulting in an obligation to pay demurrage (*Avon Steamship Co., Limited* v. *Leask & Co.*, *Avon*, Dec. 18, 1890, 18 R. 280). 'Two considerations,' observed Lord Trayner, 'go to 'strengthen this view in my mind. The first is that where 'it is intended to lump the time for loading and discharg- 'ing this is usually stated expressly in the charter-party, 'and the second is that if the defenders' view was adopted 'it would virtually read out of the charter-party the 'important provision that the ship should have a lien on 'the cargo for demurrage' (See *Marshall*, 6 Q.B.D. 231, and *Nielsen* v. *Wait*, *supra*).

Digitized by Google

Deviation.

The shipmaster has no power to deviate from his route except for the safety of his ship. If he deviates for any other reason, he acts *ultra vires*.

Deviation unjustifiable.

The *Tornado* was chartered for a voyage to carry cargo and passengers from Liverpool to Auckland and Wellington, New Zealand, and was consigned to the charterers' agents there. When she arrived at Auckland these agents and the master arranged that the cargo and passengers for Wellington should be sent on by other vessels, the *Tornado* not proceeding farther. For the disbursements for forwarding cargo and passengers the consignees sued the owners. It was *held* by the Court of Lords Ordinary that there being nothing to prevent the *Tornado* going on to Wellington, that the captain had acted *ultra vires*, and the owners were not responsible (*Strickland and Others* v. *Neilson & Mackintosh*, '*Tornado*,' Jan. 20, 1869, 7 Mac. 400). (This is the converse of the case of the owners being liable to a charterer for an unnecessary deviation, *Davies* v. *Garrett*, 6 Bing. 716.) Lord Barcaple observed :—' To say that the consignees ' were entitled to authorise this deviation, and that it was ' made by their authority, is, in my opinion, a fatal argu- ' ment for the pursuers. The authority to make the change, ' if it existed at all, must have been in the captain alone, it ' not being alleged that Strickland & Co., as consignees ' of the vessel, had any special powers conferred upon ' them. Any allegation that authority to do so was ' derived from some one else is unavailing, and can only ' introduce an additional element of difficulty in the pur- ' suers' case. Assuming, then, that the deviation was made ' by the captain, was he entitled to do so to the effect of ' binding the owners of the vessel? I can imagine a case ' in which, when a vessel reached one of the ports of dis- ' charge, having very few passengers and very little cargo ' to convey to the second port, it would plainly be greatly ' for the advantage of the owners to be freed from the rest ' of the voyage. In such a case, the manifest gain might ' with great force be pleaded in favour of such a claim as

Digitized by Google

'is made here, which might then be put upon the ground 'of recompense, or some similar ground. But we have no 'such case before us. It is not necessary to hold that this 'deviation occasioned loss to the owners. I think it is 'clear that it did. But there is certainly no evidence of 'gain having resulted from it. Accordingly, if the act was 'unauthorised, no resulting gain can be pleaded in reply 'to that answer to the claim. The case of *Burgess* [v. '*Sharpe*], 2 Camp. 529, cited by the defenders in connec- 'tion with this part of the case, does not appear to me to 'have any very clear application to the case,' p. 404.*

Justifiable deviation.

As to justifiable deviation owing to stress of weather see *Donaldson Brothers* v. *Little & Co., et e contra*, Dec. 2, 1882, 10 R. 413. The business of the master of a seaworthy ship is without deviation to proceed to his port with the best speed his vessel can make. Accidents or unexpected circumstances have, however, caused litigation in several cases as to the meaning to be attached to the words 'to 'proceed to' in a charter-party, and as a consequence the damages claimable in case of alleged failure to proceed as stipulated.

"To proceed to."

The steamship *Andalusia* was chartered to load at Caen 'a full and complete cargo of barley, in bulk not 'exceeding what she can reasonably stow and carry, and, 'being so loaded, shall therewith proceed to Leith to dis- 'charge.' Caen was known by both owners and charterers to have a bar-harbour. The owners of the vessel informed the charterer that she could carry 1800 quarters of barley he had ready for shipment. After 1175 quarters had been shipped the captain declined to take more, on the ground that otherwise the *Andalusia* might not get safely over the bar at Caen. It appeared from the proof that if the *Andalusia* had waited a few days for a higher tide she could have safely taken much more grain, if not the whole. The First Division of the Court of Session held that the terms of the charter-party implied that the ship was to

* A further point in this case was the owners were held not to be liable for exchange and re-exchange on bills drawn by the master on them, which they had refused to accept, and returned dishonoured, he having acted *ultra vires* in drawing the bills.

Digitized by Google

take as much grain as she could with safety carry across the bar at the highest spring-tide, and that as she did not do so, the charterer was entitled to recover damages from the owners for breach of contract (*Gifford & Co.* v. *Dishington & Co.*, '*Andalusia*,' July 19, 1871, 9 Mac. 1045).

Alteration of order of ports.

The charter-party of the schooner *Mary* provided that a cargo of cement should be carried from London to Aberdeen and Cruden (a small port to the north of Aberdeen), not less than 100 tons to be delivered at Aberdeen, and the balance at Cruden. The freight was fixed at a much higher rate for Cruden than for Aberdeen. In the bill of lading, the order of the ports was reversed. The *Mary* went first to Cruden, but found it impossible to enter the harbour. She proceeded to Aberdeen, and there unloaded. The consignees desired her to go again at Cruden, but the master refused. The consignees then declined to pay freight. The Second Division of the Court of Session held, in an action for payment of freight, that it was competent to prove by parole that the terms of the bill of lading were varied from those of the charter-party with the express consent of those acting for the consignees—that, this being the case, the master had duly complied with the contract by going first to Cruden and tendering delivery there (*Davidson* v. *Bisset & Son*, '*Mary*,' March 1, 1878, 5 R. 706).

Knowledge of intended deviation.

In the case of *Leduc & Co.* v. *Ward and Others*, '*Austria*,' Feb. 13, 1888, L.R. 20 Q.B.D. 475, shipowners brought evidence to show that although the bill of lading of the *Austria* stated she was bound from Fiume to Dunkirk, with liberty to call at any port in any order, the indorsees of the bill of lading knew that the vessel intended to proceed to Glasgow, the Court of appeal *held* that such evidence was not admissible to vary the terms of the bill of lading, Glasgow being altogether out of the course of the voyage, and as a consequence of such deviation, the usual clause of exception from liability for sea perils did not exonerate defenders from liability in respect of the wreck of the *Austria* near Ailsa Craig, and non-delivery of the goods.

In the absence of any distinct provision as to where delivery is to take place, the custom of the port prevails;

Digitized by Google

or, if there be no custom, goods are delivered when they are so completely in the consignee's hands that he may do what he pleases with them.

Delivery.

When payment of the freight of part of a cargo of jute shipped by the *British Princess*, from Calcutta to Dundee, for delivery 'at the port of Dundee,' was claimed, the consignee alleged in defence that the shipowners had failed to implement their contract to deliver the goods in good condition. The consignee then stated a counter claim of damages on account of certain bales injured by rain water while lying on the quay where they had been deposited. Evidence showed that, by the custom of the port, bales were checked by the shipping clerk only when placed on the consignee's carts for removal, and the consignee contended that till that time no delivery had taken place. The Second Division of the Court of Session held that the defender had failed to prove any custom of the port at variance with the general rule according to which delivery of each bale was complete as soon as it passed over the ship's side into the hands of the harbour porters employed for the consignee, and, accordingly, that the shipowners were not liable for the damage in question (*British Shipowners Co., Limited* v. *Grimond*, '*British Princess*,' July 4, 1876, 3 R. 968). This decision has been recently commented upon in the case of the *Avon Steamship Co., Limited* v. *Leask & Co.*, '*Avon*,' Dec. 18, 1890, 18 R. 280, cited p. 84, *supra*, with regard to another point. The charter-party bore that the cargo, which was of salt, should be 'brought to and taken 'from alongside.' Much of the salt was lost by being jerked from the buckets when passing to the quay. The jerking was occasioned by the defective gearing of the ship. The owners raised an action for balance of freight, the charterer having deducted a sum for above loss, and argued, *inter alia*, that the obligation to deliver and discharge was satisfied when the goods were placed on the ship's rail, founding on above case, particularly on a *dictum* of Lord Gifford. Lord Trayner, in giving the judgment of the Court for the charterers, observed that the decision in the case of the *British Shipowners Co.*,

Digitized by Google

Limited, supra, did not support the contention of the owners of the *Avon.* 'It was there held that delivery 'had been completed when the cargo had been put over 'the ship's side into the hands of the consignee's servants, 'which is a very different thing from merely swinging the 'cargo over the ship's side, or placing it upon the rail of 'the ship. Apart from this, the extent of the pursuer's 'duty in reference to the delivery of the cargo must be 'ascertained from the terms of their charter-party. Now, 'it is there provided that the cargo is "to be brought to and '"taken from alongside free of expense and risk to the '"ship." The ship, therefore, is to put the cargo at the 'port of delivery "alongside," as the consignee is only 'bound to take it from "alongside." But "alongside" is 'necessarily outside of the ship, and, consequently, putting 'it on the ship's rail would not be compliance with this 'provision of the contract. Nor would merely swinging 'the cargo over the rail of the ship be fulfilment of the 'contract in any reasonable sense. The meaning of such 'a stipulation as that in the charter-party in question, is 'that the shipowner or charterer shall, in delivering the 'cargo, place it outside and alongside the ship in a place 'from which and at which the consignee may take it. I 'am, therefore, of opinion that the loss of cargo, in the 'present case, took place while the cargo was still under 'the control of the ship, and before delivery was com-'pleted, and that, for that loss, the ship is responsible.' See also *Leishman* v. *Christie & Co.*, June 28, 1887, L.R. 19 Q.B.D. 333.

Breaking bulk.

That a consignee of goods, damaged in transit, who breaks bulk without notice to the carrier, or judicial inspection, does not thereby bar his claim for damages, although the want of precaution to preserve evidence may be an element in the proof was held in *Johnstone & Sons* v. *Dove*, Dec. 2, 1875, 3 R. 202). The circumstances were as follows:—A firm of shipowners raised an action against a consignee for the freight from Riga to Dundee of certain hemp. The consignee admitted his liability for the freight, but stated a counter claim of damages in respect that the cargo had been damaged with wet stow-wood, and that the

Digitized by Google

bales of hemp which had been in contact with the stow-wood were thereby damaged. From the proof it appeared that on 29th August, 1873, the consignee caused the bales which were on board the vessel at that date to be examined by men of skill, in the presence of the captain, but without notice to him or to the shipowners; and on 1st September, caused the damaged bales to be opened at his own warehouse, and the damage valued by the same men of skill, without notice to the shipowners. The Second Division of the Court of Session *held* as before stated.

[The endorsement of bills of lading to a bank to secure advances does not prevent, it may be remarked, the original holders raising an action in their own names, for damage to cargo, but the money recovered will be available for the benefit of those truly interested (*The Glamorganshire*, 1888, L.R. 13 App. Cas. p. 455).

As to the case where a charter-party provides that a cargo is to be loaded at 'ship's risk,' see the recent case of *Nottebohn* v. *Richter*, October 30, 1886 (C. of A.) L.R. 18 Q.B.D. 63.]

Charter-parties and bills of lading are to be construed in the light of the nature of the work contemplated by the parties to the bargain.

Guarantee as to dead weight —*Lauderdale.*

The charter-party of the steamship *Lauderdale* provided that the steamship, which was then at sea, should proceed to Glasgow, and there load all such goods and merchandise as the charterers should tender alongside for shipment, including machinery, the dimensions of the larger pieces thereof being specified; but not beyond what the ship could 'reasonably stow and carry'; that the charterers should pay a slump freight for the voyage of £2200; that the 'owners guarantee that the vessel shall carry not less 'than 2000 tons dead weight of cargo;' that 'should the 'vessel not carry the guaranteed dead weight as above, 'any expense incurred from this cause to be borne by the 'owners, and a *pro rata* reduction per ton to be made' from the freight; and that a regular stevedore, to be appointed by the charterers, should be employed by the owners to stow the cargo, 'to be paid by, and to be under 'the direction of, the master, who is responsible for impro-

Digitized by Google

'per stowage.' The charterers tendered 2000 tons of cargo, consisting partly of pieces of machinery, partly of coal, and partly of general goods. Had the coal and the machinery been stowed together, the whole cargo tendered could have been loaded, but as the coals and the machinery were stowed in separate holds, only 1691 tons were stowed. The charterers refused to pay freight except under a reduction on account of the 309 not shipped, and the owners raised an action for payment of the whole freight. Lord Trayner, as Lord Ordinary, held that the guarantee that the *Lauderdale* should carry not less than 2000 dead weight of cargo implied not merely that she should have a carrying capacity of that amount, but that she should actually carry the cargo tendered, provided it was of such a description as could, to that weight, be stowed in the vessel; and that, as the vessel could have carried the whole cargo tendered if the machinery and the coals had been stowed together, although that was an improper mode of stowage without the consent of the owners of the machinery and of the coals, the charterers were entitled to the deduction claimed, the duty of obtaining the consent of the owners of the machinery and the coals being on the shipowners, and not on the charterers. The owners *reclaimed*, but the Court, with the exception of Lord Rutherfurd Clark, *adhered* to the result of the Lord Ordinary's (Lord Trayner) judgment, but differed on the construction of the charter-party, holding that the clause of guarantee imported a guarantee of the vessel's carrying capacity merely, but that the clause providing for a *pro rata* reduction applied if the vessel actually carried less than 2000 tons through no fault on either side, which the majority of the Court were of opinion was the case. Lord Rutherfurd Clark agreed with Lord Trayner's construction of the charter-party; but, being of opinion that the charterers were in fault in not obtaining the consent of the owners of the machinery and the coals to these articles being stowed together, thought that no deduction from the freight should be allowed (*Mackill & Co.* v. *Wright Brothers & Co.*, '*Lauderdale*,' July 5, 1887, 14 R. 863). The pursuers appealed to the House of Lords, who reversed the judgment of the Second Division,

Digitized by Google

Dead weight —*continued.*

and held that, as the owners had provided a vessel capable of carrying a dead weight of 2000 tons, and as the short shipment was not due to improper stowage, but to the charterers providing a cargo more bulky than that contemplated by the parties when they entered into the contract, the charterers were not entitled to any deduction from the full freight (Dec. 18, 1888, 16 R. (H. of L.) 1).

Upon this case, one of the most important recently decided, Mr. Scrutton incidentally observes: 'The primary 'meaning of "dead weight" appears to be simply "weight"; 'it has, however, acquired a secondary meaning as applied 'to goods which measure less than forty cubic feet per ton 'weight, and therefore pay freight by weight. But it is 'submitted that "dead weight" may include goods measur-'ing more than forty feet per ton, which certainly have a 'weight, and that it is only not usually applied to them, 'because for freight-paying purposes this weight is imma-'terial. The case of *Mackill* v. *Wright* must raise some 'difficult cases of construction. It can no longer be said 'that the guarantee is one of mere carrying capacity (see '*per* Lord Macnaghten); the circumstances must be looked 'at in each case' (Scrutton, 60).

A similar case was decided by the English Courts in 1889 —viz., *Carnegie* v. *Conner*, 24 Q.B.D. 45. A ship had been chartered to 'load a cargo of creosoted sleepers and timbers, '... charterer having option of shipping 100 to 200 tons 'of general cargo. ... Owners guarantee ship to carry at 'least about 90,000 cubic feet, or 1500 tons dead weight of 'cargo.' A cargo of 1500 tons dead weight was tendered, of which less than 200 tons were general cargo, and, in all, the measurement of the cargo so tendered did not exceed 90,000 cubic feet, but the sleepers were awkwardly stowed, and only 1120 tons dead weight, measuring 64,400 cubic feet were shipped. 'The judge at the time directed the 'jury that the guarantee applied to the kind of cargo 'specified in the charter. The Divisional Court *held* that 'the guarantee was merely of carrying capacity, and sent 'the case down for a new trial. This case was decided on '25th October, 1889, but, unfortunately, *Mackill* v. *Wright*, 'decided on 18th December, 1888, and reported in August,

Digitized by Google

'1889, was not cited to the Court, whose judgment loses 'some of its authority from the omission, as the *dicta* in '*Mackill* v. *Wright* are certainly inconsistent with those in '*Carnegie* v. *Connor*' [should be *Conner*] (Scrutton, p. 61).

Negligence Clause.

Perils of the sea.

The construction to be placed upon the various clauses forming the 'negligence clause,' by which 'liable for loss 'or damage occasioned by perils of the sea, by fire, by 'barratry of the master or crew, by enemies, pirates, or 'robbers, by arrest and restraint of princes, rulers, or 'people, riots, strikes, or stoppage of labour by explosion, 'bursting of boilers, breakage of shafts, or any latent 'defect in hull, machinery, or appurtenances, by collisions, 'stranding, or other accidents of navigation of whatsoever 'kind (even where occasioned by the negligence, default 'or error of judgment in the pilot, master, mariners, or 'other servants of the shipowner), not resulting, however, 'in any case, from want of due diligence by the owners of 'the ship, or any of them, or by the ship's husband or 'manager.' The foregoing is the Form of Negligence clause given by Mr. Scrutton (p. 287). Its terms in practice vary in many ways, the tendency being always to insert new exceptions. The clause in olden times was simply 'the dangers of the seas excepted' (Abbott's Shipping, p. 257), but within the last century its terms have been greatly amplified.

In Abbott's Shipping, p. 329, the words 'perils of the 'sea' are defined to be words 'which certainly denote the 'natural accidents peculiar to that element, and in more 'than one instance have been held to extend to an event 'not attributable to natural causes.' Bell observes, 'Perils 'of the seas excuse only when unavoidable, as rocks, sand 'banks, or collision by force of the winds,' Principles 241. There has been much litigation over the words, and for a time it seemed as if a different construction were to be placed upon 'perils of the seas,' when the words were used in a policy of marine insurance, and when they were used in a bill of lading. The judgment of the House of

Lords in *Wilson, Sons & Co.* v. *Owners of Cargo per the Zantho*, 1887, L.R. 12 App. Cas. 503, however, makes it clear that whatever the expression means in the one document it means neither more nor less in the other, although different considerations no doubt apply to contracts of indemnity and contracts of carriage (*Woodley* v. *Michell*, L.R. 11 Q.B.D. 47, was overruled). In the same year the House of Lords dealt with the meaning of 'perils of the sea' in the following case. During the voyage of the *Inchrhona*, from Akyab to Bremenhaven, rats gnawed a hole in a pipe on board the ship, and seawater got in and damaged the rice. The rice had been shipped under a charter-party and bills of lading which excepted 'dangers and accidents of the seas.' There was no neglect or default on the part of the shipowners or their servants. In the case of *Kay* v. *Wheeler*, 36 L.J., C.P. 180, L.R. 2 C.P. 302, injury by rats was held not to come within the exception (Abbott's Shipping, 333) but in that case the damage was done directly by the rats. The charterers of the *Inchrhona* urged that the action of rats' teeth was the real effective cause of the loss, was not a peril of the sea or on the sea, that worms, natural decay, &c., are not perils of the sea, but of the ship; perils of the sea are sunken rocks, icebergs, swordfish, all of which are outside the ship, but rats are inside the ship and essentially of it, and have nothing to do with the sea. The shipowners answered whenever the ship leaks without fault in the owner it is a peril of the sea, whether the hole be caused by a mouse or a mountain—*e.g.*, an iceberg, The House of Lords held the damage was within the exception, and that the shipowners were not liable (*Hamilton, Fraser & Co.* v. *Pandorf & Co.*, '*Inchrhona*,' 1887, 12 App. Cas. 518), Lord Watson saying, 'in the case where rats 'make a hole or where one of the crew leaves a port- 'hole open* through which the sea enters and injures 'the cargo, the sea is the immediate cause of mischief,' p. 575. Lord Bramwell observed: 'An attempt was 'made to show that a peril of the sea meant a peril

Rats.

* A reference to the Scottish case of *Steel* v. *State Line Steamship Co.*, L.R. (H. of L.) 103, 3 App. Cas. 88.

Digitized by Google

'of what I feel inclined to call the sea's behaviour or its 'condition. But that is met by the argument, that if so, 'striking on a sunken rock on a calm day, or against an 'iceberg, and consequent foundering, is not a peril of the 'sea or its consequence,' p. 527. Lord Herschell appositely cited from one of the cases where it was held that injury done to a vessel or its cargo by rats is not damage by perils of the sea (*Laveroni* v. *Drury*, 22 L.J. (Ex.) 2, a *dictum* of Pollock, C.B.—'If, indeed, the rats had made a hole in 'the ship through which water came in and damaged the 'cargo, that might very likely be a case of sea damage,'—and referred (p. 530) to the American case of *Garigues* v. *Coxe*, 1 Binney, Penn. 592.

Collision.

When goods are lost owing to a collision, and the owners of the vessel answer that the collision was an excepted risk under 'perils of the sea,' the burden of proof is upon them to show that the collision in question came within such exception (See the *Xantho*, June 8, 1886, 11 P.D. 170).

Tempestuous weather.

The owners of the *Palermo*—a coasting steamer—contracted on 10th October, 1881, in a charter-party, containing a clause excepting 'all dangers and accidents of 'the seas,' &c., to send the vessel to Barrow-in-Furness to load a cargo of iron for Glasgow, to be alongside in Queen's Dock, Glasgow, 'not later than Friday the 14th October, 'unforeseen circumstances excepted.' The steamer left Glasgow for Dublin on 11th October with a cargo of coals, which she was loading at the time the contract was entered into. She had ample time in which to make the voyage in ordinary weather, but on this occasion the weather was tempestuous, and the *Palermo* in consequence did not arrive at Barrow until the night of 16th October. On the 17th she loaded the iron, and proceeded on the 18th on her voyage to Glasgow, but again very stormy weather awaited her, and she had to run for shelter. She did not arrive at Glasgow until 26th October, twelve days after the date at which she was due under the charter-party. An action of damages against the owners of the steamer was raised by the charterers for loss caused them by the late arrival of the iron. From a proof, it appeared that the steamer could, under ordinary conditions, have

Digitized by Google

arrived at Barrow in time to load her cargo of iron, and reach Glasgow by 14th October, notwithstanding her taking the cargo of coals to Dublin, and the Second Division of the Court of Session held that treating the matter as a jury question, the owners were entitled to rely on the steamer being able to fulfil the contract, and that the delay must be therefore attributed to 'accidents of the 'seas' and 'unforeseen circumstances.' The owners were accordingly assoilzied (*Donaldson Brothers* v. *Little & Co., et e contra; Little & Co.* v. *Hay & Sons*, Dec. 21, 1882, 10 R. 413). The Lord Justice-Clerk (Lord Moncreiff) observed: 'The only difficulty I have had is in regard to the voyage to 'Dublin. That cannot, however, be said to be a deviation 'from the voyage contracted for, because in the charter-'party it is not specified where the voyage is to commence. 'My view, generally, is that the delay did not arise in 'consequence of the voyage to Dublin being undertaken. 'Stress of weather seems to have been the cause of it from 'first to last. If the *Palermo* had met with good weather, 'there is every likelihood that she would have fulfilled her 'contract in time. The whole case in my opinion, comes 'under the clause of "unforeseen circumstances." The 'weather throughout most of the time in question seems 'to have been terrific, and I cannot think the captain of 'the *Palermo* is to blame in taking shelter from it,' p. 425.

Ambiguous clause is to be read in shipper's favour.

The import of recent decisions is clearly to read a negligence clause in a bill of lading where it is of ambiguous and of doubtful meaning, with the construction most in favour of the shipper. See *per* Lush., J., in *Taylor* v. *Liverpool & Great Western Steam Co.*, L.R. 9 Q.B.D. 546, at p. 549; and per Bowers, L.J., in *Burton* v. *English*, 12 Q.B.D. 218. "I do not understand this to mean," said A. L. Smith, J., in *Norman* v. *Binnington*, July 10, 1890, 25 Q.B.D., at p. 477, 'that the true canon of construction is 'not to be applied, but that, when applied, if ambiguity or 'doubt still exists, the construction is to be in favour of the 'shipper rather than of the shipowner.' See as to attempted incorporation of conditions favourable to shipowner by reference, *Serraino & Sons* v. *Campbell and Others*, '*John Banfield*,' Dec. 19, 1890, L.R. 1891, 1 Q.B. 283, *supra*, p. 66. A

Digitized by Google

construction favourable to the shipper is shown in the case of *The Bernina* (1), Nov. 11, 1886, 12 P.D. 36, where goods had been shipped without a negligence clause. The vessel being injured in a collision, the goods were transhipped to three other vessels under bills of lading, excepting the negligence of the master and crews. Two of the vessels, through such negligence, were lost. It was held that the shipowners of the original vessel were liable, as the loss did not arise from an excepted peril, and because, although the transhipment was justifiable, it was for the purpose of carrying the freight under the charter-party (but as to shipper's computation of value or cargo damaged by transhipment, see *The Blenheim*, August 4, 1885, L.R. 10 P.D. 167).

Errors or Negligence of Navigation.

Errors or negligence of navigation. *Ethelwolf.*

The steamship *Ethelwolf* has been the cause of two different judgments by the two Divisions of the Court of Session; comparison of the grounds of judgment in each is instructive. The *Ethelwolf* was lost on the voyage from Seville to Swansea, in consequence of the breakdown of her boiler through the presence of muddy water in it. The charter-party of the steamship *Ethelwolf* freed the owners from liability through 'the act of God, the Queen's enemies, 'fire, and all and every other dangers and accidents of the 'seas, rivers, and, or errors or negligence of navigation, of 'whatsoever nature and kind during said voyage.' In an action by the charterers against the shipowners for damages on account of the loss of the cargo, it was held by the Second Division of the Court of Session—(1) that it was proved that the muddy water had been put in the boiler before the commencement of the voyage; (2) (Lord Young doubting) that the presence of muddy water in the boiler when the ship started rendered her unseaworthy; and consequently (3) that the clause of exemption in the charter-party did not apply (*The Seville Sulphur and Copper Co., Limited* v. *Colvils, Lowden & Co.*, March 20, 1888, 15 R. 616).

Another owner of cargo later then raised an action against

Digitized by Google

the same owners (*Cunningham* v. *Colvils, Lowden & Co.*, Dec. 21, 1888, 16 R. 295), and in this case the First Division of the Court of Session, reversing the judgment of the Lord Ordinary (Kinnear), held that—(1) upon the evidence the failure of steam power was attributable to the water having been allowed to run too low in the boiler, so that the metal surfaces of the crowns of the wing furnaces and some of the boiler tubes were denuded of water, with the result that they contracted unevenly, and consequently leaked, when cold sea water was admitted into the boiler; and (2) that the loss fell under the exception of 'errors or negligence of navigation' in the charter-party, and that, therefore, the owners were not liable in damages. Lord Adam, who gave the leading opinion, observed:—'We were referred to the case of *The* '*Seville Sulphur and Copper Co.* against the present defen-'ders, in which the Second Division arrived at a different 'conclusion from that at which I have arrived, but it is 'enough to say that the evidence we have had to consider 'is materially different from the evidence in that case.'

Lord Shand observed:—'We had a good deal of discus-'sion upon the question of *onus* in the case, and I desire to 'say a few words upon that point. It appears to me, in 'the first place, that the shipowners having been entrusted 'with the carriage of the goods, and being unable to 'deliver them, have an *onus* upon them to show that they 'are to be relieved of the obligation to deliver, and I think 'that *onus* is discharged primarily by showing that the 'vessel was driven on to a lee shore and wrecked. In 'proving that, however, it came out in the evidence that 'the cause of the vessel being so wrecked and driven on 'shore was the failure of motive power. The pursuer 'maintains that it is clear that the *onus* is thereby thrown 'upon the defenders in the action to account for this, and 'that it is to be presumed that the failure of the motive 'power arose from the unseaworthiness in respect of the 'boiler being defective, or in a condition dangerous to the 'ship when she left Seville. The defenders say no; that 'there is a clause in the charter-party saving them from the 'effects of the negligence of those who were working the

Digitized by Google

'ship, and that this was just as likely to happen from the neg-'ligence of those working the machinery as from the alleged 'defective state of the machinery itself three or four days 'before, when she left Seville, and before she encountered 'the severe weather that she did. Upon that matter it 'appears to me that there is no presumption of law aris-'ing in the circumstances one way or the other, which can 'be referred to as determining the question of *onus*. It is 'purely a question of presumption of fact one way or the 'other, and that is for the judge or jury dealing with the 'circumstances of each case. The case of *Cohn* v. *David-'son*, L.R. 2 Q.B.D. 455, referred to in the cause of the 'discussion, was one in which, I think, the presumption of 'fact was absolutely clear,' p. 311.*

George Moore.

The charter-party of the *George Moore* (*Delaurier* v. *Wyllie*, Nov. 30, 1889, 17 R. 167) contained a negligence clause excepting liability for accidents of navigation 'even 'when occasioned by negligence, default, or error in judg-'ment of the pilot, master, mariners or other servants of 'the shipowners.' The bill of lading contained the exception, 'the act of God, the Queen's enemies, fire, and all and 'every other danger, and accidents of the seas, rivers and 'navigation of whatever nature and kind soever,' and then undertook delivery of the cargo on being paid freight at a certain rate 'per ton of twenty cwt. delivered, *all other con-'ditions as per charter*, dated 11th May, 1887.' The ship was lost. The owners of the cargo raised an action against the shipowners, who maintained that by the words in italics the negligence clause of the charter was incorporated in the bill of lading, and was binding on the pursuers. The Court held that the words could not be construed as importing the negligence clause, and only carried conditions prestable by the consignees. 'Construed literally, and taken by 'themselves, those words, no doubt, are wide enough,' observed Lord Wellwood, 'to bear the construction put 'upon them by the defenders. But the same or similar 'words have already been the subject of judicial decision. 'I think that the fair result of the authorities and the

* This case, and the opinions pronounced, are carefully considered in *The Juridical Review*, Vol. i. p. 155, Art.: 'The "Negligence Clause" in Charter-Parties.'

Digitized by Google

'general understanding of mercantile men on the subject 'following on the decisions, is that those words simply 'import into the bill of lading such conditions in the 'charter-party as affect and are to be performed by the 'consignee who is to take delivery of the cargo under the 'bill of lading, such as payment of freight, the manner of 'payment, payment of demurrage at the port of discharge, 'and so forth; and do not incorporate all the conditions 'of the charter-party which are binding on the shippers. 'It is sufficient on this branch of the case to refer to the 'case of *Russell* v. *Niemann*, 1864, 34 L.J., C.P. 10, in which 'the same words occurred. The statement of the law by 'Justice Willes in that case, which is to the above effect, 'was approved in the House of Lords in the unreported 'case of *Taylor & Sanderson* v. *Perrin & Sons*, 24th June, '1883. In the shorthand writer's report of the opinions 'in that case, the rule of construction stated by Justice 'Willes in *Russell* v. *Niemann* is referred to as sound and 'authoritative. The case of *Gray* v. *Carr*, June 1871, 6 'L.R., Q.B. 522 is quoted as an adverse authority. There 'was a considerable division of opinion in that case, and 'Justices Willes and Brett dissented as to the construction 'of the bill of lading. But the words in the bill of lading 'there were "he or they paying freight and all other con- '"ditions or demurrage (if any should be incurred) for said '"goods, as per the aforesaid charter-party." Now, the 'charter-party only provided for payment of demurrage at 'the port of loading. The decision, therefore, goes no 'further than this, that demurrage to be paid as per the 'aforesaid charter-party, being expressly mentioned in the 'bill of lading, and no provision for demurrage at the port 'of discharge being made in the charter-party, the provi- 'sion as to demurrage in the bill of lading must be referred 'to demurrage at the port of loading.'*

Jubilant.

In the case of the *Jubilant*, the charter-party exempted the shipowners from liability for 'accidents of navigation' —'even when occasioned by negligence, default, or error 'in judgment' of the owner's servants. The *Jubilant*

* *Russell* v. *Niemann* is not overruled by *Gray* v. *Carr*. See *Serraino* v. *Campbell*, 1891, 1 Q.B. (C. of A.), 283.

Digitized by Google

was laden with oil-cake when she arrived at Burghead, her destined port. When there, by a mistake of the engineer, the sea-cock was left open, water got in and part of the cargo was spoiled. The master represented falsely that the wetting was due to the straining of the ship when at sea. It was held that the owners were liable for the damage caused by the delay occasioned by the master's misstatements. 'It is the duty of a master,' observed Lord President Inglis, 'when an injury has been caused to cargo 'by an excepted cause, to repair by all the means in his 'power the mischief which has been done, and to land the 'cargo in as good a condition as the circumstances will 'admit. The neglect of this duty does not fall within the 'exceptions in the charter-party. It is a plain duty 'required of the master to the shipowners and the 'merchant and all concerned. Not only did the master 'in this case not fulfil that duty, but he violated it in the 'most gross manner' (*Adam* v. *J. & A. Morris*, '*Jubilant*,' Nov. 26, 1890, 18 R. 153). His Lordship cited with approval the doctrine expounded by Mr. Justice Willes in *Notara and Another* v. *Henderson and Others*, L.R. 7 Q.B. 225, who described the duty of the master 'as a duty upon 'him, as representing the shipowners, to take reasonable 'care of the goods entrusted to him, not merely in doing 'what is necessary to preserve them on board the ship 'during the ordinary incidents of the voyage, but also in 'taking reasonable measures to check and arrest their loss, 'destruction, or deterioration by reason of accidents for 'the necessary effects of which there is, by reason of the 'exception in the bill of lading, no original liability.' ['That is precisely the duty which I have been endeavour-'ing to describe,' commented the Lord President, 'and it 'occurred in circumstances quite analogous to the present 'case, because the bill of lading in that case contained a 'clause quite as strong in its terms as the clause in the 'charter-party here.'] Mr. Justice Willes continued: 'The exception in the bill of lading was relied upon in 'this Court as completely exonerating the shipowner, but 'it is now thoroughly settled that it only exempts him 'from the absolute liability of a common carrier, and not

Duty of a master.

Digitized by Google

'from the consequences of the want of reasonable skill, 'diligence and care which want is popularly described as '"gross negligence."' The Lord President adopted this doctrine as 'applicable to a case such as' that of the *Jubilant*, 'and precisely in point.' See *Carmichael* v. *Liverpool Sailing Ship Owners' Mutual Indemnity Association*, May 19, 1889, 19 Q.B.D. 242, where it was held to amount to improper navigation to send a ship to sea with an insufficiently closed port-hole; see *infra*, 71.

In *Norman* v. *Binnington*, July 10, 1890, L.R. 25 Q.B.D. 475, the bill of lading contained an exemption from the shipowner's liability to damage caused by 'negligence or default 'of pilot, master, mariners, engineers, or other persons in 'the service of the ship, whether in navigating the ship *or* '*otherwise*.' Goods were injured by rain by the negligence of persons for whom the shipowner was responsible. The Court held the shipowner was not liable, but in the case of *The Sailing Ship Garston Company, Limited* v. *Hickie, Bowman & Co.* (C. of A.), Oct. 28, 1886, L.R. 18 Q.B.D. 17, the Court, while finding the shipowners not liable in respect of non-delivery of cargo where a collision had been caused by the negligence of those in charge of the other vessel in the collision, under the clause excepting 'danger 'or accident of navigation,' held that under the charter-party the charterers were entitled to set off the cost of the cargo lost against a balance of freight payable on delivery of the remainder of the cargo at the port of discharge.

Accomac.

The charter-party of the *Accomac*, from Rangoon to London, excepted the owners from liability 'for any act, 'negligence, or default of master or crew in the navigation 'of the ship on the ordinary course of the voyage.' On arriving in London, the *Accomac* went into the Victoria Dock to discharge. While there, through some negligence in the removal of a bilge-pump, water got into the vessel and damaged the cargo. The Court of Appeal held that, assuming the negligence of the crew caused the damage, it was not negligence within the meaning of the exception, and the shipowners were held liable (*The Accomac*, August 7, 1890, L.R. 15 P.D. 208). *Laurie* v. *Douglas*, 15 M. & W. 746, was distinguished. On the other hand, where a similar

Digitized by Google

clause was included in the charter-party of the *Carron Park*, and during the loading, the cargo of sugar was damaged by water, through the negligence of an engineer, it was held that the shipowners were not liable, as the term voyage included the period of time during which loading went on (*The Carron Park*, August 5, 1890, L.R. 15 Pro. Div. 203). Lord Hannen cited with approval *Barker* v. *M'Andrew*, 34 L.J., C.P. 191. See also *Gilroy, Sons & Co.* v. *Price & Co.*, '*Tilkhurst*,' Feb. 27, 1891, 18 R. 569.

Cesser Clause.

Cesser Clause.

'When you have in a charter-party such a clause as this, '"Charterer's liability to cease as soon as the cargo is '"shipped," that has the effect of discharging the charterer 'of all liability both before and after the time of shipping 'the cargo,' said Lord President Inglis, in *Salvesen & Co.* v. *Grey & Co.*, '*Matador*,' Oct. 28, 1885, 13. R. 85, 'and, on 'the other hand, it gives the captain an absolute lien on 'the cargo for demurrage, and freight which would other'wise have accrued against the charterer. In short, the 'charterer's personal liability is extinguished, and a lien 'over the cargo is substituted for it.'

Matador.

The charter-party of the ship *Matador* provided:— 'Charterer's liability to cease as soon as the cargo is 'shipped in terms of this charter, captain having an 'absolute lien on the cargo for all freight, dead freight, 'and demurrage.' It was held by the First Division of the Court of Session, that when a cargo was shipped, liability could not be enforced against the charterers, and that demurrage at the port of loading, incurred before the loading was completed, could not be claimed against them. The Lord Ordinary (Kinnear), in his judgment, followed the decisions in the English cases of *Francesco* v. *Massey*, L.R. 8 Exch. 10; *Kish* v. *Corry*, L.R. 10 Q.B. 553; *French* v. *Gerber*, L.R. 2 C.P.D. 247; and *Sanguinetti* v. *The Pacific Steam Navigation Company*, L.R. 2 Q.B.D. 238.

'The only distinction that could be suggested between 'those cases and the present,' said the Lord President in adhering, 'was, that the expression was not precisely the 'same here. Here you have the words "shipped in terms

Digitized by Google

'"of this charter"—the whole case depends on the meaning 'of these words. Now, I think that, when the shipper has 'brought to the side of the vessel a full and complete 'cargo of the goods stipulated for, and has put them on 'board the vessel; when that has been done, the vessel 'has been loaded in terms of the charter-party. To go 'further would be unwarrantable in construing a mercantile 'document of this kind.' Lord Shand characterised the meaning sought to be put on the words quoted as being 'an hypercritical construction.'

Lismore.

In a more recent case the cesser clause was conceived in the following terms:—'Charterers' responsibility to cease 'on cargo being loaded, provided the cargo is worth the 'freight at port of discharge. Owners to have lien on 'cargo for freight, dead freight, and demurrage. To be 'loaded as customary at Sydney. To be discharged as 'customary at . . . and at the rate of not less than 100 'tons of coal per working day, . . . and ten days on 'demurrage over and above the said laying-days, at 4d. 'per register ton per day.' The *Lismore* arrived at Sydney on 15th August; 1888, but she was not loaded with her cargo, and did not sail for San Diego until 2nd December. In an action brought by the owners against the charterers for damages for detention at Sydney, the defenders founded on the cesser and lien clauses as freeing them from responsibility. The First Division of the Court of Session held that the word 'demurrage' in the lien clause did not cover undue detention at the port of loading, and, therefore, that the charterers were not exempted by the cesser clause from liability for damages for such detention (*Gardiner* v. *Macfarlane, M'Crindell & Co.*, '*Lismore*,' March 20, 1889, 16 R. 658).

Acceptance of bills of lading.

The acceptance of bills of lading in terms of the cesser clause in charter-party terminates the charterer's obligation under the charter-party. This is illustrated in the following case decided in 1881.

The ship *Alice*, of Newport, was chartered for the voyage from Greenock to Monte Video at a slump freight of £550, of which the charter-party provided that £150 was to be payable on clearing at Greenock, and 'bills of lading for the

Digitized by Google

'balance payable abroad to be taken (*sic*) by the captain, on 'receipt of which documents all responsibility of charterer 'to cease.' The *Alice* was loaded chiefly with coal. The charterer, who was himself the consignee, divided the slump freight among the various items of the cargo, and presented bills of lading, which together made up the *cumulo* sum, for the master's signature. In the bill of lading for the coal, 453½ tons were entered at a freight of 22s. 6d. per ton; the bill of lading had a note at the foot, however, 'weight and contents unknown.' On arriving at Monte Video, the master waived his lien for freight, and delivered the coal, which turned out to amount to only 398 tons as weighed there. The agents for the charterer, when settling for the balance of freight, retained £24 for coal alleged to be short delivered, and £62 freight applicable thereto. The owners brought an action against the charterer for the balance of the freight stipulated for in the charter-party. It was held by the Second Division of the Court of Session —(1) That the action could not be sustained on the charter-party, as, bills of lading having been granted for the freight, the cesser clause put an end to the charterer's obligations under the charter-party; (2) that the bill of lading only entitled the shipowners to recover the freight of the 398 tons proved to have been delivered; and (3) that as it had not been proved that any part of the cargo shipped had not been delivered the defender was not entitled to retain the £24 (*Beynon, &c.* v. *Kenneth*, '*Alice*,' March 10, 1881, 8 R. 594). Lord Craighill observed: 'As 'regards the cesser clause, it appears to me that once the 'bills of lading were delivered the charterer was relieved of 'all liability under the charter-party; were it otherwise the 'cesser clause could have no effect. But the import of the 'cesser clause is no more than this, that the charterer shall 'be no longer responsible under the charter-party. If 'there is any other ground of liability not resulting from 'the charter-party there is no inconsistency in that liability 'continuing, though the liability under the charter-party 'ceases. Whether or not the bill of lading imports a new 'contract under which the charterer is liable is the ques- 'tion. The Sheriff-substitute [Guthrie, *Lanarkshire*] has

Digitized by Google

'decided that it does. But the decision of the point is not 'necessary for the judgment we are to pronounce. If 'called upon to decide it, I would be inclined to support 'the view which the Sheriff-substitute has adopted, and 'I am satisfied that there would be no inconsistency in 'arriving at that result. But while I think there is no 'inconsistency in holding that such liability may arise, 'though that under the charter-party is discharged, I find 'that the point was expressly reserved in the leading 'English case of *Sanguinetti*, where Mellish, L.J., is 'reported to have said (L.R. 2 Q.B.D. 248): "Now, in '"the statement of claim it is alleged that the defendants '"themselves, by their agent or manager, requested that '"the cargo might be delivered to them without enforcing '"the lien. If that is true, that may possibly give rise to a '"right on the part of the plaintiff wholly independent of '"the charter, but it would be a contract *dehors* the charter. '"Mr. Benjamin said he did not claim on the present '"occasion, or wish for any decision about any right he '"might have independently of the charter; therefore we '"give no opinion, one way or the other, in respect of any '"claim that there may be against the defendants on '"account of their agent or manager having requested that '"the cargo should be delivered without the lien for demur- '"rage having been enforced." Hence, though it may well 'be that though freed from all liability under the charter- 'party the charterer is still liable *aliunde* for freight, 'I desire on that subject to reserve my opinion,' p. 601.

In computing *lay days*, the Court of Session, in the case of the *Polam* (*Hough et al.* v. *Athya & Son*, May 27, 1879, 6 R. 961), decided that they are to be computed by days or parts of days, not by hours, following the decision in *The Commercial Steamship Co.* v. *Boulton*, 1875, L.R. 10 Q.B. 346.

Shippers.

Hitherto the obligations incident to the charter of affreightment have been mainly those devolving on the owners. The following cases deal with the principal obligations of the (1) *shippers*—viz., to pay freight, and (2) of *consignees* or *endorsees* of bills of lading to accept as binding

Digitized by Google

against them for the purpose of freight the statements in such bills of lading.

The case of *Moes, Moliere & Tromp* v. *Leith & Amsterdam Shipping Co.*, '*Ivanhoe*,' July 5, 1867, 5 Mac. 988, is a leading one as regards the former head, asserting as it does, that where damage occurs to goods in transit under the conditions or exemptions of a bill of lading, the onus of proving negligence sufficient to entitle the owners to recover damages against the shipowners, or the charterers to retain freight, lies upon the owners of the goods. There an action was raised on a bill of lading, the object being to recover damages in consequence of goods being delivered in a damaged condition at the port of delivery. The bill of lading contained a stipulation that the shipowner was 'not answerable for breakage.' 'This does not 'mean,' observed the Lord President (Inglis), 'that he will 'not be answerable for breaking the goods. The word '"breakage" is not here used in an active sense; it means 'the broken condition of the goods. If this be so, the 'clause must mean that the shipowner is not to be responsible for the broken condition of the goods at the port of 'delivery. This is an exception, not of a cause of damage, 'but a stipulation of non-liability for a certain state of the 'goods. When the shipowner produces the goods in that 'state, he brings himself within the exception. It has been 'argued that, although the shipowners are not answerable 'for breakage, they will be answerable for breakage which 'has arisen from neglect. In this view the question is, 'Does the *onus* lie upon the owner of the goods to prove 'neglect, or upon the shipowners to prove that there was 'no neglect? Now, in my opinion, the shipowner has not 'that burden. I think the burden of proof lies upon the 'pursuers, and my reason is, that liability for negligence is 'not a liability which rests upon them in their capacity of 'carriers, for it lies upon every custodier. I think the 'exception in the bill of lading discharges them from all 'liability for breakage in their capacity as carriers, but 'leaves them under the common law liability of custodiers. 'The *onus* of proving negligence on the part of a custodier, 'not being a carrier, lies upon the owner of the goods,'

'Not answerable for breakage.'

Onus.

Digitized by Google

pp. 991, 992. Lords Cowan, Deas, and Ardmillan dissented from the finding of the majority of the Court.

18 & 19 Vict. c. 111, sec. 3.

The statements in a bill of lading are by 18 & 19 Vict. c. 111, sec. (3), 1855, conclusive evidence in the hands of consignees, or indorsees of bill of lading, of the goods shipped as against the person signing the bill of lading. Two Scots cases on this subject bear names so similar that some confusion has been caused. In the case of *M'Lean & Hope* v. *Munck*, June 14, 1867, 5 Mac. 893, the Court held that the master of a ship by signing a bill of lading, does not bind the owner for a greater quantity of goods than is actually shipped. This case was not appealed. The second case was that of *M'Lean & Hope* v. *Fleming*, March 27, 1871, 9 Mac. (H. of L.) 38, where the House of Lords decided that while a bill of lading signed by the master is *prima facie* evidence against the owner, it is competent for the owner to prove that a smaller quantity of goods was shipped than the bill of lading states. The judgment of the Court of Session appealed against will not be found in the Reports, but it was reported upon an incidental point in the same volume of reports as that which contains *M'Lean & Hope* v. *Munck*—viz., 5 Mac. at p. 579. The two cases are entirely different. Munck's case related to the ship *Sophia;* Fleming's case to the ship *Persian;* the one charter-party was made at Genoa, and the other at Constantinople.*

Lost by leakage.

The purchaser of a cargo of oil received from the shipper's agents the bill of lading, which bore that 369 casks had been 'shipped in good order and well conditioned.' The master had added in manuscript, 'Not responsible for weight, quality, breakage, or leakage.' The agents, on their own account, guaranteed the purchasers against leakage above one per cent. About fifteen tons of oil were lost on the voyage by leakage, owing to the insufficiency of the casks. The purchaser applied to the agents for idemnity under the guarantee; but, on their

* Yet by some error a learned judge in 15 R. 156, is made to refer to '*Munck* v. *M'Lean & Hope*, June 14, 1867, 5 Mac. 893, app. March 27, 1871, '9 Mac. (H. of L.) 38,' a reference which has unfortunately been productive of error.

Digitized by Google

suggestion, raised an action against the shipowners for the loss, on the ground that they had failed to deliver the cargo conform to the bill of lading. The First Division of the Court of Session *assoilzied* on the grounds (Lord Shand doubting)—(1) that the onerous holder of the bill of lading could have no higher right than the shipper, by whose fault in providing insufficient casks the loss was caused; (2) that by the terms of the bill of lading the shipowners were not responsible for leakage not proved to have been caused by their fault (*Craig & Rose* v. *Delargy, &c.*, '*Ann*,' July 15, 1879, 6 R. 1269). Lord President Inglis observed: 'It is 'quite settled that, supposing the bill of lading to contain 'a misstatement as to the amount of goods shipped, and 'that the quantity actually shipped is less than stated in 'the bill of lading, the indorsees of the bill of lading will 'have no recourse against the shipowners for the difference 'between the quantity delivered and the quantity contained 'in the bill of lading. That was decided in the case of '*M'Lean & Hope* [v. *Munck*, June 14, 1867, 5 Mac. 893, '39 Scot. Jur. 504]. But it seems to me that the principle 'of that case is not confined to a difference of quantity. 'The principle is founded upon the effect of the Acts 18 '& 19 Victoria, and the rights thereby vested in the 'indorsee of the bill of lading, and it seems to me that 'if other misstatements of a somewhat different kind than 'the mere matter of quantity apply in the bill of lading, 'the very same result must follow. Suppose that grain 'were shipped in bags, and that in the bill of lading it was 'described as bags of wheat, but it turned out at the port 'of delivery that it was bags of oats, and that oats and not 'wheat was the cargo actually shipped, is it possible that 'the indorsee of the bill of lading can have a property in 'anything but a cargo of oats, or to recover the difference 'of value between the one and the other as against the 'shipowners? It seems to me that the same result must 'follow there as was arrived at in the case of *M'Lean & 'Hope*. Again, suppose that the bill of lading bears that 'a cargo of wheat was shipped, and that it was all con-'tained in bags, and that when it comes to the port of 'delivery that it is not in bags but in bulk—that it never

Digitized by Google

'was in bags, but was shipped in bulk, it is impossible for 'the indorsee of the bill of lading to demand the difference 'of value between wheat in bags and wheat in bulk. The 'one is more valuable than the other unquestionably, at 'least under ordinary circumstances, but I apprehend he 'could never recover for that difference. And so it 'appears to me that the difference between sound casks 'and leaky casks is just a case of the same kind. In short, 'I think, as regards all this matter, the indorsee of the 'bill of lading cannot make the shipowners answerable for 'the fault of the shippers, but that as the indorsee or 'assignee of the shipper he must bear the consequences of 'that fault himself. Such is the result of all the authori-'ties.'*

His Lordship construed the words, 'Not responsible for 'weight, quality, leakage, or breakage,' in the light of the decision in *Moes, Moliere & Tromp* v. *Leith & Amsterdam Shipping Co.*, July 5, 1867, *supra*, and stated the effect of the exception to be that 'the shipowners are not to be 'answerable for the goods being delivered in a leaking or 'leaked-out condition at the port of delivery. Now, what 'is the effect of that? In the case of breakage (*Moes*, '*supra*), we held that the effect of it was to shift the *onus*. 'But for this special exception in the bill of lading the '*onus* would have lain upon the shipowners to show that 'the broken condition of the goods was not brought about 'by their fault, but in consequence of the exception the '*onus* was shifted, and it lay upon the consignee of the 'cargo, or indorsee of the bill of lading, to show that the 'breakage was caused by the fault of the shipowners. 'Now, I apply that doctrine here, and I think it is a 'doctrine founded upon sound principles. I think the '*onus* lies upon the pursuers of this action to show that 'the leaking or leaked condition of these casks at the 'port of discharge was brought about by the fault of 'the shipowners. But have they shown that? They 'have shown the reverse. It is the foundation of their

Breakage.

* See also observations of Lord Esher in *Leduc* v. *Ward*, Feb. 13, 1888 (C. of Appeal), 20 Q.B.D. at p. 479.

Digitized by Google

'case, and it is the whole scope of the evidence, that 'that leaking condition of the casks was brought about, 'not by the fault of the shipowners, but by the fault 'of the shippers; and, therefore, upon that exception 'in the bill of lading, even apart from the other grounds 'of judgment which I have suggested, I should be quite 'prepared to assoilzie the defenders, because I think they 'have by means of that exception exempted themselves 'from a liability which might otherwise, at least, in the 'first instance, be attached to them,' pp. 1267-8. Lord Mure referred to the case of *Ohrloff* v. *Briscall*, 1866, 1 P.C. App. 231, as proceeding on the same lines as *Moes's* case. Lord Shand made observations as to a claim of higher right advanced by an onerous indorsee over the original shipper, pp. 1281-4.

Bill of lading for goods not on board.

When a shipmaster grants, whether for a fraudulent purpose or not, a bill of lading for goods which he has not received on board, the shipowner is not responsible for damage thereby caused to an indorsee. A firm of sugar merchants bought 500 tons of sugar to be shipped from a foreign port, stipulating 'shipment to be made during 'August next.' They subsequently ascertained that about a fourth of the cargo had been shipped between 1st and 5th September, and raised an action against the sellers, the master of the *Truth*, which had been chartered by the sellers, and the owners of the *Truth*, concluding against them conjunctly and severally for payment of £5000, which they had lost by the re-sale of the sugar. They averred that it was upon the faith of the representations of the defenders, and in the belief that the bills of lading were truly of the dates they bore—viz., 27th and 31st August—they did not reject the cargo, which they would have done had they known that part of the sugar had, disconform to the contract, not been shipped during August. The sellers did not defend the action, and the *opinion* was given by Lord Shand, that if a material part of the sugar was not shipped during August, the purchaser was entitled to repudiate the contract. The shipmaster was not found liable to the pursuers in the reparation sued for, and he and the owners were assoilzied (*Grieve*,

Digitized by Google

Son & Co. v. *König & Co., &c.*, '*Truth*,' Jan. 23, 1880, 7 R. 521). Lord Shand, who gave the leading opinion, observed :—' The date of a bill of lading is very useful and ' convenient, and may be important as evidence in regard ' to questions arising as to the shipment of the cargo. But ' I do not think that the date upon a bill of lading is ' essential to the document. The essentials are, a receipt ' for the goods, and an undertaking to deliver. The date ' is really in the ordinary case entirely immaterial, and if ' a captain in an immaterial part of the document makes ' a false representation, I am not prepared to say that his ' act in doing so will bind his owners. It is not like the ' case referred to in the argument for the pursuers, of ' a manager of a bank, or other official, conducting a large ' business for his employers, and having very extensive ' powers, whose official acts will bind the bank. The cap- ' tain has a limited duty to perform in the navigation of ' the ship, and the receipt and delivery of the cargo, includ- ' ing in that the signing of bills of lading, and there can ' be no doubt that he binds his owners to deliver the cargo. ' But where he takes upon himself, not in an essential part ' of the bill of lading, to make an untrue representation as ' to the date on which he received the cargo, I am not pre- ' pared to say that the owners are bound to make good that ' representation, although false and fraudulent,' p. 525. Lord President Inglis said : ' I should very much doubt ' whether a bill of lading would be held bad if it were ' without a date. In the general case it is quite imma- ' terial if a bill of lading be ante-dated or post-dated, and it ' would require very strong evidence to convict the master ' of fraud in allowing the untrue date to be put on. He ' knew nothing of the terms of the contract of sale, or of the ' importance of the date in this case. He did it to oblige ' the shipper, with whom he seems to have been on very ' good terms, and in the absence of any knowledge that ' the date was a matter of importance in the circumstances. ' I think it would require very strong and pregnant proof ' to bring this up to a case of fraud against the master, and ' I think that on the evidence no such case has been made ' out. But supposing it were otherwise, and that the

Digitized by Google

'master had known of the contract of sale, and had put 'the date on the bill of lading in order to deceive the pur-'chasers of the cargo, would that act of his bind the 'owners? I think it would not. The mandate of a 'master is confined to pretty well-known limits. He has 'charge of the navigation of the ship, control of the crew, 'and power to enter into certain contracts—one of which 'is a charter-party—and in fulfilment of that charter-party 'he may issue bills of lading, which are just receipts for 'the cargo shipped in terms of the charter-party, and if, in 'the conduct of these functions, he commits a fraud so as 'to deceive, it may be that the owner is answerable, for 'there the master is within the scope of his authority, and 'if he does it for a fraudulent purpose, that may be a fraud 'for which the owner is liable. But how can the owner be 'liable for an act which no owner could foresee, or which, 'had he known of it, he would have considered utterly 'immaterial? I think this case is *a fortiori* of the cases of '*M'Lean & Hope* v. *Munck* [June 14, 1867, 5 Mac. 893], 'and of *Grant* v. *Norway* [Feb. 20, 1851, 10 Scott's C.B. 'Reps. 665].'*

Immanuel.

The owners of the Danish ship *Immanuel* brought an action against the indorsees of the bill of lading for freight on the cargo delivered to them at the port of discharge in Scotland. It was averred in defence that the full cargo specified in the bill of lading at Riga, the port of shipment, had not been received, and it was pleaded that the indorsees were entitled to retain from freight the value of the deficiency, as by Danish law, which was the law of the flag, the bill of lading was conclusive against the owners. After a proof, which showed that the indorsees of the bill of lading had only agreed to pay for so much of the cargo as was delivered to them, the Second Division of the Court of Session *held* that the defenders had only become indorsees of the bill of lading to the extent of the cargo actually on board the vessel, and were not entitled to retain any part of the freight (*Owners of the Immanuel* v. *Denholm &*

* See also the recent case of *Cox* v. *Bruce*, Court of Appeal, Dec. 6, 1886, 18 Q.B.D. 147.

Digitized by Google

Co., Dec. 7, 1887, 15 R. 152). The opinion was expressed by three Judges of the Court that the owners were only liable for the cargo actually put on board, and that by the law of Scotland, which, as the law of the *forum*, must regulate the proof, the bill of lading was not conclusive evidence as to the amount of cargo shipped. On the question of international law, one Judge (Lord Rutherfurd Clark) reserved his opinion. See also *Tully* v. *Terry*, 1873, L.R. 8 C.P. 679; *Blanchet* v. *Powell's, &c.*, 60 L.R. 9 Ex. 74.

Where terms of bill of lading are conclusive.

But where a charter-party provided that the bill of lading should be conclusive evidence against the owners of the quantity received as stated therein, Lord Esher held in a recent case that the bill of lading stopped the shipowner, when suing for freight, from denying as against the charterer's counter-claim for short delivery, that the full amount of cargo stated in the bill of lading was shipped (*Leishman* v. *Christie & Co.*, June 23, 1887, L.R. 19 Q.B.D. 333).

Primage.

Freight includes primage or hat-money, and the consignee is liable for it.

By the charter-party of the barque *Kishon* her cargo was to be delivered upon payment of freight at a certain rate per ton, and 'one shilling per ton gratuity for the 'captain on good delivery of the cargo.' The cargo was loaded at Sourabaya, and the terms of the bills of lading varied. That of 16th May, 1874, was to the effect that the goods shipped were to be delivered, 'assigns 'paying freight for said goods as *per* charter-party.' The Second Division of the Court of Session *held* that the allusion to the charter-party imported it into the bill of lading, and that the consignees of the cargo who held the bill were liable to pay the captain's gratuity as well as the freight. In the other bills of lading of dates between 28th May and 12th June, 1874, after the usual obligations to deliver the goods in like good order and condition (the act of God and perils of the sea, &c., excepted), the consignees undertook to pay 'freight for the said goods, '£3, 12s. 6d. per ton nett weight delivered, and one 'shilling per ton gratuity to the captain on right and good 'delivery of the cargo.' The Court *held* that although

Digitized by Google

a portion of the cargo had received damage through perils of the sea, the consignees were bound to pay the captain's gratuity as well as the freight (*Howitt* v. *Paul, Sword, & Co.*, '*Kishon*,' Dec. 15, 1877, 5 R. 321). Reference was made by Lord Ormidale to Bell's Principles, 420, and M'Lachlan's Treatise on Merchant Shipping, pp. 419 and 497, as laying down correctly that freight includes primage or hat-money.

Collection of freight.

The responsibilities which may attach to charterer's agents who collect freight is illustrated in the following case. The schooner *Puck* was chartered to carry wine from Cadiz to Leith. On her arrival at Leith, the charterers' agent collected the freight from the consignees on delivery of the goods, and, without authority from the master and owner, he compromised by a money payment a claim by a consignee for damage done to a butt of wine. It was *held* by the Second Division of the Court of Session that he acted as the owner's agent in collecting the freight, and that he was bound to account for the full freight, as he had no authority from the owners to make the payment (*Broadhead* v. *Yule*, '*Puck*,' June 29, 1871, 9 Mac. 921). So too the charterers of the *Ocean Farer* were held bound to pay certain additional freight for the use of the vessel which their agents at Rangoon undertook, without their authority but for their benefit, to pay by an agreement, the power to enter upon which the charterers had not repudiated (*Simey* v. *Peter*, '*Ocean Farer*,' June 6, 1865, 3 Mac. 883).

Lien for freight.

A lien for freight exists over a whole cargo. Abbott, p. 216.

The *Lewis M. Lamb* was chartered for a voyage to the Guano Islands on the coast of Patagonia under a charter-party dated 4th June, 1879, which provided that the shipowners should 'have an absolute lien on the cargo 'taken on board for all freight, dead freight, and demur- 'rage.' There was no stipulation for demurrage at the port of discharge. The master, after the charterer had loaded a partial cargo of guano, with his concurrence shipped other goods belonging to a third party. At the port of discharge, no one appeared to claim this portion of the cargo,

Digitized by Google

which ultimately was sold for a sum insufficient to pay its freight, and delay took place, caused, partly by this, and partly caused by the fault of the consignees of the guano. The Second Division of the Court of Session *held* that the guano was under lien for the freight of the whole cargo, but that it was not subject to lien for the unliquidated claim of damages for detention of the vessel at the port of discharge; and (2) that the consignees of the guano were only liable for the detention in so far as they had caused it (*Lamb, &c.,* v. *Kaselack, Alsen & Co., &c.,* January 31, 1882, 9 R. 482).

Observations were made by Lord Craighill, who gave the leading opinion, on *Foster* v. *Colby,* 3 Hurlstone & Norman, 718; *Porteous* v. *Watney,* L.R. 3 C.B.D. 227, 534; *Gray* v. *Carr,* L.R. 6 Q.B. 522.

Procuring freight from consignee.

That it is the master's duty to endeavour to procure the freight from the consignee, was held in *Youle* v. *Cochrane, &c.,* '*Marcellus,*' Feb. 20, 1868, 6 Mac. 427, where a ship-master who had been appointed by the owners of a vessel, employed under a charter-party, had, as representing her owners, a lien over a cargo placed on board by a sub-freighter to the extent of the sub-freight, irrespective of any stipulations regarding the payment thereof between the sub-freighter and the charterer; and, in addition, that where a payment of full freight had been made to the ship-master, a person to whom the cargo had been consigned, in ignorance that the shipper had paid one-third thereof to the charterer, had no claim for repetition against the owners, who had not been overpaid. See Abbott's Shipping, 1881, p. 360; Story, 286, commenting on *Barker* v. *Haven,* 17 Johns Rep. 234.

Wreck before freight payable.

The *Barbata,* a seaworthy vessel, was chartered from Glasgow to Demerara. She sailed on 19th September, 1868, and became a total wreck on Ailsa Craig three days afterwards. The charter-party provided that the freight should be paid in cash, one month after vessel's sailing from Glasgow. The vessel could not, under ordinary circumstances, have arrived at Demerara in less than six weeks. The owners raised an action against the charterers for payment of the freight stipulated, and the Second Division of the Court of Session held the claim to

Digitized by Google

be a good one, holding that the stipulation to pay one month after sailing in itself imported payment without repetition, irrespective of the completion of the voyage. *Leitch* v. *Wilson*, Nov. 20, 1868, 7 Mac. 150. *Saunders* v. *Drew*, 3 B. & Ad. 445; an Anonymous Case, 2 Show. 291, per Saunders, C.J.; *De Silvale* v. *Kendall*, 4 M. & S., 36; and *Andrew* v. *Moorhouse*, 5 Taunt. 435, were cited with approval by the Lord Justice-Clerk (Patton) who gave the leading opinion. See also Scrutton, p. 251.

Time Freight.

The most recent case on this subject is that of the s.s. *Westfalia*, by the charter-party of which, dated 26th February, 1887, the charterer became bound to pay hire at a certain rate per month, and the owners to provide the officers and crew and stores. It was agreed that 'in 'the event of loss of time from deficiency of men or stores, 'break-down of machinery, want of repairs, or damage, 'whereby the working of the vessel is stopped for more 'than forty-eight consecutive working hours, the payment 'of hire shall cease until she be again in an efficient state 'to resume her service.' On 30th September, 1887, when the vessel was on a voyage from the west coast of Africa to Harburg, the high-pressure engine broke down, and the vessel put into Las Palmas, Canary Isles, and there the surveyors refused to allow her to proceed as seaworthy. Repairs could not be effected at Las Palmas, and the owners and charterers arranged to send a tug to bring the vessel to Harburg, and it was agreed that the cost should be treated as general average. The *Westfalia* got at last to Harburg, by the use of her low-pressure engine, and the tug's assistance. The charterer paid £867 as his share of general average. The shipowner raised an action against the charterer for hire of the *Westfalia*, from the time she left Las Palmas with the assistance of the tug till she was discharged, and it was held by the Second Division of the Court of Session, *reversing* the judgment of the Lord Ordinary (Trayner), that the ship had not been 'in an

Digitized by Google

'efficient state' from the time of the accident, and that in terms of the charter-party the owner had no claim to hire for the subsequent voyage; but (2) (Lord Young *doubting*) that the charterers must pay hire for the period during which she was necessarily engaged in discharging her cargo at the port of arrival (*Hogarth* v. *Miller Brothers & Co.*, '*Westfalia*,' March 15, 1889, 16 R. 599). Lord Young observed: 'I put the case during the argument,—suppose 'the charterer had found another vessel in good condition 'at Las Palmas which could bring home his goods, would 'he not have been entitled to take his goods out of the '*Westfalia* and bring them home in it? The answer 'I got at first was "Certainly," but that was afterwards 'modified to, "Certainly, if the vessel was unseaworthy, '"which is not admitted." Assuming the unseaworthiness, 'therefore, it was conceded that the owner of the cargo 'might trans-ship it to another ship. That must be because 'in that case this contract by the charter-party was at an 'end. Now that is a mere illustration, because there was 'no other ship at Las Palmas to which the cargo could 'have been transferred. But it shows that the contract by 'the charter-party, and the obligation to pay hire, had 'ceased if the ship was unseaworthy, and the owner of the 'cargo decided to get his cargo home in another way. 'Let me put another illustration. Suppose the ship had 'been obliged, instead of putting into Las Palmas, to put 'into a desert island in her unseaworthy condition, the 'cargo being safe but useless in the place where it lay, the 'owner would have required to send out for it, and bring 'it to a place in which it would have some value, and 'would have held the contract to pay hire for the vessel 'at an end. Indeed the case of putting into Las Palmas 'is not very different from that case, for the cargo was of 'little or no value there, and the ship could not in reason-'able time have been repaired there. It was the interest 'of the cargo-owner to have his cargo brought to Harburg, 'which this ship could not do, and it was the interest of 'the shipowner to have his ship brought where it could be 'repaired and employed. Accordingly, the owner of the 'cargo agreed with the shipowner that the best way of

Digitized by Google

'rescuing both was to have the vessel towed to Harburg, 'for although the ship could not bring the cargo, she could 'hold it. The expense was to be divided in the propor- 'tion or ratio of the value of the cargo to the value of 'the ship. That was not done under the charter-party. 'The charter-party had nothing to do with it. It would 'have been the appropriate arrangement if there had been 'no charter-party at all. It might possibly be called a 'salvage agreement, but at any rate hire had nothing to 'do with it,' pp. 607-8. The shipowners appealed to the House of Lords, who *affirmed* the decision of the Court of Session (Lord Bramwell dissenting) that no hire could be claimed for the voyage from Las Palmas to Harburg, but *held* (Lord Morris dissenting), varying the decision of the Court of Session, that hire was payable for the full time the vessel was actually occupied in discharging cargo at Harburg, for which purpose the ship was in an efficient state, and therefore found £136, 4s. due to the shipowners for that employment, instead of £60 as fixed by the Court of Session (L.R. 1891 A.C. 48). Lord Halsbury, Lord Chancellor observed, p. 58, that it seemed to him both parties had been insisting on rights which they did not possess. 'The pursuer has insisted upon a right to pay- 'ment during the whole period of the voyage from Las 'Palmas to Harburg, which, I submit to your Lordships, 'he is not entitled to. On the other hand, the charterer, 'the defender, has been insisting from the first that he was 'not bound to pay anything in respect of the period of 'discharge, when the owner of the vessel was, according to 'the view I have presented to your Lordships, entitled to 'the hire of the vessel. The result of that appears to me 'to be that both parties have been in the wrong, and both 'parties have been insisting upon an affirmative case. It 'does not seem to me to be like the ordinary case, in 'which the plaintiff has merely claimed too much, and has 'failed in proof as to some of it. It appears to be rather 'in the nature of two separate claims, each of the parties 'failing to make out one of those claims,' p. 58. Costs were, therefore, from the origination of the litigation to the decision by the House of Lords, given to neither party.

Digitized by Google

Dead Freight. *Dead freight* was defined by Lord Ellenborough as 'unliquidated compensation for loss of freight by way of 'remuneration in respect of that loss' (*Phillips* v. *Rodie*, 1812, 15 East. 546). Lord Chancellor Hatherley, in *M'Lean & Hope* v. *Fleming*, 1871, '*Persian*,' 9 Mac. (H. of L.) 38, quoted that definition with approval. Scrutton observes :—'For such damages no lien on goods, actually 'carried in the ship, exists at common law, but such a 'lien may be given by usage or express contract of the 'parties,' *Charter-parties*, p. 276; and both propositions are illustrated by the above-cited cases — viz., *Phillips* v. *Rodie*, where it was *held* that there no lien for dead freight; *M'Lean* v. *Fleming*, where it was *held* that the terms of the charter-party gave a lien. In *Gray* v. *Carr*, June, 1871, when there was lien claimed for damages *sub nomine* 'dead freight,' the damages were not ascertainable from the charter, and the majority of the Judges held that 'dead freight' [in the words of Mr. Scrutton, p. 277] 'only meant liquidated damages, and distinguished *M'Lean* 'v. *Fleming*, on Lord Chelmsford's suggestion [when giving 'judgment in that case] that the damages were there ascer-'tainable from the charter. They dwelt on the incon-'venience of a lien for an unascertainable amount, and met 'the argument that if "dead freight" did not mean this, 'there was nothing in the charter that it could mean, by the 'suggestion in *Pearson* v. *Goschen* [1864, 17 C.B., N.S. 352] 'that in contracts written into a general printed form, it was 'not necessary to give a meaning to every word in print. 'They expressly followed *Pearson* v. *Goschen*. Of the min-'ority, Bramwell, B., admitting that it was not necessary 'to give every word in print a meaning, apparently held the 'point doubtful, but for *M'Lean* v. *Fleming* which bound 'him, while Cleasby, B., took the line that, in *Gray* v. *Carr*, 'the "dead freight" was capable of liquidation with very 'little trouble.' 'Clearly, if the view of *M'Lean* v. *Fleming* 'taken in *Gray* v. *Carr* is correct,' continues Mr. Scrutton, 'dead freight must be limited to "damages ascertained or '"ascertainable from the charter," and this construction 'would, I think, be far more convenient for mercantile 'purposes; but the judgment in *M'Lean* v. *Fleming*

Digitized by Google

'distinctly admits a lien for unliquidated damages by 'express agreement. It is, indeed, a decision in a Scotch 'case; "but, so far as it proceeds upon principles of general '"jurisprudence, it ought to have weight in England," *per* 'Lord Selborne in *Ewing* v. *Orr-Ewing*, 1885 [L.R. '10 App. Cas. 453 at p. 499], and the question was almost 'entirely discussed on the authority of the English cases. 'The early cases of *Phillips* v. *Rodie* [*supra*] and *Birley* v. '*Gladstone* [1814, 3 M. & S. 205] contain expressions 'supporting either view; but, on the whole, they favour 'the view of the House of Lords, and it is submitted that 'English Courts at the present day will be bound by '*M'Lean* v. *Fleming*, and that *Pearson* v. *Goschen* and '*Gray* v. *Carr* on this point must be treated as over-'ruled,' pp. 277, 278. In the recent case of *Gardiner* v. *Macfarlane, M'Crindell & Co.*, '*Lismore*,' March 20, 1889, 16 R. 658, Lord Rutherfurd Clark observed, with regard to the contention of one of the parties that if it were right, 'it would mean that a lien has been constituted over the 'cargo for an entirely illiquid debt. I do not say that 'cannot be done if the parties so contract, but I think it is 'reasonable to hold that, if the parties intend that such 'lien shall be created, their intention must be expressed 'in very plain words. In the case of *M'Lean & Hope* '[v. *Fleming*], it was decided by the House of Lords that 'such a lien was admissible if it was clearly contracted 'for, and, in that case, there was no doubt about the 'meaning of the charter-party. For the lien which was 'claimed, was a lien for dead freight, and that had been 'made a matter of express stipulation. The present case 'is entirely different,' p. 666.

Advances by Charterer's Agents. *Tahti.*

In the case of *The North-Western Bank* v. *Bjornstrom*, '*Tahti*,' Nov. 9, 1866, 5 Mac. 24—a leading case—where a bill was drawn by the master of the ship *Tahti*, at Calcutta, upon the charterers in London which they accepted, but, suspending payment, did not pay, it was *held* by the Second Division of the Court of Session that the charterer's agents in Calcutta, who took the bill, accepting the position of consignees, and taking delivery of the cargo, were bound to make the advance for which

Digitized by Google

the bill had been granted, in terms of the charter-party which set forth, after the freight to be paid, 'sufficient 'cash at current exchange, not exceeding £1000, to be 'advanced on account of freight for ship's disbursements 'at Calcutta;' that the advance was thus a payment in terms of the charter-party to account of freight, and that no liability attached to the owners against whom the indorsees of the bill had raised an action, the action being dismissed as irrelevant. The Lord-Justice Clerk (Inglis) observed:—'It seems to be contended that 'the pursuers [the indorsees] necessarily, by indorsation, 'obtained an assignation to the debt incurred by the 'master for the ship's disbursements. That, I think, is an 'entire mistake; and it is just therein that the present 'case differs from the cases of the *London Joint-Stock 'Bank* v. *Stewart & Co.* [July 15, 1859, 21 D. 1327] and '*Drain & Co.* v. *Scott* [Nov. 25, 1864, 3 Mac. 114]. 'In both those cases, the master being in a foreign 'port, drew upon his owners at home, in favour of 'the party who made the disbursements, and, when 'the payee in that bill indorsed it, he thereby gave 'an assignation of his claim against the owners, and 'the owners were held liable to the indorsees if the dis-'bursements had really been made. But here there is no 'assignation of a debt due by the owners. The claim of 'the payee is against the charterers, and, therefore, when 'he indorsed the bill, he only assigned his claims against 'the charterers. If, indeed, this had been a bill of 'exchange by which the master, under authority from his 'owners, had put them into the position of drawers, they 'would have been liable. But it is conceded that they are 'not in the position of drawers. The only ground upon 'which it is sought to make them liable is, that, as owners 'of the ship, they are liable for the ship's disbursements. 'To this there seems to be to me one great objection, 'which is that the pursuers have no right to the debt 'incurred by the master for these disbursements,' p. 28. See Bell's Prin. 450, note (*n*).

When a charterer undertakes to make advances, and is empowered to insure to an amount equal to those advances,

Digitized by Google

he must be held to have made such insurance a part of his security. This was the ground of judgment in the following case:—

Ship's disbursements.

The charter-party of the ship *Janet Cowan* contained this clause,—'Sufficient cash for ship's ordinary disburse-'ments to be advanced to the master against freight, subject 'to interest, insurance, and 2½ per cent. commission.' Advances were made by the charterer to the master, but the charterer did not insure the freight, and the vessel was lost on the voyage. The House of Lords *held* (*affirming* the judgment of the Court of Session) that the charterer, having stipulated that he should be entitled to insure freight at the owner's expense to an amount corresponding to the amount of his advances, must be held to have made such an insurance a part of his security, and not having effected any such insurance must be held to have relinquished, in the event of the ship being lost, any claim against the owners for repayment (*Watson & Co.* v. *Shankland et al.*, *'Janet Cowan,'* June 17, 1873, 11 Mac. (H. of L.) 51). The Lord Chancellor (Selborne) observed: 'The question is whether under this contract, 'the shipowners had not a right to rely upon the insurance 'being made, in the actual circumstances of the case, by 'the persons who here stipulated for and received the right 'to charge the premiums of insurance against him, the ship-'owner. I think, my Lords, that he had. It is manifest 'that the charterers neglected to do so, and to give notice 'that it was not done. What must be the consequence of a 'loss of the ship, the charterers knowing that the insurance 'was not made? Upon one or the other of these two parties 'that loss must fall. If the insurance had been made and 'the money paid by the shipowners, then the benefit of the 'insurance would have accrued to the shipowner,' p. 55.

Effect of delivery without production of bill of lading.

Delivery of cargo by a master without production of the bill of lading is wrong, but does not render the bill ineffective.

The ship *Emily and Jessie* was chartered by A, who designed himself in the charter-party as 'agent for the 'freighter or freighters.' At Aquilas in Spain, which was the port of lading, the master took in a cargo for which he

Digitized by Google

granted a bill of lading in favour of B, the shipper. When the vessel arrived at the port of delivery, the master delivered the cargo to C, acting thus under the instructions of A. B thereafter indorsed the bill of lading to D, to whom he had sold the cargo, and D raised an action against the master and owners of the vessel, alleging that he was the owner of the cargo, in which action the charterer sisted himself as a defender, and the First Division of the Court of Session held—(1) that as the question of ownership involved an accounting between the charterer and the shipper, it could not competently be entertained in that action; (2) that the delivery made by the master in absence of the bill of lading was in breach of the contract therein contained; and (3) that such delivery being wrongful, did not preclude the pursuers from acquiring right to the cargo by subsequent indorsation of the bill of lading, and they had therefore as onerous indorsees a good title to sue for damages (*Pirie & Sons* v. *Warden et al.*, '*Emily and Jessie*,' Feb. 11, 1871, 9 Mac. 523). The Lord President observed: 'In short, the defender cannot 'found upon his own wrongful act, and upon that plain 'ground I am of opinion that the pursuers have a good 'title to sue, in respect of their acquisition of the bill of 'lading. Having formed this opinion on principle, and 'irrespective of authority, I am glad to say that I find it is 'in accordance with the decision of the Court of Common 'Pleas in the case of *Short* v. *Simpson* [1866 (35 L.J. Com. 'Pl. 147), L.R. 1 C.P. 248, p. 529].'

Sale: Stoppage *in transitu.*

A firm of brassfounders having places of business both in Moscow and Birmingham, purchased goods from a Glasgow firm, to be shipped by C's 'first steamer from 'Leith to Riga to A & Sons' orders.' The bills of lading bore that the goods were shipped by A & Sons, the purchasers, and were to be delivered in good order at the port of Riga 'unto the agent of the R. D. Railway Com'pany, to be by them forwarded in transit to A & Sons, 'Moscow.' The purchasers became insolvent, and the Glasgow firm then stopped the goods at Riga when in the hands of the railway company. The Second Division held that the goods were still *in transitu* when

Digitized by Google

stopped (*M'Leod & Co.* v. *Harrison*, Dec. 7, 1880, 8 R. 227). The case of *Seville* v. *Burdick*, '*Zoe*,' Dec. 5, 1884 (H. of L.), 10 App. Cas. 74, raised, as the Lord Chancellor (Selborne) observed, the question whether under the Bill of Lading Act of 1855, 18 & 19 Vict. c. 111, a holder of a bill of lading, indorsed in blank, who takes it by way of security for an advance of money is liable by such indorsement only to an action for freight by the shipper, although he may not have obtained delivery of the goods or derived any other benefit from his security. The House of Lords decided that the indorsement did not pass 'the property 'on the goods' to the effect of transferring to him such liability.

Digitized by Google

CHAPTER IV.

COLLISION.

COMPENSATION FOR LOSS BY COLLISION—RULES AS TO TRACING LIABILITY—ONUS ON AN OVER-TAKING VESSEL AND OTHERWISE—CONJOINT DAMAGE—EQUAL NEGLIGENCE—INFRINGEMENT OF REGULATIONS FOR PREVENTING COLLISION—LIMITATION OF LIABILITY—COMPULSORY PILOTAGE—STRANDED VESSEL—PROCEDURE—NOTICE TO BOARD OF TRADE BEFORE ACTION—OFFER MADE FOR SETTLEMENT WHEN CASE IN COURT—JUSTICIARY CASES.

Owners of 'Hilda' v. *Owners of 'Australia'; Owners of 'Toward'* v. *Owners of 'Turkistan'; Hine Bros.* v. *Clyde Trustees; Little, &c.,* v. *Burns, &c.; Owners of 'Thames'* v. *Owners of 'Lutetia'; Flensburg Steam Fishing Co.* v. *Seligmann; Miller, &c.* v. *Powell; Rankine* v. *Raschen; Kidston, &c.* v. *M'Arthur, &c.; Carron Co.* v. *Cayzer, Irvine & Co., &c.; Clyde Navigation Trustees* v. *Barclay, Curle & Co.; Haglund* v. *Russells; Clelland* v. *Sinclair; Her Majesty's Advocate* v. *Parker & Barrie.*

As the object of the shipowner is to make profit by the freight his vessel can earn, and a collision is an event which interferes with his use of the vessel for that purpose, the question suggested by each collision is, which of the colliding ships is in fault, for by the discovery of this fact will fall to be ascertained which owner is to be compensated for the loss of profit by his vessel. There is no principle of law relative to the recovery of damages which is applicable on land which is not also applicable at sea. The ordinary principles of common law will afford the guide to the measure of those damages. There is no difference between the loss of the use of a vessel consequent upon a collision, Bowen, L.J., recently observed (*The Argentino*, Aug. 9, 1888 (C. of A.), 13 P.D. 191, at p. 201), and the loss which the owner of a serviceable threshing-machine suffers from an injury which incapacitates the machine, or the loss which a

Digitized by Google

workman suffers who is prevented from earning money by the wrongful detention of plant which cannot at once be replaced. '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 'profits) the shipowner, but for the accident, would have 'earned by the use of her.'

Principles of compensation.

The judgment of Lord Stowell in *The Woodrop Sims*, 2 Dods, 83, furnishes the principles of marine law upon which the liability to make compensation are ascertainable, which are as follows:—(1) Where neither ship is to blame the loss falls where it lies; the collision may be due, for example, to a storm. (2) Where fault attaches to both vessels then the loss falls to be shared between them. (3) If the only sufferer by the collision be the vessel which was in fault, then her owners must bear the loss themselves, and on the other hand, if the fault be on the part of the vessel which runs down the other, she is liable in entire compensation to the owners of the damaged vessel (Abbott, 575, *Woodrop Sims*, 2 Dods, 83). See also *The City of Peking*, 1890, L.R. 15 App. Cases, 438. 'The rule is '*restitutio in integrum* [*Black Prince*, 1 Lush. 573]. The 'party injured is entitled to be put, as far as practicable, 'in the same condition as if the injury has not been 'suffered,' *per* Sir Barnes Peacock, p. 442.*

Violation of Regulations.

A ship is presumed to be in fault which violates any of the regulations made under the Shipping Acts to prevent collision, unless it can be shown that circumstances rendered it impossible to observe such regulations (See

* 'It does not follow as a matter of necessity that anything is due for 'detention of a vessel whilst under repair. In order to entitle a party to be 'indemnified for what is termed in the Admiralty Court a consequential loss 'resulting from the detention of his vessel, two things are absolutely necessary '—actual loss and reasonable proof of the amount.' Evidence of profits made by a vessel substituted for the vessel injured in a collision was held inadmissible in *The Argentino*, August 9, 1888 (C. of A.), 13 P.D. 191. Loss of market of cargo is too remote a consequence to be an element of damage (*The Notting Hill* (C. of A.), May 1, 1889, 9 P.D. 105; *The Parana*, 2 P.D. 118, approved). See, however, as to sum recovered as a prospective increase in the value of a cargo (*The Thyatira*, July 10, 1883, 8 P.D. 155).

Digitized by Google

Emery v. *Cichero*, '*The Arklow*,' Nov. 21, 1883, Privy Council, 9 App. Cas. 136; also Bell's Prin. 553 (2). 'The 'policy of making rules is that they should be observed,' said Lord Morris in the case of the *Tasmania*. 'In my 'opinion large allowance should be made for sudden con- 'sideration whether directory rules should be disobeyed 'in order to avoid collision' (*Owners of* '*Tasmania*' v. *Smith and Others*, 1890, L.R. 15 App. Cas. 238). If, however, those rules have been infringed where no plea of necessity is made out, even although as between the two colliding vessels, the vessel infringing has committed the more venial error, the Court will not absolve such vessel from the consequences prescribed by statute for such infringement (*Ocean Steamship Company* v. *Apcar & Co.*, '*The Arratoon Apcar*,' 1889, L.R. 15 App. Cas. 37). See the case of *The Glamorganshire* (L.R. 13 App. Cas. 454) for circumstances in which there was held by the Privy Council, on appeal from the Supreme Court for China and Japan at Shanghai, to be no breach of such regulations, and therefore no presumption of culpability contributory to the collision. See also note, p. 455 (same vol.), giving the case of *The Fanny M. Carvill*, 1875.

Overtaking ship.

(1.) The *onus* of proving that no fault attaches lies upon the owners of a vessel which overtakes another (*Owners of the* '*Hilda*' v. *Owners of the* '*Australia*,' Nov. 7, 1884, 12 R. 76). There were here cross actions for damages by the owners of the s.s. *Australia* and the owners of the s.s. *Hilda*, for a collision in the Great Bitter Lake, which forms part of the Suez Canal. It was admitted that the *Australia*, was the larger and faster vessel, and that she made up on the *Hilda* and was either in the act of passing the *Hilda*, or after she had completely cleared her, when the port bow of the *Hilda* came into contact with the starboard side of the *Australia*. The owners of the *Australia* maintained the second hypothesis and contended that the collision was due to the *Hilda* making a sudden spurt and a deviation out of her course to port. The owners of the *Hilda*, on the other hand, alleged that the *Australia* had kept too close to the *Hilda* with the view apparently of crossing her bow; that the *Hilda* was drawn out of her course by the suction

Digitized by Google

of the *Australia*, and that seeing a collision to be inevitable the master of the *Hilda* stopped his engines, after which his helm refused to act. The Lord Ordinary found that the *Australia* was wholly in fault. The owners of the *Australia* reclaimed, and at the hearing abandoned their former theory that the *Australia* had completely passed the *Hilda*, and maintained, chiefly on the evidence of their opponents' witnesses, that the collision was due to the fault of the *Hilda* in respect that she steered badly, and that in consequence she ought not to have stopped when the *Australia* was passing her. The Second Division of the Court of Session adhered, being of opinion that as the *Australia* was in the position of an overtaking vessel, the *onus* of proving that she was not in fault, or that the *Hilda* was in fault, lay on the *Australia* and that she had not discharged the *onus*.*

Ship at anchor.

(2.) The case of *The Owners of the s.s. 'Toward'* v. *The Owners of the 'Turkistan'* involved purely matters of fact, but the circumstances are of interest. On Saturday, 26th January, 1884, the *Turkistan*, a large sailing vessel, was moored for the night to two buoys in the centre of the Clyde, placed there by the Glasgow Harbour Trustees. Her cargo was not complete, and she was, as is usual in such circumstances, in charge of a watchman. When she was being moored, the barometer showed signs of disturbance, and before the master left the ship a rapid and severe fall in it took place. In the evening the gale increased to hurricane force. About 2 A.M. on 27th January the *Turkistan* carried away one buoy, and swinging round shortly after, the ring of the other buoy broke, and she bore down upon and injured the *Toward* lying at the quay. The owners of the *Toward* raised an action for damages against the owners of the *Turkistan*, but Lord Fraser, Lord Ordinary, held it to be established

* An overtaking vessel, within the meaning of Art. 11 of 'The Regulations 'for Preventing Collisions at Sea,' was defined in *The Imbro*, May 7, 1889, L.R. 14 P.D. 73, to be one which is approaching another from aft, and is more than two points abaft the beam of the foremost ship. See also *The Main*, June 2, 1886, 11 P.D. 132; *The Franconia*, 2 P.D. 8; and Marsden's 'Collisions at Sea,' 3rd ed., p. 426.

Digitized by Google

that the approximate cause of the accident was the insufficiency of the buoys of the Glasgow Harbour Trustees, and that no blame attached to the master which could render his owners responsible—(1) for taking his vessel out of dock in the face of the exceptional indications of an approaching storm, and mooring her in the river; or (2) for not putting out additional moorings; or (3) for not himself remaining on board, and engaging hands for the night, and having the anchor ready to let go in the event of an emergency such as occurred. The pursuers reclaimed. The Second Division of the Court of Session being divided in opinion, the case was re-argued by one counsel a-side before the Division (Lord Justice-Clerk Moncreiff, Lord Young, Lord Craighill, and Lord Rutherfurd Clark), with the addition of Lord Fraser. At advising, the judgment of the Court was delivered by the Lord Justice-Clerk, who said simply: 'In this case, which 'is one of fact, raising questions of great nicety and 'difficulty, we have had the assistance of Lord Fraser. 'In determining it, we have substantially to return a ver-'dict, and I have now to announce the judgment of the 'Court, which is, to adhere to the interlocutor of the Lord 'Ordinary, and to assoilzie the defenders from the con-'clusion of the summons' (*Owners of s.s. 'Toward'* v. *Owners of 'Turkistan,'* Dec. 16, 1885, 13 R. 342).

When a steamship in broad daylight runs down a ship at mooring that, *primâ facie*, is evidence of fault (*City of Peking* v. *Compagnie des Messageries Maritimes*, 1888, L.R. 14 App. Cas. 40).

Wrong manœuvring.

(3.) In the case of *Hine Brothers* v. *Clyde Trustees*, March 7, 1888, 15 R. 498, it was held (by the Second Division) that where a ship is placed in a position of peril and difficulty by the wrong manœuvring of another ship, and her captain, in exercising his best judgment for the safety of the vessel, commits an error which causes or contributes to a collision between them, he will not be held in fault. The circumstances were as follows:—The *Horatio*, going down the Clyde after sundown, kept too much to the south—her wrong side of the channel. The master of a steam barge coming up on the south, which was

Digitized by Google

her proper side, seeing the danger of coming into collision with the *Horatio*, and thinking that if he kept his own course collision would be inevitable, endeavoured to keep outside of her by going to the north. The *Horatio*, however, almost at the same time changed her course, with the view of getting to the north side, and a collision resulted. The owners of the *Horatio* raised an action for damages, but the Court held as above-stated, that the master of the barge, having been put in danger and difficulty by the pursuers' own fault, and having steered as seemed best to avoid the danger so caused, was not in fault, and therefore that the barge owners were not liable.*

Where damage is equal.

It is possible that neither vessel may have anything to pay, if the damages to the two vessels are exactly equal. If, however, the damage to one vessel exceeds the damage to the other, it is to be clearly understood that there is only one liability. See *Stoomvaart Maatschappy Nederland* v. *Peninsular & Oriental Steam Navigation Co.*, '*The Khedive*,' 7 App. Cas. 795. 'The amount of the conjoint damage has to be divided equally,' observed Lord Esher, in *London Steamship Owners' Insurance Co.* v. *The Grampian Steamship Co.*, April 24, 1890 (Court of Appeal), L.R. 24 Q.B.D. 667, 'and in order to do this there must be a sum in arithmetic stating the amounts respectively: but as the result of the arithmetic, there is only one liability, not cross liability.'

Equal Negligence.

Equal negligence.

The following cases relate to circumstances in which it was impossible to say that either vessel was free from blame. As laid down by Lord Stowell in *The Woodrop Sims*, 2 Dods, 83, where both vessels are to blame for want of the requisite vigilance or skill, they

* 'It has been often held by the Supreme Court of the United States, that a vessel which by her own fault causes sudden peril to another, cannot impute to the other as a fault a measure taken *in extremis*, although it was a wrong step, and but for it the collision would not have occurred. A mistake made in the agony of the collision is regarded as an error for which the vessel causing the peril is altogether responsible,' Marsden's 'Collisions at Sea,' 3rd edition, 1891, p. 4 (footnote *m*).

share the loss between them. See Bell's Prin. 553 (2). The maritime law here differs from the common law which would say that neither should recover, and that the loss lies where it falls. See Guthrie Smith: *Damages*, p. 162, who remarks that where there is great disparity in the amount of fault, or much difference in the value of the ships and their respective cargoes, the rule leads to curious results. 'We first ascertain the damage done to each 'vessel, then add it together, next divide the sum by two, 'and finally decree issues against the vessel which has 'suffered the least damage, but has to pay something to 'square the account' (See *The Khedive*, L.R. 8 App. Ca. 795). 'No better means,' Valiin, however, observes (cited by Abbott, p. 576), adopting the reasoning of the *Jugemens d'Oleron*, 'of making the masters of small 'vessels, which are liable to be injured by the slightest 'shock, attentive to avoid collision, than to keep the fear 'of paying for half the damage constantly before their 'eyes. And if it be said that it would be a shorter and 'more simple mode of adjustment to let each party bear 'the loss he has sustained, as arising from *casus fortuitus*, 'the answer is, that then the masters of large vessels would 'make light of collision with those of smaller burden. 'Upon the whole, therefore, no rule is so just as that of 'equal partition.'

Lord Blackburn, in *Cayzer* v. *Carron Co.*, '*The Mar-'garet*' (H. of L.), August 1, 1884, 9 App. Cas. 873, observed, in connection with the consideration of the principles above referred to as laid down in *The Woodrop Sims*:—'I think there is no difference between the rules 'of law and the rules of admiralty to this extent, that 'where any one transgresses a navigation rule, whether it 'is a statutory rule, or whether it is a rule that is imposed 'by common sense, what is called the common law, and 'thereby an accident happens of which that transgression 'is the cause, he is to blame, and those who are injured by 'the accident, if they themselves are not parties causing 'the accident, may recover both in law and in admiralty. If 'the accident is a purely inevitable accident, not occasioned 'by the fault of either party, then common law and admir-

Digitized by Google

'alty equally say the loss shall lie where it falls, each party 'shall bear his own loss. Where the cause of the accident 'is the fault of one party and one party only, admiralty 'and common law both agree in saying that that one party 'who is to blame shall bear the whole damage of the other. 'When the cause of the accident is *the fault of both*, each 'party being guilty of blame which causes the accident, 'there is a difference between the rule of admiralty and 'the rule of common law. The rule of common law says, 'as each occasioned the accident, neither shall recover at 'all, and it shall be just like an inevitable accident, the loss 'shall lie where it falls. Admiralty says, on the contrary, 'if both contributed to the loss, it shall be brought into 'hotchpotch, and divided between the two. Until the case 'of *Hay* v. *De Neve* [2 Shaw's App. Cas. 395], there was a 'question in the Admiralty Court whether you were not to 'apportion it according to the degree in which they were 'to blame; but now it is, I think, quite settled, and there 'is no dispute about it, that the rule of the admiralty is, 'that if there is blame causing the accident on both sides, 'they are to divide the loss equally, just as the rule of law 'is that if there is blame causing the accident on both 'sides, however small that blame may be on one side, the 'loss lies where it falls.' His Lordship commented (at p. 871) on the case of *The Khedive*.

Collision in river.

In an action brought by the owners of the *Ariadne* against the owners of the *Owl* for damage caused by a collision, the following facts were proved:—On a calm foggy day, in December, 1879, the *Ariadne* was slowly steaming up the Clyde against an ebb tide, when she sighted the *Owl* in the fog, apparently about 200 yards distant, coming down the river at a speed of about six miles an hour. The *Ariadne* did not port her helm or reverse her engines, but continued her course, putting her engines to full speed. The *Owl* had been obliged by the fog to steer by the beacons on the south side, the proper side of the channels for vessels going up the river; on sighting the *Ariadne* she at once ported her helm and reversed her engines, in conformity with the admiralty regulations then in force for steam vessels

Digitized by Google

approaching end on, or nearly end on. In about two minutes the *Owl* struck the *Ariadne.* The First Division of the Court of Session *held*—(1) That when the vessels sighted each other they were meeting nearly end on, and that the *Ariadne* had infringed the admiralty regulations of 1863 by failing to port her helm and to reverse her engines, and had failed to prove that the infringement was necessary, and must, in terms of the Merchant Shipping Act, 1873, c. 85, sec. 17, be held to have been in fault; and (2) (Lord Mure *dissenting*) that although the *Owl* was justified, on account of the fog, in keeping near the south side of the river, she was in fault in going at a greater speed than was prudent in the circumstances; and, therefore (3), that the damage fell to be borne equally by the two vessels (*Little, &c.* v. *Burns, &c.*, Nov. 16, 1881, 9 R. 118). 'From 'this decision,' observes the editor of Marsden on 'Col'lisions at Sea,' 1891 ed., 'it appears that in Scotland the 'regulations are held to be applicable in rivers as well as 'at sea, and that where local rules are in force they are to 'be construed and applied in conjunction with the general 'regulations,' pp. 343, 344.

Regulation No. 18.

The 18th sailing rule under Orders in Council of 14th August, 1879, provides—'Every steamship when approach'ing another ship, so as to involve the risk of collision, 'shall slacken her speed, or stop and reverse, if necessary.'* A collision took place near Oran, in Algeria, on the night of 17th November, 1881, between the *Thames* and the *Lutetia.* In cross actions of damages by the respective owners, it was proved that down to the moment of the collision the crew of the *Thames* were almost entirely engaged in the usual ship work connected with coming out of port, and that the first mate, who was in the command, had other duties to perform. He, seeing a collision to be probable, reversed his engines in time to bring the *Thames* to a standstill before the collision took place, while the *Lutetia* neither stopped nor reversed her engines, but ran into the *Thames* at a considerable speed, cutting her down to the water's

* This rule is identical with Article 18 of the Regulations at present in force.

Digitized by Google

edge. The Second Division of the Court of Session *held* that the *Thames* was alone in fault. The House of Lords *reversed* this judgment, holding that the *Lutetia* was also in fault, in respect she had failed to obey the 18th rule by stopping or reversing her engines. Lord Watson observed :—'The evidence on both sides (as too often hap-'pens in such cases) is very unsatisfactory, but the result 'of the best consideration which I have been able to give 'to it is, that I am unable to acquit either vessel of con-'tributory fault. In my opinion, therefore, the interlocutor 'under appeal ought to be reversed, and the two actions 'remitted, with a declaration that the collision was due to 'the fault of both vessels, and that neither of the parties 'should have their costs, either in this House or the 'Courts below,' *Owners of the 'Thames'* v. *Owners of the 'Lutetia,'* Nov. 20, 1884, 12 R. (H. of L.) 1. (This case is reported L.R., 9 App. Cas. 640, as *Maclaren* v. *Compagnie Française de Navigation à Vapeur.*)

Fog.

Two vessels approaching each other in a dense fog, neither knowing the other's course, should both follow the direction No. 18, *supra*, and at once stop and reverse (*Owners of 'Lebanon'* v. *Owners of 'Ceto,'* 1889, L.R. 14 App. Cas. 670), 'unless,' observed Lord Watson, p. 686, 'the fog signals of the other vessel have distinctly 'and unequivocally indicated that she is steered on a rela-'tively clear course, and will pass clear without involving 'risk of collision.' See also *The Frankland* and *The Kestral*, L.R. 3 P.D. 529; *The Kirby Hall*, 8 P.D. 78; *The John M'Intyre*, 9 P.D. 135; *The Dordogne*, Dec. 6, 1884, 10 P.D. 6; *The Ebor*, 11 P.D. 25. Yet the obvious difficulty of laying down a rule applicable to all circumstances is shown by the still more recent case of the *Vindomora* (*Owners of the 'Vindomora'* v. *Lamb and Others*, Dec. 5, 1890 (H. of L.), L.R. 1891, A.C. 1), where it was held that where two steamships are approaching each other in a fog so as to involve risk of collision, there is no hard and fast rule of practice that neither ship is to alter her helm. Where there is a general rule, 'in 'each particular case,' observed Lord Herschell, p. 5, 'you must look to see what the circumstances were, and

'inquire in each particular case, were there circumstances 'existing which justified the manœuvre executed, or which 'prevented that manœuvre from being a wrong manœuvre.'

In an earlier case, also turning upon the observance of the regulations for preventing collisions, it was *held* by the House of Lords that if the circumstances were such that a competent seaman, exercising reasonable care, could not have discovered that a particular regulation was in fact applicable, the failure to obey that regulation was not to be deemed a fault within the meaning of section 17 of the Merchant Shipping Act, 1873, 36 & 37 Vict. c. 85 (*Baker* v. *Owners of the 'Theodore H. Rand,'* Feb. 14, 1887 (H. of L.), 12 App. Cas. 247). The 'risk of collision,' referred to in Art. 18, *supra*, is naturally greatest when 'in a fog, 'mist, or falling snow,' and Art. 13, that a vessel in such circumstances is to "go at a moderate speed," has, therefore, been frequently considered along with Art. 18. For what 'a moderate speed' means, or may mean, see *The Dordogne*, 10 P.D. 6; *The Ebor* (C. of A.), 11 P.D. 25; *The Zadok*, June 20, 1883, 9 P.D. 114; *The Beta* (C. of A.), June 18, 1884, 9 P.D. 134. Different considerations apply to the calculation of such speed at sea and in a river. See observations of Lindlay, L.J., in *The R. L. Alston* (C. of A.), Nov. 27, 1882, 8 P.D. 1, at p. 13.

Limitation of Liability.

25 & 26 Vict. c. 63, sec. 54.

By the Merchant Shipping Act, 1854, and the Amendment Act of 1862, 25 & 26 Vict. c. 63, sec. 54, sub.-sec. 4, shipowners can, to a certain extent, limit their liability. The 54th section of the latter statute provides for a limitation of liability to certain sums, enacting that the owners of any [registered] ship (See *The Andalusian*, 47 L.J., Ad. 65), whether British or foreign (this action applies whether the collision is within or without British jurisdiction, Abbott, 858, see *The Amelia*, 1 Moo. P.C. (N.S.) 471), shall not—in cases where all or any of the following events occur without their actual fault or privity, viz.:—

'(1.) Where any loss of life or personal injury is caused 'to any person being carried in such ship;

Digitized by Google

'(2.) Where any damage or loss is caused to any goods,
'merchandise, or other things whatsoever on
'board any such ship;
'(3.) Where any loss of life or personal injury is, by
'reason of the improper navigation of such
'ship as aforesaid, caused to any person carried
'in any other ship or boat;
'(4.) Where any loss or damage is by reason of the
'improper navigation of such ship as aforesaid,
'caused to any other ship or boat, or to any
'goods, merchandise, or other thing whatsoever,
'on board any other ship or boat,'

—be answerable in damages for *loss of life or personal injury*, 'either alone or together, with loss or damage to 'ships, boats, goods, merchandise, or other things, to an 'aggregate amount exceeding £15 for each ton of their 'ship's tonnage,' nor for *loss or damage to ships, goods, merchandise, or other things*, 'whether there be in addition loss 'of life or personal injury or not, to an aggregate amount 'exceeding £8 for each ton of the ship's tonnage.' The tonnage is, in the case of sailing ships, to be registered tonnage, and in the case of steamships the gross tonnage, without deduction on account of engine room.*

Flora and *Prima.*

(1.) In an action of damages by the owner of the screw-steamer *Flora* for loss of his ship by collision with the steamship *Prima*, a verdict was returned for the pursuer, and the damages were assessed at £8 per ton of the *Prima*, the amount of liability for damages to both ship and cargo, as limited by the above section of the Merchant Shipping Amendment Act, 1862. A motion was made by the defender to have the verdict set aside, on the ground that by it the pursuer, who was owner only of the *Flora* and not of the cargo, was found entitled to the whole sum of damages, which should have been apportioned between him and the owner of the cargo. The motion was *refused.*

* In the case of *The Recepta*, July 30, 1889, where the owners claimed to limit their liability, defenders denied that the registered tonnage was the correct tonnage, and at the hearing (proof) tendered evidence in support of their defence. It was *held*, *per* Butt, J., that the evidence was admissible (*The Recepta*, L.R. 14 P.D. 131).

Digitized by Google

The defender then presented a petition under sec. 514 of the Merchant Shipping Act, 1854, for distribution, among all parties interested, of the sum in the verdict. After advertisement no claims were lodged, except one by the pursuer, who claimed the whole sum. The petition was *refused* by the First Division of the Court of Session, as in the circumstances unnecessary (*Flensburg Steam Shipping Co.* v. *Seligmann*, '*Flora*' and '*Prima*,' July 18, 1871, 9 Mac. 1011). When the verdict finding a sum of damages due was applied on 18th July, 1871, the Court gave interest on the damages from 19th May preceding, in respect that but for unnecessary delay occasioned by the defender, the verdict might have been applied at that date. As to shipowner's liability for interest see also *The Northumbria*, L.R. 3 A. & E. 6; 39 L.J., Ad. 3.

Isabella.

(2.) On 21st October, 1874, during a storm of wind, the ship *Isabella*, while lying off Greenock, came into collision with two other vessels and a floating dock, and all three sustained considerable injury; their owners all raised actions against the owners of the *Isabella*, and all three arrested the *Isabella* on the dependence of their respective actions. Her owners denied liability, and defended the actions. On 4th March, 1875, during the dependence of these actions, and before any proof was led, they presented a petition, *inter alia*, to have their liability for damages ascertained or restricted under the 514th section of the Merchant Shipping Act, 1854. The First Division of the Court of Session decided that such a petition was competent, without the shipowners admitting liability for damages (*Miller, &c.*, v. *Powell, &c.*, '*Isabella*,' July 20, 1875, 2 R. 976). Lord President Inglis observed: 'As to 'the competency of this petition, I do not see the smallest 'room for doubt. The only suggestion of doubt has arisen 'from a plain misunderstanding of the case of *Hill* decided 'by Vice-Chancellor Wood,' p. 979 (*i.e.*, *Hill* v. *Audus*, 1855, 1 Kay and Johnson, 263).

Albicore and *Aurora.*

(3.) A collision occurred on 2nd Nov., 1874, between the *Albicore* and the *Aurora*; considerable damage was caused to the *Aurora*, and to certain portions of her cargo. A sum of £2115, 15s. 10d. was paid by the owners of the *Albicore*,

Digitized by Google

as fixed by arbiter mutually chosen, to the owners of the *Aurora*. Nine months afterwards, the owners of the cargo of the *Aurora* came forward with a claim amounting to £2420. They raised actions against the owners of the *Albicore* for the purpose of recovering that sum, and this led the owners of the *Albicore* to present a petition for the purpose of restricting their liability in respect of damage by the collision to £8 per ton of gross tonnage under the Merchant Shipping Act, 1854, sec. 514, and the Merchant Shipping Act, 1862, sec. 54. They pointed out that the amount already paid, £2115, 15s. 10d., with the amount now claimed amounted to £4535, 16s. 8d., which exceeded the sum they were liable for at the rate of £8 per ton. It was urged for the cargo owners that they had nothing to do with sum paid to the owners of the *Aurora*, but the Court gave effect to the petition for limitation of liability, the Lord President observing 'that the 54th section of the Act, 1862, expresses 'in negative and imperative words that the owners shall 'not be answerable for more than £8 per ton. Now, it is 'impossible to give effect to this enactment if we sustain 'the plea of the owners of the *Aurora's* cargo. The 'only difficulty they suggest is that the claim of the 'owners of the *Aurora* is not properly here, and cannot 'be given effect to. Technically, perhaps, the claim is not 'here, and cannot be given effect to, as the money has 'been paid. But if the owner has satisfied and paid the 'claim, that will not deprive him of the benefit of section '54 of the Act of 1862 and make him liable to a greater 'extent than £8 per ton. There is nothing in the statute 'and nothing in common law to lead to such a result. If 'the owner holds the fund, which is insufficient to meet 'the whole claims, and he pays one claimant in full—it 'may be in ignorance of the other claims—he may be 'made answerable for the consequences. What are these? 'Not surely that a party who makes a claim after such a 'payment is thereby to get more than he would have got 'if the holder had raised a multiplepoinding. On the contrary, it is clear to me that the holder of such a fund if 'he makes a mistake in paying one claimant can only be 'called on afterwards to pay, not the full amount of the

Digitized by Google

'claim, but only to make the balance available after 'deducting the amount which the claimant whom he has 'paid in full would have been entitled to recover along 'with the others. If that is the common law, is not that 'the position of the offending ship here? No doubt the 'fund is provided by himself, and he is not bound to pay 'it to the claimants, but to put it into the hands of the 'Court for distribution. He is in the position of the 'holder of a fund or the real raiser in an action of multi-'plepoinding. I am, therefore, of opinion that in the 'ranking the claimants, the cargo owners are not entitled 'to get more than they would have got if the owners of 'the *Albicore* had not rashly, but still in perfect good 'faith, paid away the money to the owners of the '*Aurora*' (*Rankine, &c.* v. *Raschen, &c.*, '*Albicore*' and '*Aurora*,' May 19, 1877, 4 R. 725).

(4.) The owner of the *Rio Bento*, which ran ashore going down the river Clyde, when informed of her being aground, went at once to her, and made arrangements about getting the underwriters' men to pump her out, and have her lightened. He was not a seafaring man, and stated that he had no consultation with the master about the lighting of the vessel, but considered the light that was exhibited a sufficient warning to approaching vessels. A collision occurred. The Court *held* he was entitled to the benefit of the statutory limitation of liability (*Kidston, &c.* v. *M'Arthur and the Clyde Navigation Trustees; M'Arthur* v. *Kidston, &c.*, June 15, 1878, 5 R. 936). As to the priority of claimants in respect of loss of life, and loss of goods, see *The Victoria*, July 3, 1888, 13 P.D. 125.*

Expenses of application under the section.

Clan Sinclair.

In a petition by the owners of the *Margaret* for limitation of their liability for damage caused by a collision between the *Margaret* and the *Clan Sinclair*, it was held by the First Division of the Court of Session that the general expenses of the action, including the expenses incurred by the injured parties (the owners of the *Clan*

* As to competency of deducting certain closed in spaces on the upper deck solely used by the crew from the registered tonnage of a vessel in an action for limitation of liability see *The Palermo*, Dec. 1884, L.R. 10 P.D. 21.

Digitized by Google

Sinclair) in stating their claims, in obtaining a remit to an average adjuster, and in giving effect to his award, fell to be borne by the petitioners; but that they were not liable for the expense of adjusting the claims caused by the competition of claimants (*Carron Co.* v. *Cayzer, Irvine & Co., &c.*, Nov. 3, 1885, 13 R. 114).

The words 'improper navigation' have been held to cover faulty navigation arising from the vessel failing to answer her helm properly in consequence of an improper pin having been inserted in the steam-steering gear (*The Warkworth*, Dec. 12, 1883, L.R., P.D. 20, affirmed (C. of A.), June 28, 1884, L.R. 9 P.D. 145).

Compulsory Pilotage.

Section 388 of the Merchant Shipping Act, 1854, enacts:—'No owner or master of any ship shall be 'answerable to any person whatever for any loss or 'damage occasioned by the fault or incapacity of any 'qualified pilot acting in charge of such ship within any 'district where the employment of such a pilot is com-'pulsory.'

Pilotage.

In the following case a collision occurred when the vessel was under the charge of a pilot.

On 19th February, 1873, the new steamer *Colina* which had not been taken over by the purchasers, and was still in the custody of the builder, was returning up the Clyde from her trial trip, when, about a quarter to five in the afternoon, the light being good, and the weather clear, she ran into a dredger belonging to the Clyde Navigation Trustees, moored on the south side of the river near Dalmuir, and sank her. The employment of a pilot within the district was compulsory, and a duly qualified pilot was in charge of the *Colina*, through whose fault or incapacity the collision was caused. The Clyde Navigation raised an action for damages for the sinking of the dredger. The defenders founded on the section in question. It was held that to entitle owners to the benefit of the section cited above it was sufficient for them to prove that the accident was occasioned by the pilot's fault, unless the facts proved

Digitized by Google

raise a presumption of contributory fault on the part of the shipowners, which requires to be rebutted, and in the circumstances, the House of Lords (*affirming* the judgment of the Second Division of the Court of Session), *held* that the collision had been caused by the fault of the pilot, and that there was no contributory fault on the part of the owners (*Clyde Navigation Trustees* v. *Barclay, Curle & Co.*, May 23, 1876, 3 R. (H. of L.) 44. Lord Chelmsford observed: 'It was said that the accident was partly 'owing to the want of proper assistance given to the 'pilot. It is said that the master ought to have been on 'the bridge to advise the pilot.* There was no master, as 'I have already observed, strictly so called; but there is 'no magic in the word *master*, and it appears that Durie, 'who was to be one of the officers of the *Colina*, was on 'the bridge, and did what was necessary,' p. 47.

In a recent case, decided by the Court of Appeal in England, where a vessel at anchor was run down, it was held that the fact of anchorage, and that she could be seen were *prima facie* evidence of negligence on the part of the colliding vessel, and that the *onus* lay on her owners to rebut the presumption of liability by showing that—(1) there was no fault on their part; or (2) that there had been inevitable accident; or (3) that it was solely the fault of a pilot who was on board the colliding vessel by compulsion of law. Lord Esher observed that the case of the *Clyde Navigation Co.* v. *Barclay* amounted in his opinion to this—'that where the plaintiffs make a *prima facie* case, 'and the answer is that the defendants are exempt from 'liability on the ground of compulsory pilotage, and they 'give evidence which *prima* proves, that the accident was

Pilot on board colliding vessel.

* This would be contrary to the law as generally understood in so much as, so far from advising the pilot, the master is bound to submit to his guidance, even although that involves departure from a statutory rule (*The Argo*, 1859, Swab. 462; Abbott, 160). He may, however, give him general directions (*The Isca*, Dec. 8, 1886, L.R. 12 P.D. 34), and there may be circumstances in which the master is not required to give up the navigation to a pilot, even although the pilot is compulsory—as in the case of vessels navigating the Danube (see *The Agnes Otto*, Jan. 19, 1887, L.R. 12 P.D. 56); but generally he must follow the pilot's directions, unless the proceeding ordered by the pilot is manifestly dangerous (*The Oakfield*, Feb. 24, 1886, L.R. 11 P.D. 34).

Digitized by Google

'solely the fault of a pilot who was on board by compulsion 'of law, the burden of proof is then shifted back on to the 'plaintiffs if they allege that the defendants were guilty of 'some other act of negligence;' but the application of that case did not specially affect the rules as to burden of proof under which the Court of Appeal came to their decision in the case referred to (*The Indus*, Dec. 17, 1886 (C. of A.), L.R. 12 P.D. 46). See, however, *The Rigborgs Minde* (C. of A.), April 30, 1883, L.R. 8 P.D. 132. Where there is no suggestion of non-liability owing to the presence of a pilot, the burden of proof is upon the owner of a vessel in motion which has collided with one at anchor, to prove that the collision was not caused by their negligence (*The Annot Lyle*, June 3, 1886, L.R. 11 P.D. 114).

Where harbour trustees employed an unlicensed pilot they were held liable in damages for his fault (*Holman* v. *Irvine Harbour Trustees*, '*Gertrude*,' Feb. 1, 1877, 4 R. 406).

River Trustees.

The liability of River Trustees for a collision caused by a stranded vessel, imperfectly lighted was negatived in the following case.

Stranded vessel.

Article 7 of the Board of Trade Regulations for Preventing Collisions, enacted under the 25th section of the Merchant Shipping (Amendment) Act, 1862, 25 & 26 Vict. c. 63, prescribes a certain light to be exhibited by vessels at anchor. Article 20 provides that nothing in the rules shall exonerate any ship from the consequences of neglect of any precaution which may be required in the special circumstances of the case. The s.s. *Rio Bento* ran aground, while going down the Clyde, and part of her hull which was almost entirely covered at high water, lay at right angles to the dyke, obstructing one-fourth of the navigable channel. The river superintendent of the Clyde Navigation Trust, went to the place, and the master promised that the ship should be lighted after dark. During the night the *Rio Bento* exhibited a single light of the nature and dimensions prescribed for vessels at anchor by the Board of Trade Regulations, suspended over the taff-rail or stern about ten feet above the level of high water. Another steamer, the *Toward*, coming up the river in the dark, and, about the time of

Digitized by Google

high water, believing the light to indicate a small vessel at anchor, tried to pass between the light and the shore, the usual side for vessels going up. She came into collision with the *Rio Bento*, and cut her in two, while the *Toward* herself was seriously injured. Counter actions of damages were raised. The owners of the *Toward* also claimed against the Clyde Trustees on the ground that by receiving the river tolls and dues, they come under an obligation to take reasonable precautions to keep the navigation secure, which obligation they had failed to perform. The Second Division of the Court of Session held, after a proof—(1) that improper or negligent navigation on the part of the *Toward* had not been proved; that a single light was not in the circumstances sufficient as a warning that the passage up and down the river was obstructed to the south of the light, and that the failure to give such warning was the cause of the accident, and rendered the owner of the *Rio Bento* liable in damages; (2) that no liability attached to the Clyde Trustees, the 'Rio Bento' not being in their charge, but in the hands of her master and crew (*Kidston, &c.* v. *M'Arthur & The Clyde Navigation Trustees; M'Arthur* v. *Kidston, &c.*, June 15, 1878, 5 R. 936; see, however, Abbott, p. 593).

Procedure.

(1.) Under the Merchant Shipping Act, 1854, part ix., sec. 512, notice to the Board of Trade after raising an action is incompetent. The circumstances, on which the point was decided, were as follows:—

Fram.

In a collision at sea, on 6th February, 1880, the *Fram*, a Norwegian barque foundered, and all hands were drowned. Immediately after the accident, the Norwegian vice-consul at Glasgow wrote to the Board of Trade, inquiring, 'Whether an inquiry should not be held to 'ascertain the facts of the collision, and whether those in 'charge of the steamer did all they could do to avoid loss 'of life?' The secretary replied that the Board 'do not, 'as at present advised, intend to institute a formal inquiry.'

Digitized by Google

On 29th December, 1881, the widow of one of the seamen raised an action of damages against the owners of the other vessel, and notice of her desire to proceed was, on 8th February, 1882, sent to the Board of Trade who, intimated that they did not intend to institute any inquiry under part ix. of the statute. The First Division of the Court of Session *held*, reversing the judgment of the Lord Ordinary (Fraser)—(1) that the refusal of the Board to institute an inquiry, given in answer to the letter of the vice-consul, referred only to an inquiry under part viii.; and (2) that the original incompetency of the action arising from the statutory conditions not having been complied with, had not been removed by the subsequent notice to the Board of Trade, and its refusal to institute an inquiry under part ix. (*Haglund* v. *Russells*, June 16, 1882, 9 R. 958). Lord President Inglis said:—'I regret the conclusion to 'which I have come, and I do so the more, as it appears 'to me that that general inquiry contemplated by the 'ninth part of this statute is in practice utterly useless. 'It is never resorted to, so far as I can make out, and 'these strong provisions to which I have felt bound to 'give effect, are enacted solely for the purpose of insuring 'that this form of inquiry which is never resorted to, 'should be allowed to take place without any other action 'being raised to interfere with it. Still there is the statute, 'and I find the 512th section of it a complete bar to this 'action.' See also observations of Lord Mure and Lord Shand.

(2.) In the case of *Little, &c.* v. *Burns, &c.*, Nov. 16, 1881, 9 R. 118, where damage for a collision was decided to fall equally upon the owners of two colliding vessels (*supra*, p. 134), the pursuers moved for expenses on the ground that they had—at a date after the action had been raised, the record closed, a proof ordered, and preparations begun by the parties for it—made a written offer to settle the action on the defenders paying 50 per cent. of a sum of £5346, 9s. 3d., the defenders to pay all expenses then incurred. The defenders wrote in reply, refusing to settle the action on this or any other footing. The Lord President (Inglis) observed:—'If a very reasonable offer

Digitized by Google

'were made, and refused before litigation had commenced, 'even though the ultimate judgment might not correspond 'exactly with it, or even exceeded it, it is a fair subject for 'our consideration in awarding the expenses. That was 'the kind of offer referred to in the case of *The Clyde* '*Shipping Co.* v. *Glasgow & Londonderry Steam Packet* '*Co.*, July 2, 1859, 21 D. 1131; 31 Scot. Jur. 627. But an 'offer made after the action had been raised, and things 'are already in Court, is on a different footing, and must 'be dealt with in a different way. It should, to be regular, 'be made in the form of a judicial tender, and then its 'amount can be compared with the sum ultimately 'awarded by the judgment of the Court. If the offer is 'not in the form of a judicial tender, we must look at the 'whole circumstances of the parties as litigants in Court. 'Here the action has been raised, the record closed, and 'proof ordered, and the parties were preparing the case 'for trial before any whisper of an offer was heard. The 'offer, which the owners of the *Ariadne* then made, 'came to this, that they should be paid 50 per cent. of '£5346, 9s. 3d., and all their expenses incurred in raising 'the action. Now, that is not quite in accordance with 'the judgment in the action. We have awarded them 50 'per cent. of £4850, and we have yet to decide whether 'they are to get expenses. I see no reason for taking this 'case out of the ordinary rule. I think there should be 'no expenses given on either side,' pp. 138, 139.

Tug and Tow.

For circumstances in which a tug came into collision with her tow and sank her, see *The Tasmania*, April 11, 1888, L.R. 13 P.D. 110.

Justiciary cases.

The two cases following were decided in the *Justiciary Court*. They both relate to the same point—viz., the necessity of adequate specification of the fault said to have been committed by the parties before the Court. (1.) The screw-steamer *Horatio* and No. 4 Hopper Barge collided in the Clyde, and the masters were charged in the River Bailie Court of Glasgow on a single complaint with 'culpable negligence and reckless conduct in navi'gating, directing, managing, or steering steam vessels, 'when a collision took place, and the lives of the lieges

Digitized by Google

'were endangered, actors or actor, or act and part, in 'so far as,' at a time and place libelled, the accused 'did 'both, and each, or one or other of them, while said vessels 'were approaching each other, so culpably, negligently, and 'recklessly navigate, direct, manage, or steer their vessels 'as to bring or cause or permit them to come into violent 'collision with each other whereby' the vessels were damaged, and the lives of lieges endangered. One of the accused, against whom the charge was found proven, was fined £3, but against the other it was found not proven. On appeal the conviction was quashed by the Court of Justiciary on the ground that the libel was irrelevant for want of specification of the fault said to have been committed. Lord Young, who gave the leading opinion, observed that if the prosecutor intended to prove that both the masters were guilty of the offence libelled, he ought to have charged them on separate complaints. Observations were also made as to the inexpediency of trying important questions in the River Bailie Court of Glasgow (*Clelland* v. *Sinclair*, March 18, 1887, 14 R. (Just. Cases) 23).

(2.) A collision occurred on 16th June, 1888, on the Clyde, near Skelmorlie, between the steamships *Balmoral Castle* and *Princess of Wales*. The respective pilots, J. P. and J. B., were charged in one indictment, setting forth that, on the occasion stated, 'You, J. P., when pilot in charge of the 'steamship *Balmoral Castle*, there being risk of a collision 'between the said vessel and the steamship *Princess of 'Wales* did fail to slacken speed by stopping and revers- 'ing, contrary to article 18 of the Regulations for Prevent- 'ing Collisions at Sea, issued in pursuance of the Merchant 'Shipping Acts (Amendment) Act, 1862; and you, J. B., 'when pilot in charge of the said steamship *Princess of 'Wales*, there being risk of collision as aforesaid, did fail 'to slacken speed by stopping and reversing, and did put 'to starboard the helm of the said steamship *Princess of 'Wales*, contrary to articles 18 and 15 of said Regulations, 'and you did both fail to navigate your respective vessels 'with proper and seamanlike care, and did cause said 'vessels to come into collision, and did thus kill certain 'persons.' It was *held* by the High Court of Justiciary—

Digitized by Google

(1) That it was competent to try both the accused under one indictment for their alleged separate and unconnected acts of negligence; and (2) on a motion to separate the trials, that the trials ought not to be separated. It was *held*, further, that the indictment was relevant, *repelling* objections to the relevancy—(1) that the Regulations founded on were neither referred to in the manner prescribed by section 9 of the Criminal Procedure (Scotland) Act, 1887, rendering quotation of statutes unnecessary, nor fully and correctly quoted; (2) that the charge of 'failing 'to navigate your respective vessels with proper and 'reasonable care' was defective in specification (*Her Majesty's Advocate* v. *Parker and Barrie*, Nov. 5, 1888, 16 R. (Jus. Cases) 5).

Digitized by Google

CHAPTER V.

SALVAGE AND TOWAGE.

RECORD OF EVIDENCE IN SHERIFF-COURT—COASTING VESSEL AS COMMON CARRIER—SALVING AGREEMENTS MAY BE INVESTIGATED—TWO SALVORS—SALVAGE OR TOWAGE?—MEASURE OF REWARD—DEMURRAGE ARISING OUT OF A CONTRACT FOR TOWAGE.

Sinclair v. *Spence; Duncan* v. *Dundee, Perth & London Shipping Co.; Buchanan* v. *Barr & Shearer; Mackenzie* v. *Liddell; Owners of 'Vulcan'* v. *Owners of 'Berlin'; Lawson* v. *Grangemouth Dockyard Company; New Steam Tug Co.* v. *M'Clew.*

Definition.

THE nature of Salvage, which has been the subject of many definitions, has probably never been indicated more concisely than by Lord Hannen when he observed that 'the guidance of a vessel by a person not a 'pilot under extraordinary circumstances rises to the rank 'of a salvage service' (*The Aglaia*, July 16, 1888, 13 P.D. 160, at p. 162).

Actions for the recovery of salvage may be tried in the Sheriff Court. There is no appeal from the Sheriff's decision if the sum in dispute does not exceed £50; if the claim exceeds £200, and the value saved exceeds £1000, the case must be tried in the Court of Session, unless by consent of parties the Sheriff's decision in the matter be agreed to. For the procedure before Sheriff Court see Dove Wilson, pp. 451-454.

17 & 18 Vict. c. 104, secs. 464 and 536.

If one of the parties desires a record of the evidence to be kept, he should make a motion to that effect. The question arose in connection with the construction of sections 464 and 536 of The Merchant Shipping Act, 1854.

By sec. 464, Part viii., which is headed 'Wrecks,

Digitized by Google

'Casualties, and Salvage,' it is provided that an appeal may be taken in Scotland to the Court of Session against awards by the Sheriff in salvage claims. Part x. is headed 'Legal Procedure' and sec. 536 enacts that the whole procedure brought in a summary form before the Sheriff, shall be conducted *viva voce*, without written pleadings, and without taking down the evidence in writing, and that no record shall be kept of the proceedings other than the complaint and the sentence or decree pronounced thereon. In a claim for salvage arising out of the stranding of the steamer *Gladiolus* in the Pentland Firth, the Sheriff of Caithness awarded a sum as salvage. No record of the evidence led at the proof was kept. The losing party appealed to the Court of Session under sec. 464, and contended that to support his appeal he should be allowed to lead the evidence afresh, since the recording of the proof in the Sheriff Court was prohibited by sec. 536. The First Division of the Court of Session refused the appeal, holding that sec. 536 did not apply to claims under Part viii., that Part x. (and the clauses therein), was intended to regulate procedure in criminal cases, and other cases of a like character, and does not in the least degree touch claims for salvage, which are regulated by Part viii.; consequently that the appellant by failing to move the Sheriff to direct a record of the evidence to be kept, had deprived himself of the right to have the Sheriff's judgment on the facts reviewed (*Sinclair*, *&c.* v. *Spence*, '*Gladiolus*,' July 4, 1883, 10 R. 1077). Lord President Inglis referred to procedure in the case of *The Cuba*, 6 Jurist (N.S.) 152, and *The Andrew Wilson*, 32 L.J., Prob. Ad. Div., p. 104, and Dr. Lushington's decisions therein.

Liability for salvage.

The rule is that the property actually benefited is alone chargeable with the salvage recovered, Abbott, 557. In general the various owners of the ship or cargo or other party salved, will be liable to contribute, see Newson, 'Salvage, Towage, &c.,' 1886, p. 41, citing *The Blendenhall*, 1 Dods, 417; see also Bell's Prin., 443.

In the following case, however, the Court of Session, in a case where both ship and cargo were saved, limited the

Digitized by Google

liability for payment of salvage to the owners of the ship, she, as a coasting vessel, being regarded in the main as a common carrier carrying goods for a number of separate owners.*

The *Anglia*, while on a voyage from Dundee to London, with twenty passengers and a general cargo belonging to a great number of persons, and entrusted to the owners as common carriers, 'made' in the words of the Lord President, 'an unaccountable deviation,' and struck on the Tours or Parkdyke Rock, near the Fern Islands. She lost her rudder and stern-post, and in ordinary circumstances would have been sunk by the run of water through a hole in the stern. She was, however, saved by having a bulk-head very near the stern, sufficiently watertight to enable her to float, and to be kept afloat by the constant use of pumps. For a short time after the accident the *Anglia* continued under steam, but her signal of distress being noticed by the *Harvest Queen* that vessel went to her rescue, and with some assistance from another vessel, the *Matin*, towed the *Anglia* to Dundee. At Dundee, the cargo was trans-shipped and sent to London. The owner of the *Harvest Queen* raised an action, with concurrence of the master and crew, against the owners of the *Anglia*, claiming £8000 as salvage for ship and cargo. The defence was that the defenders were not liable for claims against the cargo, contending that salvage can be recovered from owners only. The Lord Ordinary (Lord Rutherfurd Clark) decided in favour of the owners of the salving ship, fixing the amount of salvage at £1500.

The owners of the *Anglia* appealed to the First Division, arguing—(1) that assuming there had been fault on the part of the captain, the owner of the ship and the owners of the cargo were respectively liable only for salvages on their own property, that a salvage suit was essentially a proceeding *in rem*, and was merely the enforcement of a lien over the particular property saved; (2) that the damages were excessive. The

* For definitions of common carrier in Maritime Law, see Foord, 'Law of 'Merchant Shipping,' pp. 72, *et seq.*

Digitized by Google

First Division *adhered* to the judgment of the Lord Ordinary. Lord President Inglis said: 'It has been 'maintained that this mode of enforcing a claim of salvage 'is unprecedented, if not incompetent, that a claim of 'salvage ought always to be enforced in the form of 'a proceeding *in rem*, by attaching the ship and cargo if 'necessary, and so working out the remedy by a real action 'of that kind. Now, I do not know any authority for say-'ing that this is the only mode in which a claim of salvage 'can be maintained. On the contrary, I think I see in our 'own records the appearance of cases of personal action 'for the recovery of salvage by the aiding vessel against the 'disabled vessel, that is to say, by the owners and master of 'the one against the owners of the other. I see no diffi-'culty in allowing a claim of that kind to be maintained in 'a personal action. I do not attach any importance to that 'objection. But a more formidable objection has been 'stated, to the effect that this claim being made against the 'owners of the rescued ship only, and not against the owners 'of the cargo, the salvage can be claimed only in respect of 'the ship, and not in respect of the cargo; or, in other 'words, that the owners of the ship cannot be made answer-'able for the services rendered in rescuing the cargo—that 'the owners of the cargo ought to have been called and made 'answerable for their share of the recompense to be given. 'Now, at first sight certainly that appears to be a very 'plausible and formidable objection; and, if we were deal-'ing with a case of salvage in reference to a foreign-going 'vessel, with bills of lading, I think there would be great 'weight in the objection, because there is no difficulty what-'ever in making the owner of each of the subjects the 'defenders in such a claim as this, even supposing it to be 'brought in the form of a personal action. But the circum-'stances of this case are very peculiar, as affecting the 'question which I am now considering. It must be kept in 'view that it is a vessel in the coast trade, and that the 'owners of this vessel are in that respect really in the posi-'tion of common carriers, in a different sense from that in 'which the owners of a foreign-going ship are to be con-'sidered as carriers, because they carry from one port in

Digitized by Google

'this kingdom to another port in the same kingdom, not a 'cargo which is shipped under such contracts of affreight-'ment as charter-parties or bill of lading, but a general 'cargo, consisting of a great variety of goods, belonging to 'a very great number of persons, which are not the subject 'of special contract by bills of lading or otherwise, but are 'carried upon the implied or verbal contract, which arises 'from the delivery of goods to a common carrier, and implies 'an obligation on his part to deliver these goods at the place 'to which they are addressed. That this is the real state 'of the fact in the present case is made very clear, 'I think, by the admitted averments upon record. . . . The 'cargo belonged to some hundreds of owners; if they 'had been attempted to be called in the action the thing 'would have been almost impossible. If, on the other 'hand, the remedy had been adopted by the salvors of 'attaching the ship and cargo immediately on its arrival 'at a port of safety, the consequence would have been of 'the most inconvenient kind to the owners of the cargo. 'It is difficult to see how the thing could be extricated. 'How are all these owners of cargo, and each of them, to 'find security for this salvage claim, and so to obtain 'their cargo liberated from the arrestment? How is the 'remedy, supposing a proceeding *in rem* to be worked 'out? I do not say that this difficulty is conclusive. It 'may be that a difficulty of this kind is such as to put 'salvors to a great disadvantage in working out such a 'claim, and that may be the whole result of it. At the 'same time, one cannot but feel that in a case of this kind, 'with a cargo of this description, there would be no means 'of enforcing against the owners of the cargo, or against 'anybody else, the claim of a salvor for having saved that 'cargo from destruction.' Further, it had been found by a Board of Trade inquiry that the *Anglia* had struck through the fault of her captain, for whom the defenders as owners were responsible. 'It follows, as a necessary 'legal consequence, that the owners of the *Anglia* would 'have been answerable to the owners of the cargo for its 'loss if it had been lost. From this it is argued, and I 'think with great reason, that the salvage services ren-

Digitized by Google

'dered were for the benefit of the owners of the vessel in 'respect of the rescue of the cargo as well as in respect of 'the salvage of the vessel. In short, but for the services 'of the salvors, the vessel and the cargo would have been 'lost to the owners of the vessel—would have been lost 'to them to the same effect practically as if they had been 'owners of the cargo as well as of the ship.' Lord Deas, Lord Mure, and Lord Shand concurred. The estimate of salvage on £1500 was adhered to (*Duncan* v. *Dundee, Perth, & London Shipping Co.*, March 8, 1870, 5 R. 742.

Salving Agreements.

The salving agreement may itself form the subject of investigation. The ship *Lorena* was in a disabled state, when the steam-vessel *Xantho* towed her into safe anchorage. £2000 was claimed as salvage, the value of the *Lorena* and cargo being said to be £6000. In defence, it was pled that the master had arranged for a towage service at the fixed sum of £50, and that the owner and crew of the *Xantho* were bound by the contract, which was just and reasonable. Issues were adjusted by the Inner House, which included inquiry as to whether the contract when entered into was just and reasonable (*Buchanan and Others* v. *Barr and Shearer*, July 2, 1867, 5 Mac. 973). In the following English cases the freedom of investigation allowed by the Court is well illustrated.*

A ship undertook to tow the disabled *Benlarig* (value, with cargo and freight, £78,000), to Gibraltar. After towing

* In the case of *The Renpor* (C. of A.), April 20, 1883, 8 P.D. 115, the *Mary Louisa* had agreed, at the request of *The Renpor's* master, to stand by his ship, and when she sank, the *Mary Louisa*, at considerable danger, saved the lives of the crew. Salvage was claimed under the agreement. The Court of Appeal held that in order to found an action for salvage there must be something more than life, which will form a fund from which salvage may be paid; in other words, 'for the saving of life alone, without the 'saving of ship, freight, or cargo, salvage,' said the Master of the Rolls, 'is not 'recoverable in the Admiralty Court. Life salvage, it is true, may by statute 'be payable under some such circumstances, but then it must be paid by the 'Board of Trade.' For circumstances in which no salvage reward was given in consequence of misconduct of the salvors, see *The Yan-Yean*, May 25, 1883, L.R. 8 P.D. 147. The *United Service* was damaged owing to negligence of her tug, but the owners of the tug were held to be protected from liability by the terms of the towage contract (the *United Service*, Jan. 23, 1883, L.R. 8 P.D. 56).

Digitized by Google

her 130 miles, the hawsers parted in severe weather, and the *Benlarig* was left in a more dangerous position than she was at first. The Court *held* that no salvage reward had been earned, but that the towers were entitled to £400, as adequate remuneration for what they had done towards fulfilling their contract (*The Benlarig*, Nov. 13, 1888, L.R. 14 P.D. 3). A somewhat similar case came before the Court of Appeal shortly afterwards, where the *Howick* fell in with the disabled *Westbourne* at a distance of about 260 miles from Gibraltar and 60 miles from Carthagena, and agreed to tow her to Gibraltar for £600. The next day the weather was still worse, and all the hawsers broke, save one. The *Howick*, therefore, towed the *Westbourne* to Carthagena instead of to Gibraltar. It was *held* in an action for salvage that circumstances had entirely altered the service, and £900 was awarded as salvage in the Admiralty Court. The Court of Appeal adhered. It had become impossible to carry out the original contract. 'The 'ship was in such danger that she required to be saved 'promptly, and she was saved by the prudence of the 'salvers. Under those circumstances,' said Lord Esher, 'the Court of Admiralty had authority to deal with the 'question as though no contract had been made' (*The Westbourne*, June 24, 1889 (C. of A.) L.R. 14 P.D. 132).

In the following case, the salving vessel arrived *too late*. The question between parties was as to whether an obligation of immediate despatch was implied in the agreement.

By the terms of a charter-party entered into between the agents of Æneas Mackenzie, salvage contractor, Stornoway, and William Liddell, manager and sole partner of the New Clyde Towing Company, Liddell undertook to let the steam-tug *Commodore*, for the sole use of the charterers and for their benefit, for the space of one or four weeks, at the charterer's option, 'commencing from the 8th Sep- 'tember, at which date the vessel is to be at the disposal 'of the charterer at Greenock,' the captain 'to use all and 'every despatch possible in prosecuting the voyage.' The agents telegraphed to Mackenzie on 7th September: 'Tug '*Commodore* is coaling; will leave Greenock to-night 'about midnight;' and the same afternoon Liddell tele-

Digitized by Google

graphed to his agent in Greenock: '*Commodore* fixed 'for Stornoway job. Wanted to leave to-night,' &c. The tug, owing to an engagement to shift a vessel in Greenock harbour, which occupied an hour in the morning of the 8th, and having to finish coaling (the whole of which might have been executed in six hours), did not leave Greenock until 2.30 on that day, and, in consequence, arrived too late to execute a contract entered into by Mackenzie to salve a vessel on the rocks in the Gairloch, Ross-shire, that vessel, the *Tolfaen*, having been warped off the rocks and beached. Had the *Commodore* arrived twelve hours before she did, she would have been in time to fulfil the contract. Mackenzie raised an action against Liddell for loss of profit caused by Liddell's breach of contract in not sending off the tug at the earliest moment on 8th September. Liddell maintained that the meaning of the charter-party was that the tug was to sail any time on the 8th, and that his contract had been fulfilled. It was *held* by the Second Division, confirming the judgment of the Lord Ordinary, Lord Lee (Lord Young doubting), that the true meaning of the contract was that the tug was to sail at the earliest moment of the 8th, and that Liddell was liable for the loss caused by his breach of contract (*Mackenzie* v. *Liddell*, February 28, 1883, 10 R. 705). See also Guthrie Smith, 'The Law 'of Damages,' pp. 388, 389.

Two Salvors.

Two Salvors.

The *Harvest Queen* took the *Anglia* in tow on perceiving a signal of distress. Thereafter the *Matin* came up, and, at the request of the master of the *Anglia*, a hawser was run out from the *Anglia* to the *Matin*. Both vessels then towed the *Anglia* to St. Abb's Head, when, the *Matin's* tow-rope having broken for the third time, the *Matin* at the request of the *Anglia* proceeded to Dundee to get a tug to help the *Anglia* over the bar of the Tay. The *Harvest Queen* towed the *Anglia* to the harbour of Dundee until she was placed in safety, but in crossing the bar the *Anglia* had the assistance of the tug which had been sent out by the *Matin* for that purpose.

Digitized by Google

In an action by the owners of the *Harvest Queen* for salvage, a question was raised by the owners of the *Anglia* as to whether the *Harvest Queen* was to be considered as sole salvor. The Lord Ordinary (Rutherfurd Clark) considered that she was sole salvor; 'at any rate, 'the assistance rendered by the *Matin* was not material,' p. 743, and the Lord President expressed a similar opinion, p. 746 (*Duncan* v. *Dundee, Perth & London Shipping Co.*, '*Anglia*,' March 8, 1878, 5 R. 742).

In the case of *The Livietta*, Jan. 30, 1883, L.R. 8 P.D. 24, the Norwegian brig *Julie* fell in with the Italian derelict vessel the *Livietta* in the North Sea, between Heligoland and the Dogger Bank. Two men from the *Julie* succeeded in bringing the *Livietta* to within three miles of Dungeness, where she was taken in tow by the *Walton*. The owners of the *Julie* and of the *Walton* raised actions for salvage; the Admiralty Court awarded three-fifths of the salvage award to the owners, master, and crew of the *Julie*.

Salvage or Towage?

Salvage or Towage.

The difficulty of distinguishing between these two services has been recently considered by the Scottish Courts. 'If 'the salvage service becomes necessary in the course of 'the performance of an agreement for towage,' says Lord Tenterden, 'or the towage service has ceased to be possible 'by reason of tempestuous weather, or unforeseen or extra-'ordinary peril, and salvage service be rendered by the 'towing vessel, a preliminary agreement for merely towage 'services will be no ground for refusing to the towers a 'salvage reward—mere towage service being confined to 'vessels which have received no damage,' Abbott, p. 548. That the tow should have received no damage is possibly stating the case rather low, as the tow, although not damaged so far as to be unseaworthy, may be unable to proceed, and in that case a claim for salvage arises.

The *Berlin*, 423 tons register, with engines of 90 horse power, left Hamburg for Leith on 24th September, 1881. The following morning (Sunday) her propeller shaft broke; all sail was made, and the weather being fine, she continued

Digitized by Google

on her voyage. On the afternoon of Wednesday, the 28th, the steamship *Vulcan*, 372 tons, on a voyage from Middlesborough to Flensburg, hove in sight, and seeing signals of distress, went to the assistance of the *Berlin*. The *Berlin* had by this time performed the greater part of her voyage, and was then some sixty or seventy miles from the English coast, and about 250 miles from the coast of Norway. There was a dead calm when the *Vulcan* came up. The captain of the *Vulcan* wished to make for the Tyne, but the captain of the *Berlin* insisted on going to Leith. No terms were fixed, but the *Vulcan* took the *Berlin* to Leith. A gale sprung up before Leith was reached, but the chief danger in the passage to Leith consisted in the risk there was that the towing hawser might break from chafing. There was no scarcity of water or provisions on the *Berlin*, although precautionary measures had been taken. The owners of the *Vulcan* claimed £4000 for salvage, including detention and loss on her own voyage through the deviation to help the *Berlin*. The owners of the *Berlin* offered £500 as towage. The Lord Ordinary (Kinnear) found the case to be one of salvage, but that £500 was the amount due for such salvage services. The owners of the *Vulcan* reclaimed, and argued that the sum awarded was too small, the services being clearly salvage services, and, the evidence being that the *Berlin* was in great danger when she was picked up, this was an element always considered in such cases. The owners of the *Berlin* argued that the service was no more than twenty-six hours' towage. The First Division adhered to the Lord Ordinary's findings. 'It is impossible 'to deny,' said the Lord President, 'that the *Berlin* was 'in a situation of considerable peril. It was not in one 'sense "immediate" peril, because there was no existing 'cause which could produce immediate destruction or 'damage, but she was, at all events, at the mercy of the 'winds and waves. I do not think, therefore, that there 'can be any doubt that when the *Vulcan* came to her 'assistance, *salvage services* were performed in the proper 'sense of the term.' Lord Mure, in concurring (as did the other Judges) said, 'On the evidence, this is clearly a case

Digitized by Google

'of salvage and not of towage, seeing that the salved 'vessel was discovered in a disabled condition in the 'North Sea at a considerable distance from shore, and 'unable to make any way' (*Owners of the 'Vulcan'* v. *Owners of the 'Berlin,'* July 6, 1882, 9 R. 1057).

A later case showed, however, further difficulty as to the rule for distinguishing between salvage and towage services:—

In *Lawson* v. *Grangemouth Dockyard Company*, 15 R. 753, decided by the First Division of the Court of Session on June 14, 1888, there was little conflict as to the facts. The point of the case lay in the construction, in marine law, to be placed on those facts; particularly where the distinction lay between salvage and towage. The *Tabasqueno*, returning to Grangemouth from her trial, ran for about one-sixth of her length upon a bank or breakwater composed of loose stones and mud on the west side of the entrance to the river Carron, and remained fast. A passing tug was hailed to assist her, but failed to tow her off, and signals were made to another tug steamer, the *Cruiser*, which was at the time engaged in towing a sailing vessel past the entrance of the harbour down the Forth. The *Cruiser* cast off the sailing vessel, and, at considerable risk, and with the loss of her hawser and other damage requiring her detention for two days in port, drew the *Tabasqueno* off the bank.

The pursuer, the owner of the *Cruiser*, claimed £500 as salvage, pleading that the defenders' ship, the *Tabasqueno*, having been stranded and in imminent danger of being wrecked, and the pursuer's tug having saved her, he was entitled to *salvage*. The defenders made a tender of £20, and pleaded that the pursuer was not entitled to compensation as for salvage, the services rendered by his tug being *towage*, and not salvage services. The pursuer endeavoured to show that the *Tabasqueno* had mounted over the breakwater, the consequence of which would probably have been that upon the retiral of the tide the stem of the vessel would have sunk down, and the vessel would have capsized. The defenders' contention, which the Lord Ordinary (Fraser) *held* to be proved, was that she remained

Digitized by Google

fixed in the mud, and would have floated off with the tide. 'The wind was light,' says the Lord Ordinary in his opinion, 'and there was no danger to be apprehended from 'rough weather. The scene of the occurrence was in the 'channel of an inland river, and there are here, therefore, 'wanting several of the elements which induce Courts to 'give large compensation for such services.' At the same time the Lord Ordinary thought 'the prompt and efficient 'assistance' of the *Cruiser* should be recognised, and he gave decree for £50. The defenders reclaimed, arguing that the Lord Ordinary had erred in not applying his mind to the question, were the services rendered those of salvage or of towage? If they were salvage services, then the reclaimer argued that the award of £50 was not too large, but if they were towage services, then it was clearly excessive. To constitute salvage services, the vessel saved, it was contended, must be in probable danger of shipwreck or serious injury; if the assisting vessel performs a service which she holds herself out to do, then the service is that of towage, and this they urged was the case here.

The Court adhered to the Lord Ordinary's judgment, the Lord President dealing at some length with the circumstances which led him to the conclusion that the services of the *Cruiser* were those of towage and not of salvage. 'The answer to that question (salvage 'or towage),' said the Lord President, 'must depend 'upon whether the vessel which received the assist- 'ance was in danger, and was rescued from it by the 'services which were performed. There is a great deal of 'conflicting evidence upon this point—and I think the 'point is a very narrow one—but upon the whole, I think 'it is not satisfactorily proved that the vessel was in dan- 'ger because they invoked the services of the tug. They 'put up signals of danger or distress, and upon that invi- 'tation the tug went to her assistance. But assuming that 'she was not in danger, although she was thought to be 'so, what was the nature of the services rendered? The 'benefit which the vessel derived was that she was dragged 'off the breakwater or mud-bank on which she had stuck, 'and was brought back into the channel of the Carron. I

Digitized by Google

'think that was a service of very considerable difficulty, 'and involving risk to the tug, to her crew, and to all her 'appliances.' The Lord President's view was, therefore that the services rendered were those of towage of exceptional risk, deserving exceptional reward. Lord Mure concurred; but Lord Shand, though not dissenting, was obviously inclined to regard the case as one of salvage. 'In the first place,' said his Lordship, 'those who asked 'the assistance thought the services were salvage services. 'In the second place, the tug was asked to give her assist-'ance by parties who thought there was risk and danger, 'and I do not think she would have left the vessel she was 'towing unless she had been so called. In the third place, 'the vessel was fast on the bank for one-sixth of her 'length. No doubt it was a bank of mud, but there were 'also tons of stones forming the embankment, and there 'was, I am disposed to think, a risk of the vessel heeling 'over and of the stones going through her side; and these 'circumstances all rather tend to the inference that the case 'was one of salvage—though the payment to be made 'might not in the circumstances be large.'

Without questioning the decision of the Court in the above case, it is not unlikely that the grounds on which Lord Fraser and the Lord President gave their decision may invite some comment. Shortly put, the decision of the Court seems to be that, seeing the *Tabasqueno* was probably in no danger, though everyone at the time believed her to be in danger, no salvage services were rendered. This introduces a very delicate point in such cases, for it is evident that in this view the question of salvage and towage cannot be determined until, it may be, long after the service is completed. It has been said, and there are many cases, English and American, to be cited in support of the statement, that towing a vessel disabled and in distress cannot by possibility be compared to an ordinary towage service 'if it leads to the rescue of the 'vessel from danger,—as towing a vessel off the rocks and 'into a harbour.' No doubt the Court regarded the case as one, in Lord Shand's words, 'of special service short of 'salvage;' yet, again, it has been held in America that

M

Digitized by Google

the fact that a vessel is aground is enough to show that she is in a situation to require salvage services, and again, when the signalled vessel was a tug which went to the signalling ship's assistance and rescued her from peril, it was held to be a salvage service. Bell's definition of a person entitled to salvage (Prin. 444) is 'one who is not 'otherwise in duty bound to interfere for the safety of the 'ship;' and in the case of *The Owners of the 'Vulcan'* v. *The Owners of the 'Berlin,' supra*, where the *Berlin* on her way from Hamburg to Leith broke her propeller, and, becalmed or drifting, was met by the *Vulcan*, which, on perceiving signals of distress, without risk or difficulty towed her to Leith, it was held, as we have seen p. 160, that this was a proper service of salvage and not of towage, a case on all fours with that of *The Jubilee*, 42 L.T. 594; and again, where a ship was disabled in hull 'or *is aground*, or where 'the performance of the towage service is necessarily attended with danger or extraordinary labour or risk to 'the salving vessel,' the service has been held in England (*The Princess Alice*, 3 W. Rob., 138, 140; 6 N. of C., 584, 585), to be one of salvage and not of towage. See also *The Erato*, June 29, 1888, L.R. 13 P.D. 163 (vessel ashore on the Parkin Rock in the Red Sea); and *The Cargo ex Ulysses*, June 25, 1838, L.R. 13 P.D. 205 (vessel ashore on the island of Jubal Sereea in the Red Sea), in both of which cases salvage services were held to have been rendered. Reference may also be made to the case of *The Aglaia*, July 16, 1888, L.R. 13 P.D. 160, where the crew were frost-bitten, and the vessel was short of provisions, and it was held that salvage service had been rendered.

The decision in the *Tabasqueno* case leads to the inference that, in the view of the Scottish Courts, an owner claiming to have rendered salvage services must show that the assisted ship was *actually* in danger, and did not simply *profess* to be in danger. This may prove difficult law to apply to future cases, for it is obvious—(1) that no vessel is likely to be represented as in danger if she is not believed to be so; and (2) that it is the next thing to an impossibility for a vessel such as the *Cruiser* to say in such circumstances as those of the *Tabasqueno* whether there

Digitized by Google

is no danger or great danger. Perhaps the wisest course will be to regard the above decision as intended to be applied only to the peculiar circumstances of the case before the Court, and not as one directly affecting marine law in its wider aspects.

In the case of *The Galatea*, May 22, 1858, Swabey's Adm. Rep. 349, where it was *held* that while the contract to tow embraced the risk of ordinary bad weather, it was put an end to by weather rendering such towage impossible, and subsequent services were of the nature of salvage. This is precisely the reverse of the circumstances in the case of the *Commodore* (already noticed, pp. 155-6 on another point), where it was held that a contract for salvage services not promptly rendered may be partly compensated by towage allowed. The owner of a tug contracted to execute a salvage contract which would have entitled him to receive £600. The tug arrived too late, and he only received £50. He was held liable in damages, and for breach of contract, and argued that the damages should be merely nominal, as he had not received notice that he ran any special risk if his tug was too late. The Court *held* that the contract was a salvage contract, and assessed the damages at £250, taking into consideration the facts that the salvage contractor had received £50, and had obtained a new, though not equally advantageous contract to repair and then to tow the stranded vessel (*Mackenzie* v. *Liddell*, Feb. 28, 1883, *Commodore*, 10 R. 705. In the *Commodore's* case the weather had moderated, the risk had vanished, and the subsequent services were of the nature of towage.

Calculation of amount of Salvage.

Amount of award.

In arriving at the measure of salvage to be paid, it was observed by Lord Rutherfurd (Lord Ordinary) in *Duncan* v. *D. P. & L. Steamship Co.*, March 8, 1878, 5 R. 744, that the amount 'seems to be left to the discretion of the Court 'in each particular instance.'

The value of the *Anglia*, the damaged vessel, after the accident, was £11,000, and of the cargo, £20,000. The

Digitized by Google

value of *Harvest Queen*, salvor, was £8000. She claimed £8000 as salvage. The Court gave £1500.

The Lord President observed, p. 749, that he thought the value of the salving vessel 'ought to be kept in view as 'well as value of subjects saved.' Lord Mure thought this was 'a very fair medium.' The Court will not interfere with amounts on appeal, unless they are excessive or utterly inadequate, Lord Mure observing, that in the case of *The Meg Merrilees* (Jan. 21, 1847, 3 Hagg. Adm. 346), 230 tons, and insured for £9500,—£750 was allowed as salvage. 'The vessel, no doubt, was picked up some- 'where about the Scilly Islands, and may have been in 'greater danger than the *Anglia*, and have caused more 'risk and trouble to the salvors.' The Court adhered. This case is not referred to in Newsom's Towage, &c.

Elements to be considered.

There are four elements according to Lord Deas in *Owners of the 'Vulcan'* v. *Owners of the 'Berlin,'* July 6, 1882, 9 R. 1062 to be taken into account:—

(1.) The enterprise of the salvors with the risk they run.

(2.) The degree of peril encountered by the salved ship.

(3.) The labour and time employed by the salvors.

(4.) The value of the ship salved.*

The Berlin.

In the case of the *Berlin*, 423 tons, which was the vessel salved, the cargo was valued at £11,205, and freight for it was £275, 16s. 1d. The salvor was the *Vulcan*, 372 tons, built in 1874 at a cost of £10,000. The *Vulcan* claimed £4000, urging that a delay of seven days on her voyage from Middlesborough to Flensburg had occurred, due to towing *Berlin* to Leith. The *Berlin* offered £500, alleging towage (see *supra*, p. 158). The Court found the services were salvage, but gave only £500 therefor. The Lord President said: 'The inquiry naturally arises what was the value of these 'seven days to the owners of the *Vulcan*? Her freight 'for the voyage from Middlesborough to Flensburg was '£257, and the length of the voyage is three and a-half

* Similar rules were also laid down in *The Werra*, Dec. 20, 1886, L.R. 12 P.D. 52.

Digitized by Google

'days. Making a moderate and reasonable allowance for 'loading and unloading, it will be found that about eight 'days were occupied by the *Vulcan* in earning the '£252. Therefore the sum per diem which she earned may 'be put at £31, 10s., and multiplying that sum by seven, 'the number of days occupied in accomplishing the salvage, 'the amount produced is about £220, being a little less 'than half the sum allowed by the Lord Ordinary. So far 'as the *owners* are concerned, I do not see that they can 'expect to be remunerated at any greater rate. The ques- 'tion is therefore reduced to this, whether the other £250 'which the Lord Ordinary has allowed is sufficient remun- 'eration for the services of the *master* and *crew*. Looking 'to the circumstances of the case, there is an absence of real 'risk and damage to the *Vulcan* and her crew, and the 'service is confined to a small amount of labour and skill in 'its performance. I am not inclined to say that the Lord 'Ordinary has gone wrong in the estimate which he has 'formed.' *Ibid.*, p. 1061.

In the case of *Lawson* v. *Grangemouth Dockyard Co.*, 15 R. 753, June 14, 1888, the amount claimed as salvage was £500; defenders tendered £20 as towage. The salved ship, the *Tabasqueno,* was valued at £8000. The Court awarded £50 as towage. See Newson, 'Amount of salvage awards,' *Salvage, &c.*, pp. 61, *et seq.*

The case of the *Thomas Allen* was very much that of the *Berlin.* She was 'a steamship which had lost her 'propelling power.' The value of the cargo and freight was $126,775. The judge of the Vice-Admiralty Court at Halifax, Nova Scotia, awarded $12,000 for salvage services rendered to her. The Privy Council reduced the remunera- tion to $7500, being of opinion that the difference between the sum awarded, and that which would be liberal, was so large as to require correction (*Owners of the 'Thomas 'Allen'* v. *Gow,* Dec. 11, 1886 [1866 by mistake in Reports], L.R. 12 App. Cas. 118). In the case of *The Raisby* it was *held* that the owners were not liable to pay salvage in respect of the cargo (April 17, 1885, 10 P.D. 11). The salvors of the *Prinz Heinrich,* of the value of £3500, with a cargo worth £14,000, which had been three days on

Recent English cases.

Digitized by Google

rocks in Castraes Bay, in the Gulf of Tartary, agreed with the master for £200 for each day of service, and £2000 more if the vessel were got off the rocks during the salvors' attendance. The Court of Appeal *held* the agreement was fair and reasonable, and that the owners were liable for the whole amount, without deduction for salvage of cargo (*The Prinz Heinrich*, Jan. 19, 1888, 13 P.D. 31). 'It is said,' observed Butt, J., 'that the case of *The Raisby* is 'opposed to this view, but I am of opinion it is inapplic-'able to the facts of the present case,'—a distinction being definable between an agreement generally to tow or to salve a ship, and one for a salvage service for a particular sum. The value of the salving ship will not substantially affect the amount of salvage, *The Werra*, Dec. 20, 1886 12 P.D. 52. Where a vessel, whose cargo and freight were valued at £52,665, was towed, according to the towers, about fifty-five miles and for nine hours, and, according to the towed, about thirty-five miles and for seven hours, in fresh water, the masters had agreed that £200 should be the towage payable. The crew of the tower raised an action for more than £200. The Court upheld the agreement, Butt, J., observing, 'So far as I have any observation 'to make on the amount, I think it is almost too large a 'sum for the services rendered,' *The Nasmyth*, Feb. 27, 1885, 10 P.D. 41.

In the case of *The Lancaster*, Dec. 7, 1883, the Court of Appeal refused to interfere with an award of £6000 for salvage services to a vessel which had run aground on a reef in the Red Sea, nearly five miles from Suez (L.R. 19 P.D. 14). *The Camellia* received £200 as salvage for towing the *Victoria*, value £35,000, cargo £41,536, and freight, £4692, for twelve hours, bringing her ten to fourteen miles nearer her proper track, and eighty-five miles on her course (*The Camellia*, Jan. 22, 1883, L.R. 9 P.D. 27). For the salvage of *The City of Chester*, value £90,000, and cargo and freight, £89,535, the Admiralty Court awarded the salvors (the value of whose ship was £85,000, and of her cargo and freight, £89,535), the sum of £4500 to the owners, £500 to the master, and £1500 to the crew. The Court of Appeal varied the decree by awarding £1000 to

Digitized by Google

the shipowners for the actual services rendered, and referred to the registrar and merchants to ascertain cost of repair to the salving vessel, and as to her detention (*The City of Chester*, July 30, 1884, L.R. 9 P.D. 182). Lindley, L.J., referred to the importance of remunerating salvors so as to make it worth their while to succour ships in distress, as this consideration should tend towards liberality towards the owners of the salving vessels, as well as to her captain and crew, p. 203. Evidence of loss of earnings by a salving vessel, and of the costs of her repair, necessitated by the salvage services she rendered, was admitted in the case of *The Sunniside*, May 24, 1883, L.R. 8 P.D. 137, but while those are to be regarded as elements in arriving at the proper salvage award, they are not to be considered as fixed amounts to be added to a salvage award.

Although the owners of the salving vessel are also the owners of the salved vessel, it has been held that they are entitled to salvage from the owners of cargo in the salved vessel (*The Cargo ex Laertes*, June 25, 1887, L.R. 12 P.D. 187); not, however, when the necessity for the salvor's services has been occasioned by an accident, which implies that the salved vessel was not seaworthy when she began her voyage, although, even in that case, the master and crew are entitled to salvage (*The Glenfruin*, March 31, 1885, L.R. 8 P.D. 103).

Demurrage arising out of a Contract for Towage.

It was agreed that a Liverpool tug boat should tow the *Syren* from Queenstown to Stranraer. During the voyage, the towing hawser broke in a gale, and the *Syren* and tug put into Luce Bay. There they waited seven days; the tug twice proposed to start, but the captain of the *Syren* declined to go, and refused to allow the tug to go without him. On the completion of the voyage, the owners of the tug claimed, in addition to the stipulated sum of £85, a further sum of £70 for seven days' demurrage. The contract provided that demurrage was payable at £10 a-day, unless detention was caused by stress of weather. 'No extra charge to be made in case of acci-'dent, unless for detention arising therefrom, to be paid for

Digitized by Google

'as per rate mentioned above.' The First Division of the Court of Session *held* (Lord Ardmillan *dissenting*), that the tug owners were entitled to the demurrage they claimed (*New Steam Tug Co.* v. *M'Clew*, March 19, 1869, 7 Mac. 733).

As the delay here occurred without the fault of either tug or tow, the demurrage seems, in law, only to have been due upon the construction of the contract, for in *The Betsey*, 2 W. Rob. 167, no extra remuneration, in consequence of delay occurring without fault, was found claimable. Newson, 148.

Digitized by Google

CHAPTER VI.

MARINE INSURANCE.

UNDERWRITERS MAY RELY ON OBSERVANCE OF PROVISIONS OF MERCHANT SHIPPING ACT BY BRITISH SHIPOWNERS—BROKER'S KNOWLEDGE — BREACH OF WARRANTY — RISKS INSURED AGAINST—CONSTRUCTIVE TOTAL LOSS—IMPROPER NAVIGATION—EXCEPTED RISKS—TIME-POLICY—WHERE TWO COLLIDING VESSELS BELONG TO SAME OWNER—RELATION OF TUG AND TOW—FOREIGN AVERAGE SETTLEMENT—MEANING OF 'AT OUR RISK'—'ALL OTHER PERILS'—RIGHT OF MORTGAGEES TO PREVENT SHIP SAILING WITHOUT BEING INSURED—PROCESS—JUSTICIARY CASES.

Hutchinson & Co. v. *The Aberdeen Sea Insurance Co.; Blackburn, Low & Co.* v. *Vigors; Blackburn, Low & Co.* v. *Haslam; Birrell* v. *Dryer; Harvey & Co.* v. *Seligmann; Shepherd* v. *Henderson; Kenneth & Co.* v. *Moore; Simpson & Co.* v. *Thomson; Barrie & Johnston* v. *M'Cowan; Robinows & Marjoribanks* v. *Ewing's Trustees; Delaurier* v. *Wyllie; Lauring & Co.* v. *Seater; Watson & Co.* v. *Shankland; Nelson, Donkin & Co.* v. *Browne, &c.; Lord Advocate* v. *Bourdais.*

WHILE the cases, relative to marine insurance, decided by the Scottish Courts, have not been numerous, they are not without features of interest.

36 & 37 Vict. c. 85.

That underwriters are entitled when dealing with British shipowners to rely upon the observance of the provisions of the Merchant Shipping Acts, as to inspection, is illustrated by the decision in the case of *William Hutchinson & Co.* v. *The Aberdeen Sea Insurance Co.*, '*The John George*,' May 23, 1876, 3 R. 682, where a fictitious sale and the transfer from the British to the Belgian flag in order to avoid the inspection provided by the Merchant Shipping Act, 1873, was held to void a policy of insurance underwritten by the Insurance Company, although they did not maintain that the vessel was unseaworthy when she sailed upon the

Digitized by Google

voyage for which she was insured, and on which she was wrecked; the Court observed that the fictitious sale was fraudulent.

Broker's knowledge.

An underwriter is entitled to believe that every material fact has been communicated to him that would affect an insurance, including every material fact of which the assured in the ordinary course of business ought to have knowledge (*Proudfoot* v. *Montefiore*, L.R. 2 Q.B. 511, 521). How far the knowledge of a broker can be regarded as the knowledge of the person who desires an insurance, was considered in two cases arising out of the same set of circumstances. The cases were decided in the English Courts, but all the matter of the cases was entirely Scottish. Messrs. Blackburn, Low & Co., underwriters, Glasgow, desired to cover their risk over the *State of Florida* which had been effected by the usual brokers for the ship, Rose, Murison & Thomson, and the circumstances are taken from the outline of facts given in 12 App. Cases at p. 531. The *State of Florida* had left New York on 11th April, 1884, and was due, in Glasgow, about the 24th or 25th April. On the 30th April, Blackburn, Low & Co. tried to re-insure through their London brokers, Roxburgh, Currie & Co., but would not give the terms asked for. Next day, 1st May, they asked Rose, Murison & Thomson to effect a re-assurance for £1500 at 15 guineas through Rose, Thomson, Young & Co., the London agents of Rose, Murison & Thomson, and a telegram was, accordingly, sent to London. After the despatch of the telegram and before an answer came, Murison, a member of the firm of Rose, Murison & Thomson became aware of rumours concerning the ship which were material to the risk, but those rumours, which afterwards proved to be facts, were never communicated to Blackburn, Low & Co., or to Roxburgh, Currie & Co. The answer received from the London agents to the telegram mentioned above, was, 'Twenty guineas paying freely, 'and market very stiff; likely to advance before day is 'out.' This answer Rose, Murison & Thomson showed to Blackburn, Low & Co., and sent a telegram in their name to Rose, Thomson, Young & Co., 'Pay twenty guineas.' The answer to this was sent direct to Blackburn, Low &

Digitized by Google

Co. who ultimately re-insured for £800 at 25 guineas through Rose, Thomson, Young & Co.

On 2nd May, Blackburn, Low & Co., through Roxburgh, Currie & Co., effected a policy of re-insurance for £700 at 30 guineas lost or not lost. The *State of Florida* had in fact been lost some days before the plaintiff tried to re-insure. It was admitted that Blackburn, Low & Co. and Roxburgh, Currie & Co. acted in good faith throughout.

Both re-insurances came before the English Court; the second policy in *Blackburn, Low & Co.* v. *Vigors* (H. of L.), August 9, 1887, 12 App. Cas. 531, and the first policy in *Blackburn, Low & Co.* v. *Haslam*, June 4, 1888, 21 Q.B.D. 144. In the second policy case, the House of Lords *held*, reversing the judgment of the Court of Appeal, and restoring the judgment of Day, J. (17 Q.B.D. 553), that the knowledge of Rose, Murison & Thomson was not the knowledge of Blackburn, Low & Co., who were entitled to recover upon the policy for £700. In the first policy case, the Queen's Bench Division *held* that the policy was void on the ground of concealment of material facts by Rose, Murison & Thomson; Pollock, B., observing that, being incapacitated from continuing the negotiation in the sense that no valid policy could be founded upon it—'They could not put themselves in a better position by 'telegraphing in the name of their principals, instead of 'their own name,' p. 150, though the policies might effect a valid policy by a fresh and independent negotiation carried on through another agent, as illustrated in the case against *Vigors*. The learned judge observed that the judgment in *Haslam's* case in no way conflicted with the decision in that case:—'Although the opinion was 'expressed in that case that it was not the duty of the 'agents to communicate to their principals the information 'which they had received, we take that opinion as 'applying to the particular facts before the House which 'showed that, before the negotiations for the policy sued 'upon had commenced, all connection of the plaintiff '[Blackburn, &c.], with his former brokers had ceased, and 'we cannot suppose it would be intended to apply to the

Digitized by Google

'facts proved in the present case, which showed that so 'far from the connection between the principals and their 'agents ceasing, the brokers used the name of the 'principals to continue the negotiations, and the principals 'adopted the acts and themselves continued and carried 'out what their brokers had commenced,' p. 153.

Breach of Warranty.

Warranty.

In the following case the construction of a warranty 'No 'St. Lawrence' decided rather a point of usage of trade, than any legal principle.

The wooden barque the *L. de V. Chipman* was insured under a time policy which contained the warranty 'No St. 'Lawrence between 1st October and 1st April.' Between these dates she entered the Gulf of St. Lawrence, but not the River St. Lawrence, and she was subsequently lost at sea within the period of the policy. The shipowners brought an action for a total loss against the underwriters, who pleaded breach of the warranty. On a proof it appeared that the River St. Lawrence and the Gulf (into which the river flowed) were both highly dangerous to navigation during the excepted period, though the respective dangers were not precisely identical. The Second Division of the Court of Session held, reversing the judgment of Lord M'Laren, Lord Ordinary—(1) that the warranty was ambiguous; (2) that no general or local usage of trade had been shown to exist by which the warranty was to be construed; (3) that, being a penal clause, it was to be construed strictly *contra proferentes;* and consequently (4) that the underwriters were not freed from liability by reason of the vessel having been in the Gulf within the excepted period. Lord Craighill dissented, being of opinion that the warranty was not ambiguous, and prohibited both the River and the Gulf (C. of S., Feb. 8, 1883). The defenders appealed to the House of Lords, who *held*, reversing the judgment of the Second Division that 'No St. Lawrence' was a warranty against entering either the Gulf or the River St. Lawrence during the time fixed (*Birrell* v. *Dryer*, March 17, 1884, 11 R. (H. of L.) 41).

Digitized by Google

The Court of Session within three weeks of its decision in the above case dealt with a somewhat different class of misunderstanding.

Alleged misrepresentations.

The owner of the barquentine *Eunice* had entered upon a time policy for six months; upon the wreck of his vessel, he raised an action, against one of the underwriters, concluding as for a total loss. The underwriter answered that when the policy was effected the shipowner's broker had represented to him that the vessel was to sail to Pernambuco with coals, and home with sugar; whereas the vessel had been already chartered for Imbituba with a cargo of iron, but it was not proved that the shipowner's broker knew this, and he denied that he had made any positive misrepresentation. It was proved that in such time policies it is the custom for underwriters to make inquiries as to the employment of the vessel, a policy for such a period being practically for a single voyage. The Second Division of the Court of Session *held* there had been no fraudulent representation, nor any representation of a fact material to the risk. The underwriter also pleaded concealment of material facts in respect he had not been shown the charter-party, which would have disclosed the dangerous nature of the port for such a cargo in such a ship. The Court *found* in fact—(1) that the port to which the vessel sailed was not one which was notoriously dangerous, and that the owner was not shown to have had any special knowledge of it; and (2) that it had not been proved that a cargo of iron in a wooden vessel was of such an exceptionally dangerous character that it ought to have been disclosed to the underwriter, and consequently held that the underwriter was liable for the sum sued for (*Harvey & Co.* v. *Seligmann*, '*Eunice*,' Feb. 27, 1883, 10 R. 680).

Constructive total loss.

Turning from the consideration of causes of vitiation, to the nature of the risks insured against, the case of the *Krishna* is important as bearing upon what is, and what is not, regarded as a constructive total loss.

The steamship *Krishna*, while on a voyage from Panjim to Bombay, was driven upon a sandy beach, on 23rd May, 1879, where she was abandoned, and became a wreck;

Digitized by Google

on 15th October the vessel was taken possession of by the underwriters, and was afterwards got off and towed to Bombay Harbour. The owner had given notice of abandonment to the underwriters on 7th June, and, on 1st October, raised an action against one of the underwriters for payment of the amount he had underwritten. The defender stated that the underwriters had always refused to accept of the pursuer's abandonment, and that, when taken into Bombay Harbour she was little injured. The Sheriff-substitute of Lanarkshire (Guthrie) found that the underwriters had not accepted abandonment, and that there was not a constructive total loss. The pursuer appealed to the Court of Session, and the Second Division pronounced an interlocutor, containing the following findings:—'Find that on or about the 7th day 'of June, 1879, the pursuer intimated to the under- 'writers in said policy that he abandoned the *Krishna*, 'and claimed as for a total loss: Find that the underwriters 'did not accept the abandonment: Find that the pursuer 'brought this action for indemnification of his loss upon 'the 1st day of October, 1879: Find that shortly after the 'stranding of the *Krishna* the south-west monsoon began 'upon the coast of India, and continued till the end of 'September or beginning of October, and that during its 'continuance it was impossible to get the *Krishna* afloat; 'But find that there was on the 7th of June, and continued 'thereafter to be, a reasonable prospect of her being got off 'the sandy shore on which she lay without greater expense 'than a prudent uninsured owner would reasonably incur: 'Find therefore that there was not at that date a constructive 'total loss of the ship.' The pursuer appealed to the House of Lords against the judgment (case in Second Division reported 25th February, 1881, 8 R. 518) on the grounds—(1) that the 'finding' that the underwriters did not accept the 'abandonment' was a mixed finding of law and fact, and that the interlocutor did not contain a distinct finding as to the facts bearing on the question raised on record whether the underwriters had done any acts inconsistent with the character of salvors, and inferring acceptance of the abandonment; and (2) that the finding 'that there was

Digitized by Google

'on the 7th June, and continued thereafter to be, a reason-
'able prospect of the ship being got off the sandy shore
'... without greater expense than a prudent uninsured
'owner would reasonably incur' was not sufficient to support the finding in law, 'therefore that there was not at 'that date a constructive total loss of the ship,' insomuch as it might have been practicable to get the vessel off at a reasonable expense, but in such a state as not to be worth repair, in which case there would still have been a constructive total loss. The House of Lords *held* that while in certain circumstances a finding 'that the underwriters 'did not accept abandonment' might have involved matter of law, on the present record the question of acceptance of abandonment was a pure question of fact; and (2) that though the practicability of removing the ship did not necessarily imply that there was no constructive loss, still, looking to the statements on record, the finding that there was no constructive total loss was to be read on the assumption that the vessel was capable of being repaired if its removal was practicable (*Shepherd* v. *Henderson*, '*Krishna*,' Dec. 1, 1881, 9 R. (H. of L.) 1).

Repudiation of abandonment.

Lord Penzance distinguished this case from *Hudson* v. *Harrison*, 3 B. & B. 97, by the underwriter's distinct repudiation of abandonment in *Shepherd's* case, p. 9. There was the same want of repudiation in *The Provincial Insurance Company of Canada* v. *Leduc*, L.R. 6 P.C. 224. In the case of *Peele* v. *The Merchants' Insurance Company* (American case), 3 Mason, 27, the vessel 'was cast upon the 'rocks, lost and bilged. The insurers were told by the 'underwriters, after they had given notice of abandonment, 'not to let their agent intervene in the matter. The 'underwriters' agents took possession of the vessel, and 'the Court said that any act which can only be justified 'under a right derived from abandonment, is decisive 'evidence of acceptance. I think your Lordships would 'hold that to be perfectly good law,' p. 9. Lord Blackburn observed:—'The law I take to be clear enough, that where 'a ship has been by the perils of the sea (though not 'actually destroyed—so that it is still a ship) so damaged, 'and placed in such a position that the owner of the ship

Digitized by Google

'cannot use her again as a ship, unless he incurs consider-
'able expense, or so situated that he is deprived of his
'control over her, and cannot use her unless he can get her
'out of that situation, which would generally both occupy
'time, and involve expense in repairs and otherwise—in
'such a case I take it the rule is, as I have always under-
'stood it for a great many years, as it was expressed by
'Mr. Justice Maule, in the case of *Moss* v. *Smith*, L.R. 9
'C.B. 94. He put it thus: We are dealing with a mercan-
'tile matter—we are dealing with mercantile law, and
'where a thing cannot be practically done in a mercantile
'contract, we think it cannot be done at all; if you cannot
'practically get a ship out, it is impossible to get her out;
'she is lost because she must stay there. And, further, he
'goes on to say, in mercantile matters what cannot be done
'without an expense in doing it, which would be unreason-
'able in proportion to the object, is to be considered as
'impracticable and impossible; and he gives the celebrated
'instance that a sixpence dropped into the water, which
'you can see lying at the bottom at a depth of twenty feet
'in clear water, is totally lost, because it would cost much
'more than the sixpence to get it up—it would cost more
'than it was worth. That is an apt illustration of the rule
'applying in such cases. It is called a "constructive total
'"loss." I do not quarrel with the phrase, although it is
'not, perhaps, quite correct.' His Lordship, continuing,
made the following observation on *Hamilton* v. *Mendes*, 2
Burr, 1198, and *Houldsworth* v. *Wise*, 7 B. & C. 794.

'Now we have to see how time enters into the question.
'Supposing the notice of abandonment was, at the time
'when it was given, justified on the ground, that at that
'time a reasonable person would think, and would reason-
'ably and properly act upon the notion, that the ship,
'situated as she was, was then totally lost within Mr. Justice
'Maule's rule, because he must have waited longer, and
'spent more than he could reasonably have done before he
'could get the ship back to be a ship—there is a question
'raised upon which I have an opinion. I have both
'expressed it in this House, and formerly I have also,
'I think, in advising this House, expressed an opinion upon

Digitized by Google

'the matter as far as regards English law. There is a
'considerable difference between the law of England and
'the law of some foreign countries, France in particular.
'In the law of England, where notice of abandonment is
'given, and the circumstances are such that the man may
'reasonably give it, but the underwriter refuses to take
'it, and afterwards an action commences, if in the *interim*
'that which the man who gave the notice of abandonment
'reasonably and properly believed to be a total loss turns
'out to be not a total loss, it cannot be held that it is. For
'instance, if a ship has actually been captured, and is
'apparently going off into the enemy's hands, and thereupon
'notice of abandonment is given, it is perfectly good as
'matters then stand. But an English frigate meets the ship
'and recaptures her, and brings her back before action is
'brought; then you must take it that it is not a case of
'"constructive total loss," in law at the time when the
'action is brought, and as Lord Mansfield said long before
'in *Hamilton* v. *Mendes*, 2 Burr, 1198, it is a rule of the law
'of insurance in England, that where a thing is safe in fact
'no artificial reasoning should be permitted to say that it
'is not. The case is quite different if the recapture puts
'the ship in such a position that the owner cannot get her
'without paying more than she is worth; that is the case
'of *Holdsworth* v. *Wise*, 7 B. & C. 794. But the law in
'foreign countries is different—certainly in France, where
'it depends, I think, upon express enactments in the
'famous Code of the Marine, the law is different alto-
'gether. The point seems to be a moot point, not
'yet finally decided in Scotland, and I am not going to
'express an opinion as to how it would be in Scotch law,'
p. 14.

A case not altogether without analogy was recently
decided by the Privy Council, where it was *held* that the
sale of a derelict, sold by salvors with its cargo for less than
the actual salvage services, constituted a total loss; it is not
necessary to constitute such a claim, that a ship should be
actually annihilated or destroyed (*Cossman* v. *West;
Cossman* v. *British America Assurance Company*, '*L. E.
Cann*,' Appeal from Supreme Court of Nova Scotia, 1887,

Digitized by Google

L.R. 13 App. Cas. 160). In this case the vessel had been scuttled and deserted by master and crew.

Improper Navigation.

An insurance association endeavoured to escape liability for damage to wheat caused by a taint communicated to it through the ceiling of a vessel having been saturated with a composition which had leaked from a previous cargo, by asserting that it came under the clause of exception for damage caused by 'improper navigation' (*Canada Shipping Company* v. *British Shipowners' Mutual Protection Association*, July 30, 1889 (C. of A.), L.R. 23 Q.B.D. 342, '*Lake Ontario*,') and referred to the case of *Carmichael* v. *Liverpool Sailing Shipowners' Mutual Indemnity Association*, '*Argo*' L.R. 19 Q.B.D. 242, but the Court of Appeal distinguished between the two cases. In *Carmichael's* case it was held, Lord Esher showed, that if there was negligence on the part of the shipowner or his servants before the navigation of the ship commenced, which had the effect of causing unsafe navigation with regard to the safety of the goods, that would make the navigation 'improper navigation,' but this case was different. Because a ship smells of creosote, improper navigation is not implied.

'Iron' includes 'Steel.'

A policy contained a clause, 'warranted no iron or ore or phosphate cargo exceeding the net ton register.' Steel was shipped in excess of the net registered tonnage. The word 'iron' was construed by the Court of Appeal in its generic sense, and as comprehending a cargo of steel (*per* Bowen, L.J.), and the Court *held*, in an action on the policy against the underwriters, that the warranty had been broken (*Hart* v. *The Standard Marine Insurance Co. Limited*, Jan. 28, 1889 (C. of A.), 22 Q.B.D. 499).

Time Policies.

In a time policy there is no warranty of seaworthiness. The well known case of *Dudgeon* v. *Pembroke*, March 28, 1877, '*Frances*,' 2 App. Cas. 284, is suggested by the following case, in which also an old vessel was the subject of the inquiry.

The *City of Manchester*, a wooden barque over twenty years old, classed A 1 at Lloyd's for seven years, and just passed her half-time survey, was insured for twelve calendar months from 2nd December, 1880. She reached Rio de Janeiro in safety, and left for Astoria; but when

Digitized by Google

approaching Cape Horn she encountered weather of such severity as caused her to leak badly, and ultimately she was put back for Barbadoes. The result of a survey was to show that the cost of repairing her would be greater than her value when repaired, and that her condition was due to the action of the wind and sea on rottenness of timber and other defects which had existed previously, but were then discovered for the first time. The owner raised an action against the underwriters, concluding as for a total constructive loss. The underwriters maintained that the vessel had been unseaworthy when the risk began, that she had not encountered weather of sufficient severity to be regarded as a peril of the sea; and, in consequence, while admitting that in a time policy there was no implied warranty of seaworthiness, they pleaded that her worthless condition when surveyed, not being due to the perils insured against, they were not liable for a constructive total loss, but merely for such minor damage as might be shown to have been due solely to the action of the weather. The Second Division of the Court of Session (without determining whether the ship had been unseaworthy when the risk on the policy began) *held* that the proximate cause of her condition when surveyed was a peril of the sea, and consequently that the underwriters were liable as for a constructive total loss (*Kenneth & Co.* v. *Moore, &c.*, '*City of Manchester*,' Feb. 2, 1883 10 R. 547). Lord Young observed:—'The counsel for the 'underwriters endeavoured to make the distinction be- 'tween an actual total loss and a constructive total loss. 'I am not able to see the distinction. I could understand 'this case—and, indeed, upon that my opinion would have 'inclined to be favourable to the underwriters—a vessel 'does receive some damage from perils of the sea, and 'upon measures being taken to ascertain the extent of 'them, the true state of the vessel is discovered, and then 'she is pronounced to be not worth repairing, because the 'cost of renewing her constitution, which is gone from the 'decay of long life, *plus* the cost of repairing the damage, 'inconsiderable though it might be, done by the sea, would 'amount to more probably than her value when repaired.

Digitized by Google

'I say, upon such a state of facts, I should be inclined to 'favour the case of the underwriters,' p. 556. But in this case it was the very bad weather which disclosed the unseaworthiness.

Collision.

Underwriters are liable for damage resulting from collision, however caused. A curious question is suggested for consideration when both the colliding vessels belong to the same owner.

On 4th February, 1876, the s.s. *Fitzmaurice* ran down and sank the s.s. *Dunluce Castle* near Lowestoft. Both vessels belonged to the same owner. He presented a petition under the Merchant Shipping Acts, 1854 and 1862, for limitation of his liability, as owner of the delinquent vessel, to £8 per ton, and for ranking claimants on the fund. The House of Lords *held* (reversing the judgment of the First Division of the Court of Session) that underwriters who had paid insurance to the shipowners for the loss of the sunk vessel, were not entitled to claim upon the fund, as the owner himself could not have done so, and they were no more than his assigns (*Simpson & Co.*, &c. v. *Thomson*, &c., '*Fitzmaurice*' and '*Dunluce Castle*,' Dec. 13, 1877, 5 R. (H. of L.) 40). The Lord Chancellor (Cairns) observed that the case of *Yates* v. *Whyte*, Jan. 26, 1838, 4 Bingham's New Cases, 272, involved questions analogous to and decisive of the case. There the plaintiff sued the defendants for damaging his ship by collision, and the defendants sought to deduct from the amount of damages to be paid by them a sum of money paid to the plaintiff by his insurers in respect of such damage. Judgment was given for the plaintiff. His Lordship cited the opinion of Chief Justice Tindal in that case, who said the case fell to be decided in principle by that of *Mason* v. *Sainsbury*, April 19, 1782; 3 Douglas' Rep. 61, and *Randall* v. *Cockran*, June 17, 1748, 1 Ves. sen. 97; and those of Mr. Justice Park and Mr. Justice Vaughan, the latter of whom observed that in *Clark* v. *The Hundred of Blything*, 1823, 2 Barn. and Cres. 254, the authority of *Mason* v. *Sainsbury* was expressly recognised by Lord Tenterden, and continued:—'My Lords, these 'authorities seem to me to be conclusive that the right of

Digitized by Google

'underwriters is merely to make such claim for damages as 'the insured himself could have made. And it is for this 'reason that (according to the English mode of procedure) 'they would have to make it in his name; and if this is 'so, it cannot of course be made against the insured him-'self. It may be said that this view of the law inflicts 'considerable hardship upon the underwriters. I am not, 'however, satisfied that this is the case. Either the policy 'by which the underwriters are bound is an insurance 'against perils of the sea arising from the negligent navi-'gation of any other vessel, even although that vessel 'belong to the person insured, or it is not. If it is not an 'insurance against such a peril of the sea, the underwriters 'should defend themselves accordingly, and decline to pay 'for the loss. If, on the other hand, the insurance is a 'contract to indemnify against the consequences of the 'negligent navigation of any other ship of the insured, 'it would be but little short of an absurdity that the under-'writers should, in the first place, indemnify the insured 'for the consequences of that negligent navigation accord-'ing to their contract, and immediately afterwards recover 'the amount back from the insured as damages occasioned 'by this negligent navigation,' p. 44. Lord Gordon observed:—'If the ships had belonged to different owners 'I think there can be no doubt that in such a case as here 'occurs—viz., a case of a total loss, the underwriters would 'have been entitled, as in right of the owner of the injured 'ship, to establish a claim of damages against the owner of 'the vessel which had caused the damage, and to participate 'in the fund *in medio* which forms the measure of the 'offending shipowner's liability under the Merchant Ship-'ping Acts. But that is not the case with which your 'Lordships have to deal, and you must consider the case on 'the facts as they arise—viz., that the same person was the 'owner of both ships. I think there is nothing peculiar to 'Scotch law in the case, the systems of both countries in 'regard to marine insurance being the same, and the pro-'visions of the Merchant Shipping Acts applying equally 'to both. The view which I take of the case is a very 'short one, and it is this—I think the case must be looked

Digitized by Google

'at as if the owner of the *Dunluce Castle* had not been 'insured. His having effected insurance was a very proper 'and prudent act, but he did it for his own benefit, and the 'underwriters cannot complain that they had to meet the 'risk against which they insured. Now, I think it is clear 'that if the owner of the *Dunluce Castle* had not been 'insured he could have had no claim against himself as the 'owner of the *Fitzmaurice*, which caused the injury to 'the *Dunluce Castle*. The injury to that ship was sub-'stantially caused by its own owner, and he could not be 'liable to himself for the damage so caused. And if he 'could not be liable to himself he could not assign any 'right, either expressly or by implication of law, to any 'third person as he had none to convey. No doubt the 'rights of underwriters are well established, and it is one of 'these that on payment of the risk as for a total loss they 'are entitled to all the rights in the injured ship which 'belonged to its owner, but they are not entitled to more. 'And if the owner of the *Dunluce Castle* had no right to 'sue the owner of the *Fitzmaurice*, neither can the under-'writers on the '*Dunluce Castle*, whose rights were derived 'from the owner of that vessel,' pp. 49-50. This case in its original form in the Court of Session was described as *Burrell* v. *Simpson & Co.* (Nov. 24, 1876, 4 R. 293). The Court of Session *held* there—(1) That the underwriters of the sunk ship were entitled to rank upon the fund *pari passu* with owners of cargo and seamen, repelling the plea that they were excluded as being assignees of the owner; (2) that the petitioner was not entitled to claim for loss of freight or expenses of shipwrecked crew.*

Tug and Tow. When a collision occurs between the tug of a vessel under tow and another vessel, the underwriters of the vessel under tow are liable, just as if that vessel and not the tug had done the damage.

* In a question between the shipowner and claimants it was *held*, further (3), that in estimating the 'gross tonnage' as prescribed by the 54th section of the Merchant Shipping (Amendment) Act, 1862, the petitioner was entitled to deduct the berthage of the crew; and (4) that he was liable for interest at 4 per cent. from the date of collision till consignation. It will be observed that the Court's judgment is only affected by the House of Lords' decision as regards the first branch of the judgment, which is reversed.

Digitized by Google

In a policy of marine assurance the underwriters insured the ship *Niobe* 'from the Clyde (in tow) to Cardiff . . . 'while there, and thence to Singapore,' and agreed 'that if 'the ship hereby insured shall come into collision with any 'other ship or vessel, and the insured shall in consequence 'thereof become liable to pay, and shall pay to the persons 'interested in such other ship or vessel . . . any sum or 'sums of money, &c.,' to pay to the aggrieved a certain proportion of the sum so paid. Through the fault of the *Niobe*, and of her tug the *Flying Serpent*, the latter came into collision with and sunk another vessel, whose owners recovered damages both from the *Niobe* and from the tug *Flying Serpent*. In an action by the owners of the *Niobe* upon the policy against one of the underwriters for payment of his proportion of the sum paid by the pursuers on account of the collision, the defender pleaded that under the policy he was only liable for damages arising from collision with the *Niobe*. The Second Division of the Court of Session *held* (Lord Rutherfurd Clark doubting) that in maritime usage the word 'ship' was frequently understood to cover a ship and the tug by which it was towed, and that it fell to be construed in this sense in the collision clause of the policy, and that the defender was liable (*Barrie & Johnston* v. *M'Cowan*, June 20, 1890, 17 R. 1016). The authorities cited in support of the contention that the tow and tug were to be regarded as one were *Coey* v. *Smith*, March 3, 1860, 22 D. 955, 32 Scot. Jur. 403; *Stevens* v. *Gourlay* '*The Cleadon*,' Dec. 12, 1860, 14 Moore's P.C. Rep. 92; *The Union Steamship Co.* v. *Owners of the 'Aracan*,' July 24, 1874, L.R. 6 P.C. App. 127; Marsden on Collisions, p. 189; Parsons on Marine Insurance, pp. 68-69. Lord Young observed: 'I cannot doubt that 'the collision intended to be insured against was pre-'cisely such a collision as occurred. The collision was 'not exceptional, but just such a one as was looked 'forward to as possible with a "ship under tow,"' p. 1020. This judgment was affirmed on appeal by the House of Lords, July 27th, 1891, 7, Times Law Reports, 713 as *M'Cowan* v. *Barrie & Johnston*.

Digitized by Google

In the following case a foreign average settlement was considered.

Foreign settlement.

A policy of insurance effected at Glasgow, on the cargo of the ship *Warrior* for delivery at Königsberg, —contained the clause 'General average payable according to foreign 'statement, if so made up.' On the voyage the *Warrior* was obliged to put into Gothenburg to repair, and the master, granted a bond of bottomry and *respondentia*, hypothecating the ship and cargo. When the ship arrived at Königsberg a general average statement was made up, in which a sum was fixed as the contributory value of the cargo. The ship and freight being unable to pay their share of the bond, the balance fell to be paid, under German law, by the owners of cargo, 'on the prin- 'ciples of general average,' and a second statement was made up, embodying the first. In an action by the policy-holders it was *held*, by the First Division of the Court of Session, that they were entitled to recover the whole amount paid by them from the underwriters, as the liability of the cargo, as shown in the final statement, was for the general balance due under the bond, after applying the proceeds of the sale of the ship and freight (*Robinows & Marjoribanks* v. *Ewing's Trustees*, '*Warrior*,' July 20, 1876, 3 R. 1134).

Meaning of "at our risk."

In a more recent case, a cargo was insured by a firm of merchants, as well in their own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall, appertain in part or in all. It was *held* by Lord Young that, in the circumstances of the case, the shipowner having stipulated for exemption from liability for negligence of his servants, it was not competent in the event (which happened), of the loss of the cargo through such negligence, for the underwriters to sue the shipowner in name of the firm for whose account the cargo had been purchased and shipped, inclusive of cost, freight, and insurance, as the underwriters had no contract with the shipowners, and to give them such a right to sue, tended to deprive the shipowners of the benefit of the negligence clause in the charter-party (*Delaurier* v. *Wyllie*, '*George*

Digitized by Google

'*Moore,*' Nov. 30, 1889, 17 R. 167. Lord President Inglis, Lords Adam, Trayner, and Wellwood dissented). Lord Wellwood observed :—'Some importance is attached to the 'expression, "insurance at our risk" in the invoice No. 21 'of Process, which is a translation of No. 20 of Process. 'Now, the words which are translated, "at our risk," are, 'in the original, "à notre charge." The meaning and 'effect of the expression, c.i.f., simply is that the sellers 'undertake to insure for the purchaser, and include in the 'invoice price, the cost of the cargo, the insurance pre-'miums, and the full freight. From this they deduct the 'amount of the freight to be paid at the port of discharge, 'and draw for the balance upon the consignee. In sub-'stance, therefore, as Lord Blackburn says in *Ireland* v. '*Livingstone,* L.R. 2 Q.B. 99, and L.R. 5 H.L., 395, the '"consignee pays the same price as if the goods had been '"bought and shipped to him in the ordinary way." The 'defenders maintain that the pursuers sustained no loss, 'having been recouped by the proceeds of the insurance 'policy effected on their behalf; and it is alleged, and 'apparently with truth, that this action is being insisted in 'on behalf of the underwriters. In my opinion, this is *res* '*nites alios* to the defenders, who have nothing to do with 'the arrangements between the pursuers and the under-'writers,' p. 189. See also as to insurable interest in cargo, Lowndes' Law of Marine Insurance, pp. 8, 9.*

Meaning of 'All other perils.'

Although neither case was Scottish, yet the disapproval of *The West India and Panama Telegraph Co.* v. *Home and Colonial Insurance Co.*, 6 Q.B.D. 51, by *The Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co., Inchmaree,* 12 App. Cas. 484, is so important, that a note of the circumstances may properly be inserted here. The facts were very similar in the two cases. In the former case, the port-boiler of a steamboat burst at sea, and caused much damage; in the latter, the check valve of a pump

* Damage done to goods by unshipping, and handling re-shipping, subsequent to a collision of the vessel in which they were, is not recoverable from underwriters, the collision not being the proximate cause of the loss (*Park* v. *Fleming,* July 15, 1890, L.R. 25 Q.B.D. 396, following *Taylor* v. *Dunbar,* 4 C.P. 206).

Digitized by Google

was closed when it should have been opened, and the air-chamber of a donkey-pump was split, and damage done to the extent of £72, 10s. In the former case, the underwriters were held liable for all the damage done, by the bursting of the boiler. In the latter, the Queen's Bench Division, and the Court of Appeal, also found the underwriters liable; but the House of Lords took a different view, such accidents as are above referred to, being held not to fall under such words in policies of marine insurance as 'perils of the seas,' &c., nor under the general words, 'all other perils, loss, and misfortunes that have, or 'shall come to the hurt, delinquent, or damage of the 'subject-matter of insurance.' *The West India and Panama Telegraph Company's* case is expressly disapproved (all paragraphs, therefore, regarding it in Mr. Lowndes' Treatise on the Law of Marine Insurance, and other legal works, should be received with caution). Observing that 'Definitions are most difficult,' Lord Bramwell proceeded to endeavour to define the meaning of the clause as to 'all 'other perils,' &c., as follows:—'I have had given to me 'the following definition or description of what would be 'included in the general words: "Every accidental circum-'"stance not the result of ordinary wear and tear, delay, or '"of the act of the assured, happening in the course of the '"navigation of the ship, and incidental to the navigation, '"and causing loss to the subject-matter of insurance." 'Probably a severe criticism might detect some faults in 'this. There are few definitions in which that could not 'be done. I think the definition of Lopes, L.J., in *Pandorf* '*v. Hamilton* [16 Q.B.D. 629, 633], very good: "In a sea-'"worthy ship, damage to goods caused by the action of the '"sea during transit, not attributable to the fault of any-'"body," is a damage from a peril of the sea. I have 'thought that the following might suffice: "All perils, '"losses, and misfortunes of a marine character, or of a '"character incident to a ship as such." I put it forward 'with distrust, but it would comprehend all the cases cited 'where the assured has recovered, save, perhaps, the '*Panama* case. For example, it would include the case of 'the ship blown over while in dock; of the ship damaged

Digitized by Google

'by its moorings giving way; of the ship fired into by a 'ship. It would not include the cases put by Lord Esher '(in the Court of Appeal), nor the case I put of the captain 'seized with giddiness dropping the chronometer into the 'hold; nor would it include the present case. The damage 'to the donkey-engine was not through its being in a ship, 'or at sea. The same thing would have happened had the 'boilers and engines been on land, if the same mismanage-'ment had taken place. The sea, waves, and winds had 'nothing to do with it,' pp. 492, 493.

Where a contract of insurance related to wheat cargo, then on board, or to be shipped in the *Duke of Sutherland*, it was *held* by the Privy Council, on appeal from the Supreme Court, Australia, that the risk commenced as soon as any portion of the wheat was on board (*Colonial Insurance Co. of New Zealand* v. *Adelaide Marine Insurance Co.*, Dec. 18, 1886, P.C., L.R. 12 App. Cas. 128).*

Mortgagee's powers.

A mortgagee is entitled to prevent a ship over which he holds a mortgage as against a charterer from sailing uninsured, the owner, in view of his mortgage, not being entitled to deal with the ship as owner to the mortgagee's prejudice (*Laming & Co.* v. *Seater*, '*Mula*,' March 26, 1889, 16 R. 828).

As determining the rights of mortgagees in question with charterers, *Collins* v. *Lamport*, Dec., 1864, 4 De G. J. & S. 500, 34 L.J., Chan. Div. 196 (Lord Chancellor Westbury), was referred to, and Lord Rutherfurd Clark observed, 'I 'accept that declaration of the law to its full extent,' p. 837, see Foard, p. 168; Scrutton, p. 35.

A charterer who is empowered to insure to an amount equal to advances which he undertakes to make against freight, is held to have made that insurance a part of his security, *Watson & Co.* v. *Shankland*, '*Janet Cowan*,' June 17, 1873, 11 Mac. (H. of L.), 51.

Process.

Process.

The owners of the *Menzeleh* sued fifty underwriters, under

* As to construction of rules of a Mutual Insurance Society, see *London Steamship Owners' Insurance Co.* v. *Grampian Steamship Co.*, 1889, 24 Q.B.D. 32; subsequently before the Court of Appeal on another point (1890), same vol., p. 663.

Digitized by Google

a policy of assurance on their vessel, for £60, 13s. 1d., 'according to the several proportions for which the policy 'was underwritten by them—viz., £1, 4s. 3½d. each.' The First Division of the Court of Session *held*, following *Dykes* v. *Merry & Cunninghame*, March 4, 1869, 7 Mac. 603, that the action was competent in the Court of Session, as the sum which the pursuers sued for exceeded £25 (*Nelson, Donkin & Co.* v. *Browne, &c.*, '*Menzaleh*,' June 10, 1876, 3 R. 810).

The charterers in the case of *Laming & Co.* v. *Seater* (*supra*, p. 187), asking delivery of the *Mula*, 'or alterna-'tively, in the event of the defenders . . . failing so to 'deliver to the pursuers the said steamship,' to have the whole defenders found liable in damages. After evidence had been led, dealing with damage sustained before the raising of the action as well as after, and judgment had been pronounced in the Outer House, the pursuers and reclaimers moved to be allowed to substitute for the words quoted above, the words 'and in any event.' The Court *held* (Lord Lee *dissenting*)—(1) that the summons as laid did not conclude for damage from non-delivery prior to the date of the action; and (2) that as the effect of the amendment would be to include such damage, the amendment was incompetent.

Expenses of arrestment of a ship on the dependence of an action and dismantling her, are not recoverable by the pursuer as expenses of process, see *Black* v. *Jehangeer Framjee & Co.*, '*Huron*,' Mar. 19, 1887, 14 R. 678 and *infra*, p. 207.

Justiciary Indictment—Defrauding Insurers—Relevancy.

Destroying a ship with intent to defraud insurers.

Criminal Procedure (Scotland) Act, 1887 (50 & 51 Vict. c. 35) secs. 8 and 60.

The master and mate of the British barque *Gylfe* of Quebec, were charged on an indictment which set forth that certain insurances having been effected on the vessel, and these insurances being still in force, they did 'attempt 'to sink and destroy the said barque with intent to defraud 'the insurers liable under said insurances.' It was *held* by the Lord Justice-Clerk (Macdonald), who tried the case at Glasgow, that the allegation of an attempt to destroy

Digitized by Google

the vessel 'with intent to defraud' the insurers, implied knowledge of the insurances, and that the qualifying words 'you well knowing that the ship had been so "insured"' were to be implied, by virtue of sec. 8 of the Criminal Procedure (Scotland) Act, 1887, and that the indictment was relevant. His Lordship expressed the opinion that in the event of the prosecutor failing to prove fraudulent intent, it would be competent for the jury to convict the accused of an attempt to sink the ship maliciously, the word 'maliciously' being in that event read in to qualify the acts charged, and a conviction of a part of what was charged in an indictment, if in itself an indictable crime, being competent by sec. 60 of said Act. Evidence having been led, the jury by a majority found the master and mate guilty of the first charge as libelled, and sentence of ten years' penal servitude was pronounced upon each of them (*Her Majesty's Advocate* v. *Bourdais,* Dec. 29, 1888, 16 R. (Just. Cases), 68).

Digitized by Google

CHAPTER VII.

HARBOUR, &c.

PORT AND HARBOUR—PORT OF GREENOCK—PORT OF CARDIFF —OPEN ROADSTEAD—PORT OF NEWRY—PORT OF GLOUCESTER —CLYDE—BALLAST FROM RIVERS—AYR HARBOUR—GRANGEMOUTH—WHITEHAVEN—EXEMPTIONS FROM DUES OF 'RESI- 'DENT BURGESSES OF DUMBARTON'—LIABILITY FOR PILOTS —HARBOUR TRUSTEES—CULPA.

Hunter v. *Northern Marine Insurance Co., Ltd.; Clyde Navigation Trs.* v. *Laird & Sons; Carswell* v. *Nith Navigation Trustees; Milne Home* v. *Allan and Others; Ayr Harbour Trustees* v. *Oswald; Moon* v. *The Caledonian Railway; New Dumbarton Steamship Co., Ltd.; Holman* v. *Irvine Harbour Trustees; Gifford & Co.* v. *Dishington & Co.; Thomson* v. *Greenock Harbour Trustees; Buchanan* v. *Trustees of the Clyde Lighthouses; Renney* v. *Magistrates of Kirkcudbright.*

Port and Harbour.

THE terms port and harbour are used with some looseness. It does not appear that the meaning is otherwise than the same. Sir Matthew Hale (*Pars secunda de Portibus Maris*), observes :—' A port is an haven, and something ' more—(1) It is a place for arriving and unlading of ships ' or vessels ; (2) It hath a superinduction of a civil signa- ' ture upon it, somewhat of franchise and privilege, as shall ' be shown ; (3) It hath a ville, or city, or borough, that is ' the *caput portus*, for the receipt of mariners and merchants, ' and the securing and vending of their goods, and victual- ' ling their ships. So that a port is *quid aggregatum*, con- ' sisting of somewhat that is natural—viz., an access of the ' sea, whereby ships may conveniently come, safe situation ' against winds, where they may safely lie, and a good ' shore, where they may well unlade ; something that is ' artificial, as quays, and wharves, and cranes, and ware-

Digitized by Google

'houses, and houses of common receipt, and something 'that is civil—viz., privileges and franchises—viz., *jus* '*applicandi*, *jus mercati*, and divers other additaments given 'to it by civil authority.'

Port of Greenock.

The above definition was cited with approval by Lord Chancellor Halsbury in giving judgment in the case of *Hunter* v. *Northern Marine Insurance Co., Ltd.*, July 30, 1888, 15 R. (H. of L.) 72. In this case it was *held*, affirming the judgment of the First Division of the Court of Session, March 4, 1887, 14 R. 544, that in a policy of insurance on a ship for the voyage, 'and while in port 'thirty days after arrival,' the meaning of the term 'port,' as applicable to the port of *Greenock*, did not include the fairway of the navigable channel of the river Clyde *ex adverso* of the harbour works.

The circumstances were narrated by Lord Watson in his judgment as follows:—'The barque *Afton*, of Ayr, 'arrived at Greenock from Java on 22nd January, 1885, and 'discharged her cargo in the Victoria Harbour. On 6th 'February the vessel was taken for repairs into a ship-'builder's private dock within the *ambit* of the harbour 'works, and on the 12th of the month she left that dock 'in ballast for the port of Glasgow in tow of a tug-'steamer, when she was capsized by a sudden gust of wind, 'and sustained serious damage. At the time when the 'accident occurred the stern of the *Afton* had reached 'a point in the waterway of the Clyde 500 yards or thereby 'outside the harbour works of Greenock. The *Afton* 'was covered by three policies of insurance for a voyage 'from Java to any port of discharge in the United Kingdom, '"and while in port during thirty days after arrival." An 'action was brought by the owners of the *Afton* against 'the underwriters for the cost of raising and repairing the 'vessel. Lord Trayner, Lord Ordinary, assoilzied the 'underwriters, being of opinion that the *locus* of the 'accident was not within the port of Greenock, and that 'the vessel had left the port on 6th February, within the 'meaning of the policies, when she went into a private 'dock for repairs. The First Division of the Court (Lord 'Shand dissenting), affirmed the interlocutor of the Lord

Digitized by Google

'Ordinary upon the first of these grounds, without dis-'posing of the second. Lord Shand was of opinion that 'the Lord Ordinary was wrong on both points, and that 'the appellants (the owners), were entitled to decree.' The House of Lords, as noted above, affirmed the judgment of the First Division.

Definitions suggested.

If nicety of definition were required, it might be suggested that there are three classes of places of arrival or refuge for ships—(1) haven—viz., an access of the sea, not necessarily possessing quays, or wharves, or merchant laws, but affording safe anchorage for ships; (2) harbour—a place of permanent resort, as distinguished from temporary recourse, as in the case of havens, walls, quays, &c.; (3) ports as defined by Sir Matthew Hale, and embracing a wider area than harbours. Yet such definitions, particularly of harbour and port, are of little moment when we find the words used loosely in so many cases.

Port of Cardiff.

'Generally speaking,' said Wills, J., in the case cited by Lord Watson (*Ship 'Garston' Co.* v. *Hickie*, July 3, 1885 (C. of A.), 15 Q.B.D. at p. 583), which was a case as to the port of Cardiff,* 'wherever there is a right to take 'money, or exercise jurisdiction within a port, adequate 'means exist for establishing, with reasonable certainty 'for commercial purposes, the limits of the port. I can 'hardly conceive that in England, or, indeed, in any part 'of the civilised world, anything deserving to be called 'a port can exist which does not satisfy some such con-'ditions. One does, indeed, occasionally, at places on the 'south coast of England (Brighton, for instance), see small 'vessels discharging odd cargoes on the beach, places 'which may possibly have some legal limits, but where 'there is no right to collect dues; but it would be difficult 'to say that such places answer the description of a port. 'It is, I think, extremely unlikely that in any part of the 'world where ships resort, a port should be a mere place 'of call of that sort for ships. So far as I know, at all 'places of call for vessels in the nature of ports, certain 'things are provided for their use, such as moorings and

* See also as to that port, *Roelands* v. *Harrison*, 9 Ex. 444.

Digitized by Google

'buoys, which afford some test of the legal limits of the 'port. If there should ever arise a case of a port, in the 'vague and purely popular sense of the word, with no pos-'sibility of ascertaining any defined limits, various questions 'may arise which it is not worth while to discuss now.' On appeal the Master of the Rolls, p. 588, defined a port as a place of safety for ships and goods whilst goods are being loaded or unloaded. 'A natural port' he defined to be 'a 'place in which the configuration of the land with regard 'to the sea is such that if you get your ship within certain 'limits she is in a place of safety for loading and unloading. 'That is almost certain to be the port of that place in 'a business sense.' He then defined an artificial port, as at Plymouth, and thirdly a port in which neither the natural configuration of the land with regard to the sea, nor the artificial walls, make a perfectly safe port, but only a place of comparative safety. 'Then you have not such 'easy means of ascertaining what the parties to a charter-'party must have meant by "the port," and you must find 'out where in fact people have had their ships loaded and 'unloaded. The moment you can find that the loading 'and unloading of ships takes place at a particular spot, 'you may safely infer that the parties understood that 'spot to be within "the port," because, as a general rule, 'people do not load or unload goods outside a port. They 'do sometimes, but very seldom, and only under excep-'tional circumstances. If, therefore, you can find a place 'of loading and unloading you have another safe rule. 'But the port may extend beyond the place of loading and 'unloading, just as a dock may. The space in the centre 'of a large dock is seldom used for loading and unloading. 'Vessels may load or unload in the middle of the docks, 'but they seldom do so. They generally load and unload 'at the quay, which is at the edge of the dock. Therefore, 'although the loading and unloading of goods is not 'always the exact measure of a port, it is a safe rule to say 'that the loading and unloading takes place within the 'port.

'Then, if you want to find out how far the port extends 'beyond the place of loading and unloading, what is the

Digitized by Google

'next test you would apply? If you find that the author-
'ities, who are known in commercial business language
'as "the port authorities," are exercising authority over
'ships within a certain space of water, and that the ship-
'owners and shippers who have ships within that space of
'water are submitting to the jurisdiction which is claimed
'by those authorities, whether legally or not, whether
'according to Act of Parliament or not, if you find what
'are called "the port authorities" exercising port discip-
'line, and the ships which frequent that water submitting
'to the port discipline so exercised, that seems to me the
'strongest possible evidence that the shipowners, the
'shippers, and the port authorities (that is, the persons
'connected with the locality), have all come to the con-
'clusion to accept that space of water in which that author-
'ity is so exercised and submitted to as "the port" of the
'place.

'All these seem to me to be proper tests whether a cer-
'tain space of water is a port within the popular sense, the
'business sense, the commercial sense, or the ordinary
'sense—anything you please but an Act of Parliament or
'a fiscal sense.'

Open roadstead.

An open and exposed roadstead may be a port within the meaning of a marine policy (*The Sea Insurance Company* v. *Gavin*, 1830, 4 W. & S. 17). 'I think it was rightly *held*, 'in "*Garston*" *Ship Company* v. *Hickie*, 15 Q.B.D. 580,' said Lord Watson in *Hunter's* case, *supra*, 'that in ascertaining
'its popular limits no aid can be derived from statutory
'definitions of a port for fiscal purposes. That is obviously
'true in the present case, because the port of Greenock,
'as defined by Treasury Warrant, in pursuance of the
'Customs Consolidation Act of 1853, includes the greater
'part of the Firth of Clyde, and all seaports on the main-
'land, or in the Hebrides, from Ardnamurchan Point to
'West Loch Tarbet. The boundaries of the burgh of
'Greenock, as fixed for police purposes by a series of
'Municipal Acts, appear to me to be equally beside the
'present question. In my opinion the most important
'consideration in all cases like the present must be
'whether the area in dispute has or has not been

Digitized by Google

'used and treated as an integral part of the port by 'vessels frequenting it, as well as by the port authori-'ties.'*

As to 'the port of Newry,' see *Caffarini* v. *Walker*, 1876, 10 Ir. L.R. C.L. 250, and *M'Intosh* v. *Sinclair*, 1877, 11 Ir. L.R. C.L. 456, and as to the 'port of Gloucester,' see *Nielsen* v. *Wait*, 1885, L.R. 14 Q.B.D. 516.

Port of Newry.

Port of Gloucester.

In the following case the river Clyde was incidentally held to form part of the area under the Clyde Navigation Trustees, although the circumstances of the case had mainly reference to the meaning of the term 'unshipped' as applicable to logs towed in loose rafts. The circumstances were as follows:—

Clyde.

By section 98 of the Clyde Navigation Act, 1858 (21 & 22 Vict. c. 149), it was enacted that it should be lawful for the trustees to levy on and in respect of all goods 'shipped 'or unshipped in the river or harbour the rates specified in 'the first and second columns of part 1 of the schedule 'H. annexed to the Act.' Part 1 was entitled 'Rates on 'goods conveyed upon or shipped or unshipped in the 'river or at the harbour, or using any transit shed or ware-'house.' A list of goods chargeable was contained in it, and timber was therein mentioned. In 1877 the Clyde Trustees proposed to charge dues on logs in loose rafts, floated up a part of the river within the statutory limits, on which the trustees had executed no improvements, to timber ponds. In a suspension at the instance of a firm of timber-measurers who were owners of certain of the ponds, the House of Lords *held* (affirming the judgment of the First Division of the Court of Session)—(1) That the word 'river' in the sense of section 98, embraced the whole waters of the Clyde within the prescribed limits; (2) that

* The right of erecting a free port is in the Sovereign, 'and cannot be trans-'ferred from him without a special grant' (Erskine, Inst. bk. 2, tit. vi. 17). But the grant may give the privilege of levying dues over a large area of water as in the case of the royal burgh of Campbeltown (See *Magistrates of Campbeltown* v. *Galbreath*, Dec. 14, 1844, 7 D. 220). Observations upon the grantee's power to levy dues to be applied to maintenance of the harbour will be found in *Christie* v. *Landale*, May 16, 1828, F.C. (with notice of unreported case of *Stein* v. *Stirling*, June 10, 1814), and *Milne Home, &c.* v. *Allan, &c.* (*Eyemouth Harbour Trustees*), Jan. 8, 1868, 6 Mac. 189.

Digitized by Google

the powers of levying dues conferred by section 98 on goods 'shipped or unshipped' was not extended by the terms of the schedule to goods 'conveyed,' the schedule being merely referred to for the purpose of specifying the rates to be levied; and (3) that logs towed up the river in loose rafts were not when separated 'unshipped' in the sense of the statute (*Clyde Navigation Trustees* v. *Laird & Son*, July 19, 1883, 10 R. (H. of L.) 77). In the Court of Session reference had been made to a usage by the trustees of levying sales and dues on timber floated to yards on the upper part of the Clyde as being *contemporanea expositio* of the statute. Lord Watson observed:—'Such usage as 'has in this case been termed *contemporanea expositio* is of 'no value whatever in construing a British statute of the 'year 1858. When there are ambiguous expressions in an 'Act passed one or two centuries ago, it may be legitimate 'to refer to the construction put upon these expressions 'throughout a long course of years, by the unanimous 'consent of all parties interested, as evidencing what must 'presumably have been the intention of the Legislature at 'that remote period. But I feel bound to construe a recent 'statute according to its own terms, when these are brought 'into controversy, and not according to the views which 'interested parties may have hitherto taken; and in determining the true import of such a statute it appears to be 'quite immaterial to consider whether it was passed in the 'year 1858 or in 1883,' p. 83.

Ballast from rivers.

The right to take ballast for ships from the banks of a tidal river was discussed in the case of *Carswell* v. *Nith Navigation Trustees*, Oct. 23, 1878, 6 R. 60, where it was *held* by the First Division of the Court of Session that the Nith Commissioners, acting under statutes empowering them to improve the navigation of the river were not entitled to allow shipmasters to take sand from the banks for ballasting their vessels. This decision followed the precedent of *Milne Home* v. *Allan and Others* (*Eyemouth Harbour Trustees*), Jan. 8, 1868, 6 Mac. 189, 40 Scot. Jur. 109, where it was *held* by the First Division that the Eyemouth Harbour Trustees had no right to allow gravel and sand to be taken for ballast purposes.

Digitized by Google

Powers of statutory trustees.

In the case of *Ayr Harbour Trustees* v. *Oswald*, July 23, 1883, 10 R. (H. of L.) 85, it was *held* by the House of Lords, affirming the judgment of the Second Division of the Court of Session sitting with three consulted Judges, that the Trustees of Ayr Harbour, a statutory body, could not bind themselves and their successors to abstain from the exercise of their full statutory powers upon the land taken by them under the compulsory powers of their special Act.

The two following cases relate—(1) to a preference claimed by steamships in Grangemouth harbour, which was disallowed; and (2) exemption from payment of shipping dues claimed by burgesses of Dumbarton.

Usage; Notice; Bye-Laws.

(1.) For four years, steamships coming to load coals at Grangemouth were allowed a preference over sailing vessels, in getting the use of the cranes. The bye-laws of the harbour did not contain any reference to the practice, and the owners of the harbour put a stop to it without notice, and placed all vessels on an equality, according to their arrival. The owners of the s.s. *Nellie* raised an action of damages for detention, relying on the practice, but the First Division of the Court of Session *held* that the owners of the harbour were entitled, as a matter of management, to alter the practice, and if they pleased, without notice (*Moon* v. *Caledonian Railway*, '*Nellie*,' June 9, 1876, 3 R. 806).

A somewhat similar point was decided by the Irish Courts. A sailing vessel was chartered to proceed to Whitehaven with a cargo of coals. Her charter-party provided 'regular turn' should be allowed for loading. It turned out that the custom of the port of Whitehaven is to give a preference in loading coal to steam vessels, even though they arrive after the sailing ships, but as between sailing vessels themselves, the order of arrival is observed in loading. The shipowners were ignorant of the Whitehaven usage. Their vessel was delayed loading until several later arrived steam vessels were loaded, but she was loaded in the order of her arrival as regarded the other sailing vessels in the harbour. The shipowners claimed demurrage. It was *held* that the expression 'regular turn' in the charter-party, should in the absence of exclusive

Digitized by Google

words, be construed as 'regular turn' according to the usage of the port of Whitehaven; that it was not material that the shipowners were ignorant of such usage, and that, accordingly, they could not recover (*King* v. *Hinde*, L.R. 12 Excheq. Div., Ireland, 113).

Clyde Navigation Consolidation Act, 1858, sec. 108; Shipping Dues Exemption Act, 1867, sec. 5.

(2.) By the Clyde Navigation Consolidation Act, 1858, certain exemptions from payment of dues were reserved to 'the resident burgesses of Dumbarton;' and by the subsequent Shipping Dues Exemption Act, 1867, it was provided that a 'person or body corporate' entitled to exemption prior to the Act, should be entitled to compensation under it. The Second Division of the Court of Session held, in a special case, that the New Dumbarton Steamboat Company, which was a private unincorporated trading company, was not as a company entitled to compensation, but that, being entirely composed of partners possessing the necessary qualifications, these partners, as individuals, were so entitled (*New Dumbarton Steamboat Co., &c.*, June 10, 1870, 8 Mac. 850).

Liability for pilots.

The liability of harbour trustees in certain circumstances for the fault of pilots employed by them, is illustrated by the case of *Holman, &c.* v. *Irvine Harbour Trustees*, '*Gertrude*,' Feb. 1, 1877, 4 R. 406, where it was decided that harbour trustees who are appointed a 'pilotage 'authority,' within the meaning of the Merchant Shipping Act, 1854, part v., Pilotage Regulations, and do not license pilots under the powers conferred on them by part v. of that Act, but employ unlicensed pilots at stated wages to pilot vessels into their harbour, and themselves receive the pilotage dues, and apply them to harbour purposes, are liable for the fault of such pilots. The s.s. *Gertrude*, while entering Irvine harbour, was injured through the fault of an unlicensed pilot (locally known as a 'hobbler'), in the Harbour Trustees' employment, whose charge she was under at the time. The Second Division of the Court of Session *held* that the trustees were liable for the damage.

Caen.

For a case regarding the bar-harbour of Caen, see *Gifford & Co.* v. *Dishington & Co.*, '*Andalusia*,' July 19, 1871, 9 Mac. 1045, or *sub voce* Charter-party.

Digitized by Google

Harbour Trustees; Reparation; *Culpa.*

The ship *Albatross* was removed by the orders of the harbour-master at Greenock to a new berth in the harbour. After taking in sixty or seventy tons of coal, she was taken to a graving-dock, where it was discovered that her keel and bottom had been injured. A stone was found in the bed of the harbour at the spot where the vessel had been moored, and it was alleged that the stone had caused the injuries. The shipowners raised an action against the Greenock Harbour Trustees. The First Division of the Court of Session *held* that, assuming the stone had caused the injuries, the harbour trustees were not liable in damages, as they had taken all reasonable means to make the harbour safe, and no fault or negligence of themselves or their servants had been established (*Thomson, &c.* v. *Greenock Harbour Trustees, 'Albatross,'* July 20, 1876, 3 R. 1194). After discussing the two questions of fact, was the *Albatross* injured by the stone, and was the stone left in the dock when it was formed or extended in 1873? Lord Ardmillan continued on the question of law, 'Must fault or negligence on the part of 'the harbour trustees be proved? and if so, has it been 'proved? I have no doubt that fault or negligence on the 'part of the trustees or of their servants must be proved. 'There is no guarantee or assurance of absolute safety. It 'is not expressed, and it is not implied. The defenders 'can only be liable if fault or negligence by them or their 'servants has been proved. Then I think it has not been 'proved. On this point, which is sufficient for judgment, 'my opinion is in favour of the defenders. The stone was 'latent — discoverable only by dredging or by divers. 'When it came there, or how it came there, we know not. 'It may have been thrown in, or carried in by the tide, 'and that may have been a few weeks, or a few days, or a 'few hours before the *Albatross* entered. No one can 'say. Therefore, I cannot find any safe or sufficient ground 'for attributing fault or negligence to the defenders, either 'on their own part or on the part of their servants, and in 'the absence of proved fault or negligence, there is no 'guarantee, and therefore no liability,' p. 1197. The shipowners founded on *Gibbs* v. *Liverpool Dock Trustees,*

Digitized by Google

Feb. 23, 1858, 27 L.J. (Exch.) 321; and the Harbour Trustees on *Winch* v. *Conservators of the Thames*, May 13, 1874, 9 L.R. (Q.B.) 378; and *Parnaby* v. *Lancashire Canal Company*, 1839, 11 Adolph. and Ellis' Reports (old series), Q.B. 223, but those decisions were not reviewed in this judgment.

Clyde.

In the case of *Buchanan* v. *Trustees of the Clyde Lighthouses*, Feb. 6, 1884, 11 R. 531, which was an action for damages for injury done to the steamer *Scotia* by running on a sandbank, upon the wrong side of which a warning buoy was said to be placed, the Lord Justice-Clerk (Moncreiff) observed that trustees, whose statutory duty it was to buoy the estuary of the Clyde, would be liable for damage done to a ship navigating that estuary in consequence of negligent performance by the trustees of their duty. In the circumstances the Court, however, found that the master was navigating his vessel on an improper assumption as to his course, and the owner's claim was held to have failed. The result, as Lord Young and Lord Craighill pointed out, was arrived at, not on the ground of contributory negligence, but on the ground that there was no loss attributable to any fault on the part of the trustees.

Westport, New Zealand.

Reference should, however, be made to the English case of *Jolliffe* v. *Wallasey Local Board*, L.R. 9 C.P. 62, where it was *held* that an omission to do something which ought to be done, in order to the complete performance of a duty imposed upon a public body under an Act of Parliament, amounts to an act done or intended to be done—a case cited by Sir Richard Couch, in giving the judgment of the Privy Council on appeal from the Court of Appeal in New Zealand, that the negligence of the authorities having control of the harbour of Westport, New Zealand, in failing to remove a snag was negligence to take reasonable care, for which they were liable in damages to the owners of a vessel which was so much injured by striking the snag as to sink to the bottom of the harbour (*The Queen* v. *Williams*, April 9, 1884, P.C. 9 App. Cases, 418; *Parnaby* v. *Lancaster Canal Company*, 11 Ad. & E. 223; and *Mersey Docks' Trustees* v. *Gibbs*, L.R. 1 H.L. 93, approved).

In the case of the *Calliope* (*The Tredegar Iron & Coal*

Digitized by Google

Company, Limited v. *The Owners of the 'Calliope,'* Dec. 15, 1890, 1891, A.C. 11) where the owners of a vessel sought damages from wharfingers on the ground that damage had been done to the vessel owing to an obstruction in the bed of the Usk, the House of Lords *held* that no breach of the wharfingers had been proved, and that the injury done had been caused by the captain and pilot attempting to berth the vessel at a time of the tide when it was not safe for such a vessel. 'If the mischief had arisen from the bed 'of the river adjoining the wharf being in such a condition 'that a vessel invited there could not, even if she had come 'in at the most fitting and proper time of tide, have lain 'there in safety, it may well be,' observed Lord Herschell, 'that there would have been a cause of action. But the 'peculiarity of the present case is that it was all a matter 'of time and degree. Whether it was safe to come or not 'depended upon a variety of elements. There was no 'necessarily inherent danger in the condition of the bed of 'the river,' p. 27; and Lord Watson said, 'I think it would 'be altogether unreasonable to hold that the river-bed in 'front of the Tredegar Wharf was not in an ordinary con-'dition of safety unless it was kept as level as a billiard-'table,' pp. 23-4.

Usk.

Four days later a similar case was decided by the Court of Session (*Renney* v. *Magistrates of Kirkcudbright, 'Janets 'and Ann,'* Dec. 19, 1890, 18 R. 294). The *Janets and Ann*, a sailing vessel with two local pilots on board, suffered damage from grounding while on her way into Kirkcudbright harbour. The owner raised an action against the Magistrates of Kirkcudbright, as being the harbour authorities, alleging that the accident was due to the fault of the harbour-master, who gave wrong directions considering the state of the tide. The Court reversing the judgment of the Lord Ordinary (Lord Trayner) *held* that though the harbour-master was in error, there had been contributory negligence on the part of the master and pilots, and the harbour trustees were assoilzied. 'It seems 'to me,' observed the Lord President, 'that but for the 'great mistake which was committed in the navigation of 'the vessel by porting the helm when it ought to have

Kirkcudbright.

Digitized by Google

'been starboarded and a middle course kept, the accident 'would not have occurred,' p. 298. See, however, *The Rhosina*, June 16, 1885 (C. of A.), L.R. 10 P.D. 131, where Falmouth Harbour Trustees were held liable for damage done to a vessel in consequence of directions given by harbour-master.

Falmouth.

Digitized by Google

CHAPTER VIII.

ARRESTMENT—EVIDENCE—FOREIGN LAW.

ARRESTMENT — PROCEDURE WHERE ACTION RAISED PERSONALLY AGAINST A MASTER AS GRANTER OF A BOTTOMRY BOND—ARRESTMENT ILLEGAL—ARRESTMENT IN SCOTLAND FOLLOWING ON DECREE OF HIGH COURT OF JUSTICE IN ENGLAND—EXPENSES OF ARRESTMENT ON DEPENDENCE—ARRESTMENT AD JURISDICTIONEM FUNDANDAM—COMES TO AN END WHEN CAUTION FOUND — RECALL OF ARRESTMENT—EVIDENCE—FOREIGN LAW.

Lucovich; Ranking & Co. v. *Tod; Petersen* v. *M'Lean & Hope, &c.; English Coasting and Shipping Co., Limited* v. *British Finance Co., Limited; Black* v. *Jehangeer Framjee & Co.; Grant* v. *Grant; Borjesson, &c.* v. *Carlberg; Stewart* v. *Macbeth & Gray; M'Phedion & Currie* v. *M'Callum; Mitchell, &c.* v. *Burns, &c.; Williams* v. *Dobbie; Ross, Skolfield & Co.* v. *State Line Steamship Co., Limited; Davidson* v. *Bisset & Son; The Owners of the Immanuel* v. *Denholm & Co.; Valery* v. *Scott.*

Arrestment.

Definitions.

ARRESTMENT may be considered under two heads. It is primarily 'the attaching of a pecuniary fund or of a moveable, so as to remain till the debt be satisfied,' Bell's Prin. 2273. Secondly, it is the attaching of such a fund or of a moveable, *jurisdictionis fundandæ causa—i.e.*, to the effect of enabling proceedings against a foreigner to be brought in the Scottish Courts. This form of arrestment is peculiar to Scotland.

Arrestment on Bottomry Bond.

(1.) When a master has executed a bottomry bond, if on the arrival of the ship in this country the loan is not repaid within the time prescribed, proceedings may be taken and the ship arrested, Abbott, p. 115. In the following case the master appears to have possessed only the

Digitized by Google

ordinary powers, in which case a bottomry bond granted by him does not create a personal obligation against the owners, the lender's security being the ship only, and the personal obligation of the master (Bell's Prin. 452 (*b*)).

A bottomry bond was granted over the s.s. *Cavendish*, in ordinary form, by the master (who was not a part-owner), at Trieste, on 8th May, 1885. The ship arrived at Leith on 7th June, 1885, and the sum due under the bond became payable, therefore, on 10th June. Application was made to the master for payment, which he refused to make. As the master was not a part-owner, it was not possible to arrest the vessel on the dependence of an action against him, and the owners not being proper defenders in an action on a bottomry bond, it was impossible to arrest the *Cavendish* on the dependence of such action, which proceeded against the master, as personally debtor under the bond. Being apprehensive that the *Cavendish* might be removed beyond the Court's jurisdiction, the endorsee of the bottomry bond presented, on 11th June, a summary petition to the Inner House, craving warrant to arrest. It was admitted that there was no precedent for the course adopted. The Court pronounced an order, but on the following day, the petition being called in the Single Bills, the master of the vessel appeared at the bar, and stated that though he himself would temporarily leave the limits of the jurisdiction, the ship would not be removed, but would await the result of the action, of which he had received notice. Counsel for the petitioner expressed himself satisfied with this understanding (*Lucovich*, June 12, 1885, 12 R. 1090).

The consignees of a cargo, imported in the *Reggente*, a vessel under bottomry, sold the cargo, stipulating in the bought-note that the price should include freight, 'the 'average and bottomry bond to be for account of, and 'settled by, sellers.' The bill of lading was endorsed to those purchasers, and they retained part of the price to meet a balance of the freight. A creditor of the owner and of the master of the vessel subsequently arrested in the hands of the purchasers of the cargo. The First

Digitized by Google

Division of the Court of Session, in an action of forthcoming, held—(1) that the arrestees—*i.e.*, the purchasers of the cargo were accountable for so much of the freight as remained in their hands at the date of the arrestment, without deducting the contents of the bottomry bond, (which they had only acquired right to after the date of the arrestments); and (2) that the arrestments attached the amount due to the ship for general average, this being a claim which only arose when the vessel reached the port of delivery, and in which the arrestees, as then owners of the cargo, were the sole debtors, notwithstanding the terms of their arrangement with the sellers (*Ranking & Co.* v. *Tod, &c.*, '*Reggente*,' June 29, 1870, 8 Mac. 914).

Illegal arrestment.

A vessel may be arrested on the dependence of an action, but that the invasion of a vessel and carrying her off from her anchorage is illegal, and is a legal wrong for which the parties committing it are unquestionably liable in damages, was laid down in *Petersen* v. *M'Lean & Hope and Hertz*, Jan. 14, 1868, 6 Mac. 218. The *Nayaden*, a foreign vessel, was arrested and taken from her anchorage to a neighbouring harbour, where through carelessness or unskilfulness on the part of the defenders, or of those for whom they were responsible, she struck against the quay and was injured. The First Division of the Court of Session held it to be immaterial to an issue whether the collision took place before or after arrestment, maliciously and without proper cause, had been used. If the collision took place before the arrest, such injury aggravates the damages; if after the use of the arrestments, the arresters are not justified in handing the vessel over to the care of unskilful persons, and would still be liable. It was also *held* that in an issue, whether the defenders maliciously, and without probable cause, arrested the *Nayaden*, which was, as above-mentioned, a foreign vessel, the master and crew of which were foreigners, it was not necessary to insert the *locus* where the arrestments were used.

Arrestment may competently proceed in Scotland under a decree of the High Court of Justice in England.

Arrestment in Scotland under English Decree.

On 14th November, 1884, judgment was obtained against a shipping company in the High Court of Justice,

Digitized by Google

Queen's Bench Division, Liverpool District Registry, and on 10th November the judgment was registered in the Books of Council and Session at Edinburgh, in terms of section 2 of the Judgments Extension Act, 1868, which enacts that 'where judgment shall hereafter be obtained, 'or entered up in any of the Courts of Queen's Bench, 'Common Pleas, or Exchequer, at Westminster . . . for 'any debt, damages, or costs . . .' on production at the office in Edinburgh for the registration of deeds, &c., registered in the Books of Council and Session, of a certificate of such judgment in statutory form, such certificate shall be registered in a book kept for that purpose, and 'every certificate so registered shall, from the date of such registration, 'be of the same force and effect as a decreet of the Court of 'Session, and all proceedings shall and may be had and 'taken on an extract of such certificate as if the judgment, 'of which it is a certificate, had been a decreet originally 'pronounced in the Court of Session. . . .' On 15th November, the Lord Ordinary on the Bills, granted 'concurrence and authority for putting the within warrant of 'arrestment' (*i.e.*, the warrant contained in the extract registered certificate of judgment), 'unto all due and legal 'execution, so far as regards maritime subjects, and grants 'warrant to dismantle arrested vessels, if necessary.' The shipping company had no domicile in Scotland. Some months afterwards the *Magdala* in which the company had an interest, was arrested, and dismantled when lying at Grangemouth. On 16th February, 1885, the shipping company raised an action, in the Court of Session, for the reduction of the extract-registered certificate of judgment, and the warrant of arrestment thereon, and for damages. The First Division of the Court of Session, affirming the judgment of Lord Fraser, *held* that such a certificate as was here registered, was properly registerable, in terms of the Judgments Extension Act, 1868, and that it is not necessary to entitle a creditor, who holds a judgment of the High Court of Justice in England, to register it in Scotland, with the view of doing diligence thereon, that the debtor should be subject to the jurisdiction of the Scottish Courts. Lord Fraser, in his interlocutor, referred

Digitized by Google

to the jurisdiction of the High Court of Admiralty, now merged in the Court of Session, and said : 'There seems to 'be no good reason why the conclusions of a summons 'should not be as extensive in the Court of Session—now 'the Admiralty Court—as they were in the former Admi- 'ralty summonses or precepts—that is, containing a warrant 'both to arrest and dismantle. Dismantling a ship is 'simply completing an arrestment and making it efficient' (*English Coasting and Shipping Co., Ltd.* v. *British Finance Co., Ltd.*, Dec. 10, 1886, 14 R. 220).

Expenses.

The expenses of arrestment on the dependence cannot be recovered by the pursuers as expenses of process.

On 8th September, 1886, the barque *Huron*, described as 'of Persia,' was arrested *ad fundandam jurisdictionem* while lying in Lamlash Bay, Arran, at the instance of a sailmaker in Greenock, who the same day raised an action for payment of an account for furnishings, and also on the same day obtained from the Lord Ordinary on the Bills a warrant to arrest the vessel on the dependence of the action. The vessel was, accordingly, dismantled at Greenock. Ultimately the case was settled except as regarded an item of £21, 7s. 7½d. of pursuer's expenses, being the expenses of arresting and dismantling, which the auditor of the Court of Session disallowed. The First Division *held*, on appeal from Lord Fraser, that such expenses are not recoverable by the pursuer as expenses of process. Lord Shand observed :—'If the pursuers had had 'to proceed to a sale of the ship, a question might have 'arisen as to whether the expenses of the arrestments and 'dismantling might not have been proper expenses in the process at that stage, just as in a forthcoming and sale' (*Black* v. *Jehangeer Framjee & Co.*, '*Huron*,' March 19, 1887, 14 R. 678. See also *Taylor* v. *Taylor*, Jan. 25, 1820, F.C.; *Symington* v. *Symington*, June 11, 1874, 1 R. 1006).

(2.) The following cases relate to the second branch of the subject—viz., arrestments *jurisdictionis fundandæ causa*.

Arrestment *jurisdictionis fundandæ causa.*

Arrestment *jurisdictionis fundandæ causa*, as a rule is only competent in the Supreme Court. There are two exceptions—(*a*) If a foreigner have a ship or other vessel belonging to him, or of which he is part owner or master,

Digitized by Google

an arrestment is competent to found jurisdiction against him in any action in the Sheriff Court of the sheriffdom within which the ship has been arrested, 40 & 41 Vict. c. 50, sec. 8. The action which follows need not be a maritime one ; any action is competent which would have been competent against a Scotsman subject to the sheriff's jurisdiction (Dove Wilson, p. 449). There is also (*b*) under the Merchant Shipping Act, 17 & 18 Vict. c. 104, sec. 527, power to detain foreign ships for claims of damage caused by misconduct or want of skill on the part of the master or mariners.*

Confining our attention to the Supreme Courts, the following case indicates the limits under which arrestment *jurisdictionis fundandæ causa* is competent.

A Scottish creditor before raising an action in the Court of Session for recovery of a debt constituted by decree of the Court of Chancery in England, against a debtor residing in Wales, in order to found jurisdiction, arrested at Dunvegan, Skye, a vessel, the *Skylark*, 32-64th shares of which *ex facie* of the register belonged to the debtor's pupil children, and the remaining shares to a third party. He then raised a second action to reduce the bill of sale in favour of the children, and to have it declared that the debtor was the true owner of those shares registered in the children's names, and again arrested the vessel to found jurisdiction, the execution being directed against the children as the registered owners. The First Division of the Court of Session *held*—(1)† that the arrestments *ad fundandam jurisdictionem* against the father in the first instance were inept, in respect that from the register the children, and not the father, were the owners; and (2) that the arrestments *ad fundandam jurisdictionem* against the children were inept to found jurisdiction in the action of reduction, in respect that the conclusions of that action if sustained would be destructive of the jurisdiction, to found which the arrestments had been used (*Grant* v. *Grant*, '*Skylark*,' Dec. 14, 1867, 6 Mac. 155).

* 'It is not much used here, as the more familiar proceeding of arresting to 'found jurisdiction serves all the purpose in Scotland,' Dove Wilson, p. 449.

† In conformity with *Duffus* v. *Mackay*, Feb. 13, 1857, 19 D. 430.

Digitized by Google

A creditor is not entitled to pursue a ship to sea, and bring her back into the Court's jurisdiction.

To pursue ship to sea is illegal.

The *Edgar Cecil*, a Swedish vessel lying in Glasgow harbour, having been arrested on 3rd Oct. 1877, *ad fundandam jurisdictionem*, an action was raised, and the concurrence of the Lord Ordinary to arrest maritime subjects obtained. The vessel started on her voyage and passed Greenock on her outward voyage on the 5th October. The arrester's agents therefore instructed a messenger-at-arms to follow the *Edgar Cecil* in a tug, which he did. The vessel was overhauled at a point opposite to the coast between Toward Point and Skelmorlie, and boarded by the messenger and about thirty men, was taken possession of forcibly. She was brought back to Greenock, the nearest harbour, and there dismantled. The House of Lords (*affirming* the judgment of the First Division of the Court of Session) *held* that the seizure of the vessel was illegal (*Borjesson, &c.* v. *Carlberg, &c.*, '*Edgar Cecil*,' July 9, 1878, 5 R. (H. of L.) 215). The Lord Chancellor (Cairns) observed: 'It may be a question whether the men were 'entitled to board her even for the purpose of serving the 'notice, but certainly no authority has been cited to justify 'their conduct in actually taking possession and turning 'the ship about and bringing her back. The object of 'dismantling a ship when that process is resorted to, is said 'to be to disable the ship from moving from the spot 'where she lies, but no one ever heard of a ship being dis-'mantled while she was on the high seas or near it. 'Therefore, as no reason whatever has been given for 'differing from the Judges in the Court below, the first 'interlocutor must be affirmed, with costs.'

A second case bears the same name. On the ship being brought back to Greenock, she was again arrested at the instance of the same person who had previously arrested along with others. The House of Lords *held* (again affirming the judgment of the First Division) that as the ship had been illegally brought back to port, she could not be there arrested, either by the pursuer of the first action, or by the mandatory on his own behalf, or by other parties who had granted authority to the pursuer to act for them,

Digitized by Google

and who had a common end to serve with him in securing the vessel (*Borjesson, &c.* v. *Carlberg, &c.*, second case, '*Edgar Cecil*,' July 9, 1878, 5 R. 217).

When arrestment ends.

In *Carlberg* v. *Borjesson, supra* (5 R. at p. 192), Lord President Inglis observed that the effect of such an arrestment 'comes to an end either when the party finds 'caution *judicio sisti*, or enters appearance without stating 'any objections to the jurisdiction.' *

Recall of arrestment.

This was illustrated in the following case where the mortgagee in possession of the *British India* presented a petition for recall of arrestments laid on the ship *jurisdictionis fundandæ causa*, and on the dependence of an action against the registered owner. The Court *recalled* the arrestments to the effect of allowing the ship to sail on the petitioner consigning a sum sufficient to cover the claims of the arresting creditor as a *surrogatum* for the ship, the said sum to be subject to the same extent as the ship to the petitioner's existing preferable claims and rights as mortgagee in possession in competition with the arresting creditor (*Stewart* v. *Macbeth & Gray*, Dec. 19, 1882, 10 R. 382).

This precedent was followed in the case six years later of *M'Phedron & Currie* v. *M'Callum*, Oct. 31, 1888, 16 R. 45, where in a petition at the instance of the owners of the s.s. *Hebridean*, praying the Court to recall arrestments laid on the ship upon the dependence of an action against them for payment of £176, and to prohibit any further arrestment on the dependence of the same action. The Court recalled the arrestments, and prohibited further arrestments as prayed for, on the petitioners finding caution for £200, or consigning that sum. Lord President Inglis said: 'I think we ought to follow the precedent in the case of '*Stewart* v. *Macbeth & Gray*. No doubt we have a 'discretion in the matter, but still I think regard must be 'shown to the previous practice of the Court,' p. 46.

It is not competent to arrest freight in the hands of

* It appears that arrestment *ad fundandam jurisdictionem* imposes consequently a nexus on the subject arrested until such caution is found. See *Malone* v. *M'Gibbon*, May 28, 1884, 11 R. 853; Bell's Prin. 2273.

Digitized by Google

shippers to found jurisdiction against the owners of a vessel if the shipper's sole contract was with certain charterers, and the shipper's bargain one solely by bill of lading granted by the master on behalf of the charterers. The owners would themselves have had no direct ground of action against the shippers, but the charterers would have. See *Mitchell, &c.* v. *Burn, &c.*, '*Northumberland*,' May 21, 1874, 1 R. 900.

Evidence.

Where damage is alleged to be done to cargo, and severity of weather has to be proved in addition to the log-book, returns from the keepers of lighthouses, and meteorological returns are 'quite legitimate in such an inquiry,' per Lord Shand in *Williams* v. *Dobbie et e contra*, '*Agnes* '*and Helen*,' June 27, 1884, 11 R. 782.

In a question between a steam-ship company and a sub-agent of the company, it was *questioned* by the Judges how far the books kept by the manager were evidence against the company (*Ross, Skolfield & Co.* v. *State Line Steamship Co., Ltd.*, Nov. 17, 1875, 3 R. 134).

Parole.—For circumstances under which it was held competent to prove by parole that a variation of the bill of lading from the terms of the charter-party had been made with the express consent of consignees' representatives, see *Davidson* v. *Bisset & Son*, '*Mary*,' March 1, 1878, 5 R. 706.

An engineer's log is admissible as evidence against the shipowner by whom he is employed, but not for him, *The Earl of Dumfries*, Jan. 15, 1885, L.R. 10 P.D. 31, and a letter from the master of a ship to her owners is admissible evidence against them, but his opinions as to the facts he mentions are not evidence (*The Solway*, July 16, 1885, 10 P.D. 137).

Foreign Law.

The law regulating disputes as to differences between cargo as stated in bill of lading and cargo actually on board is the *lex fori*. Thus Scots law was applied in the

Digitized by Google

case of the *Owners of the 'Immanuel'* v. *Denholm & Co.*, Dec. 7, 1837, 15 R. 152, as against Danish law, that of the flag, or Russian law, that of the place of contract. See also *The Gaetano and Maria*, 1882, L.R. 7 P.D. 149. Scrutton, p. 14.

In the case of *Valery* v. *Scott*, July 4, 1876, 3 R. 965, where French law was excluded, it was the *lex solutionis* which was held to apply.

NOTE.

Insurance, p. 187.—In the case of *Birkett, Sperling & Co.* v. *Engholm & Co.*, '*Ems*,' Nov. 30, 1871, 10 Mac. 170, it was held that war having been declared between France and Germany subsequently to the date of an agreement for the purchase of a cargo of oats to be shipped by a German vessel, the seller was, in the circumstances of the case, bound to effect an insurance against war-risks, and that, as he refused to do so, the buyer was entitled to rescind the contract.

Digitized by Google

INDICES.

Digitized by Google

Digitized by Google

INDEX OF CASES.

PAGE

Accomac, The, L.R. 15 P.D. 208, ... 102
Adam *v.* J. & D. Morris, *Jubilant*, 18 R. 153, ... 71, 100
Adams *v.* Glasgow and South-Western Railway Co., 3 R. 215, . . 56
Aglaia, The, 13 P.D. 160, ... 149
Agnes Otto, The, 12 P.D. 56, ... 142
Alston *v.* Herring, 11 Exch. 822, ... 79
Amelia, The, 1 Moo. P.C. (N.S.) 471, ... 136
Andalusian, The, 47 L.J. Ad. Div. 65, ... 136
Anderston Foundry Co. *v.* Law, *Black Eagle*, 7 Mac. 836, . . 43
Andrew *v.* Moorhouse, 5 Taunt. 435, ... 117
Andrew Wilson, The, 32 L.J. Prob., Ad. Div. 104, . . . 150
Annot Lyle, The, 11 P.D. 114, ... 143
Argentino, The, 13 P.D. 191, ... 126
Argo, The, Swabey, 462, ... 142
Arina, The, 12 P.D. 118, ... 50
Armstrong *v.* Lancashire and Yorkshire Railway Co., 10 Exch. 47, . 56
Armstrong & Co. *v.* M'Gregor & Co., *Macedon*, 2 R. 339, . . 10
Arrospe *v.* Barr, *Victoria*, 8 R. 602, ... 60
Auld *v.* Shairp, 2 R. 191, ... 57
Australasian Steam Navigation Co. *v.* Morse, 4 P.C. 222, . . 45
Avon Steamship Co. Limited *v.* Leask & Co., *Avon*, 18 R. 280, 2, 84, 88
Ayr Harbour Trustees *v.* Oswald, 10 R. (H. of L.) 85, . . . 197

Baine, &c., *v.* M'Cowan. *See* M'Cowan *v.* Baine & Johnston.
Baker *v.* Owners of the *Theodore H. Rand*, 1887, 12 App. Cas. 247, . 136
Barker *v.* Haven, 17 Johns. Rep. 234, ... 116
" *v.* Hodgson, 3 Maule and Selwyn, 267, ... 75, 78
" *v.* M'Andrew, 34 L.J. (C.P.) 191, ... 103
Barr & Shearer *v.* Cooper, *Joan Cunllo*, 2 R. (H. of L.) 14, . . 18
Benlarig, The, 14 P.D. 3, ... 155
Benn & Co. *v.* Porret, *Cereal*, 6 Mac. 577, ... 45
Bennett *v.* Maclellan, *Austria*, 17 R. 800, ... 27
Benson *v.* Duncan, 18 L.J. Exch. 169, ... 43
Bernina, The (1), 12 P.D. 36, ... 97
" (2), 12 P.D. 88, ... 56
Beta, The, 9 P.D. 134, ... 136
Betsy, The, 2 W. Rob. 167, ... 168
Beynon, &c. *v.* Kenneth, *Alice*, 8 R. 594, ... 105

Digitized by Google

PAGE

Birkett, Sperling & Co. *v.* Engholm & Co., *Ems*, 10 Mac. 170, . 212
Birley *v.* Gladstone, 3 M. and S. 205, ... 121
Birrell *v.* Dryer, 11 R. (H. of L.) 41, ... 172
Black *v.* Jehangeer Framjee & Co., *Huron*, 14 R. 678, . . 188, 207
Black Prince, The, 1 Lush. 573, ... 127
Blackburn, Low & Co. *v.* Haslam, *State of Florida*, 21 Q.B.D. 144, . 171
" " *v.* Vigors, " 12 App. Cas. 531, . 171
Blanchet *v.* Powell's, &c., 60 L.R. 9 Ex. 74, ... 114
Blendenhall, The, 1 Dods, 417, ... 150
Blenheim, The, 10 P.D. 167, ... 97
Board of Trade *v.* Brown, *Abercarne*, 13 R. (Jus. Cases) 58, . . 48
Borjesson, &c. *v.* Carlberg, &c., *Edgar Cecil*, 5 R. (H. of L.) 215, 209, 210
Broadhead *v.* Yule, *Puck*, 9 Mac. 921, ... 29-115
Bremner and Another *v.* Burrell & Son, *St. Fergus*, 4 R. 934, . . 74
British Shipowners' Co., Limited *v.* Grimond, *British Princess*, 3 R. 968, 88
Brown *v.* Board of Trade, *Ashdale*, 18 R. 291, ... 48
" *v.* Johnston, 10 M. and W. 331 ; 11 L.J. (Exch.) 373, . 75, 77, 78
Bruce *v.* Barclay, *Tagus*, 17 R. 811, ... 57
Buchanan and Others *v.* Barr & Shearer, *Loreno* and *Xantho*, 5 Mac. 973, ... 154
Buchanan *v.* Trustees of the Clyde Lighthouses, *Scotia*, 11 R. 531, . 200
Budgett & Co. *v.* Binnington & Co., *Fairfield*, 25 Q.B.D. 320, . . 78
Burgess *v.* Sharpe, 2 Camp. 529, ... 86
Burrell *v.* Simpson & Co., *Dunluce Castle* and *Fitzmaurice* (first stage), 4 R. 177, ... 180
Burton *v.* English, 12 Q.B.D. 218, ... 96

Cafferini *v.* Walker, 10 Ir. L.R., C.L. 250, ... 195
Camellia, The, 9 P.D. 27, ... 166
Campbeltown, Magistrates of, *v.* Galbreath, 7 D. 220, . . . 195
Canada Shipping Co. *v.* British Shipowners' Mutual Protection Association, *Lake Ontario*, 23 Q.B.D. 342, ... 178
Carmichael *v.* Liverpool Sailing Shipowners' Mutual Indemnity Association, *Argo*, 19 Q.B.D. 242, ... 71, 102, 178
Carnegie *v.* Conner, 24 Q.B.D. 45, ... 92
Carron Co. *v.* Cayzer, Irvine & Co., *Margaret* and *Clan Sinclair*, 13 R. 114, ... 141
Carron Park, The, L.R. 15 Pro. Div. 203, ... 103
Carswell *v.* Nith Navigation Trustees, 6 R. 60, ... 196
" & Son *v.* Finlay, *Arran*, 14 R. 903, ... 32
Cayzer *v.* Carron Co., *The Margaret*, 9 App. Cas. 873, . . . 132
Chappel *v.* Comfort, 10 Scott's C.B. Rep. 802, ... 63
Chieftain, The, Br. and L. 104, ... 41
Christie *v.* Landale, May 16, 1828, F.C., ... 195
City of Chester, The, 9 P.D. 182, ... 167
City of Peking, The, *v.* The Compagnie des Messageries Maritimes and Others, L.R. 15 App. Cas. 438, ... 127
Clacevich *v.* Hutcheson & Co., *Una*, 15 R. 11, ... 82
Clark *v.* The Hundred of Blything, 2 Barn. and Cres. 254, . . . 180
Clelland *v.* Sinclair, *Horatio* and *No. 4 Hopper Barge*, 14 R. Jus. Cases, 23, ... 147

Digitized by Google

PAGE

Clover *v.* Royden, 17 Eg. 190, ... 25
Clyde Navigation Trustees *v.* Barclay, Curle & Co., *Colina*, 3 R. (H. of L.) 44, ... 142
„ „ *v.* Laird & Son, 10 R. (H. of L.) 77, . 196
„ Shipping Co. *v.* Glasgow & Londonderry Steam Packet Co., 21 D. 1131, ... 146
Cochrane *v.* Retberg, 3 Espinasse, 121, ... 77
Coey *v.* Smith, 22 D. 955, ... 183
Cohn *v.* Davidson, 2 Q.B.D. 455, ... 99
Collins *v.* Lamport, 4 De G. J. and S. 500; 34 L.J. Chan. Div. 196, . 187
Colonial Insurance Co. of New Zealand *v.* Adelaide Marine Insurance Co., *Duke of Sutherland*, 12 App. Cas. 128,. 187
Coltman *v.* Chamberlain, *Freedom*, 25 Q.B.D. 328, ... 10
Commercial Steamship Co. *v.* Boulton, 10 Q.B.D. 346, . . . 106
Cossman *v.* West; Cossman *v.* British America Assurance Co., *L.E. Cann*, 13 App. Cas. 160, ... 177
Cox *v.* Bruce, (C. of A.) 18 Q.B.D. 147, ... 113
Craig & Rose *v.* Delargy, &c., *Ann*, 6 R. 1269, ... 63, 109
Cuba, The, 6 Jurist (N.S.) 152, ... 150
Cunningham *v.* Colvils, Lowden & Co., 16 R. 295, . . . 71, 98
Curtis *v.* Williamson, 10 Q.B.D. 57, ... 40
Czech *v.* General Steam Navigation Co., 3 C.D. 14, ... 39

Dall' Orso *v.* Mason & Co., *Presidente Washington*, 3 R. 419, . . 73
Davidson *v.* Bisset & Son, *Mary*, 5 R. 706, ... 87, 211
Davies *v.* Garrett, 6 Bing. 716, ... 85
De Silvale *v.* Kendall, 4 M. and S. 36, ... 36
Delaurier *v.* Wyllie, *George Moore*, 17 R. 167, . . 59, 65, 99, 184
Denny Bros., &c. *v.* Board of Trade, &c., *Buenos Ayrean*, 7 R. 1019, ... 25
Dickinson *v.* Martini & Co., *Redewater*, 1 R. 1185, ... 84
Donaldson Bros. *v.* Little & Co., *et e contra;* Little & Co. *v.* Hay & Sons, *Palermo*, 10 R. 413, ... 86, 96
Dordogne, The, 10 P.D. 6, ... 135, 136
Drain & Co. *v.* Scott, *Hyndeford*, 3 Mac. 114, . . . 41, 46, 122
Dudgeon *v.* Pembroke, 2 App. Cas. 284, ... 178
Duffus *v.* Mackay, 19 D. 430, ... 208
Duncan *v.* Dundee, Perth & London Shipping Co., *The Anglia*, 5 R. 742, ... 151-154, 157, 163
Dundee, The, 1 Haggart's Admir. Cases, 109, ... 10
Dykes *v.* Merry & Cunninghame, 7 Mac. 603, ... 188
Dymond *v.* Scott, *Anna Alida*, 5 R. 196, ... 44

Earl of Dumfries, 10 P.D. 31, ... 211
Ebor, The, 11 P.D. 25, ... 135, 136
Edwin, The, Br. and L. 281, ... 41
Emery *v.* Cichero, 9 App. Cas. 136, ... 128
English Coasting and Shipping Co., Ltd. *v.* British Finance Co., Ltd., *Magdala*, 14 R. 220, ... 207
Erato, The, 13 P.D. 163, ... 162
European, The, 10 P.D. 99, ... 72

Digitized by Google

PAGE

Ewer *v.* Board of Trade, *Carfin*, 7 R. 835, ... 48
Ewing *v.* Orr-Ewing, 10 App. Cas. 499, ... 121
Eyemouth Harbour Trustees, 6 Mac. 189, ... 195, 197

Fairenoth, The, L.R. 7 P.D. 207, ... 48
Fairport, The, 8 P.D. 48, ... 41
Fanny M. Carvill, The, 13 App. Cas. 455, ... 128
Feronia, The, 2 A. and E. 65, ... 41
Flensburg Steam Shipping Co. *v.* Seligmann, *Flora* and *Prima*, 9 Mac. 1011, ... 138
Ford *v.* Cotesworth, L.R. 4 Q.B.D. 127, 5 Q.B.D. 544, . . 77
Foster *v.* Colby, 3 Hurlstone and Norman, 718, . . . 116
Fowler *v.* Knoop, L.R. 4 Q.B.D. 299, ... 82
Francesco *v.* Massey, L.R. 8 Exch. 10, ... 103
Franconia, The, 2 P.D. 8, ... 129
Frankland and *The Kestrel, The*, 4 P.C. 529, ... 135
French *v.* Gerber, L.R. 2 C.P.D. 247, ... 103

Gaetano and Maria, The, 7 P.D. 149, ... 212
Galatea, The, Swabey, 349, ... 163
Gale *v.* Laurie, 5 B. and C. 156, ... 10
Gardiner *v.* Macfarlane, M'Crindell & Co., *Lismore*, 16 R. 658, 104, 121
Garigues *v.* Coxe (American), 1 Binney, Penn. 592, . . . 95
Garriock *v.* Walker, *Petrel*, 1 R. 100, ... 38
Garston Ship Co. *v.* Hickie, Borman & Co. (C. of A.) 18 Q.B.D. 17, . 102
,, *v.* Hickie, L.R. 15 Q.B.D. 580, . . 192, 194
Gibbs *v.* Liverpool Dock Trustees, 27 L.J. (Exch.) 321, . . 199
Gibson *v.* Small, 4 H.L.C. 353, ... 68
Gifford & Co. *v.* Dishington & Co., *Andalusia*, 9 Mac. 1045, . 87, 198
Gillespie & Co. *v.* Howden & Co., 12 R. 800, ... 9
Glamorganshire, The, 13 App. Cas. 455, . . . 90, 128
Glenfruin, The, 10 P.D. 103, ... 71, 167
Glentanner, The, Swa. 415, ... 41
Gowans *v.* Thomson, *Renown*, 6 D. 606, ... 42
Granfelt & Co. *v.* Lord Advocate, *Florida*, 1 R. 782, . . . 10
Grant *v.* Grant, *Skylark*, 6 Mac. 155, ... 208
,, *v.* Norway, 10 Scott's C.B. Reps. 665, . . . 42, 78, 113
,, & Co. *v.* Coverdale, Todd & Co., *Mennythrope*, 9 App. Cas. 470, ... 72
Gray *v.* Carr, 6 Q.B. 522, ... 100, 116, 120, 121
Great Northern Steamship Fishing Co. *v.* Edgehill, 11 Q.B.D. 225, . 52
Green *v.* Partlett, 32 L.J., C.P. 261, ...
Grieve, Son & Co. *v.* König & Co., *Truth*, 7 R. 521, . . . 111
Griffiths *v.* London & St. Catherine's Docks, 12 Q.B.D., 493, . . 55

Haglund *v.* Russells, *Fram*, 9 R. 958, ... 145
Hamilton *v.* Mendes, 2 Burr. 1198, ... 176, 177
,, Fraser & Co. *v.* Pandorf & Co., *Inchrhona*, 12 App. Cas. 518, ... 82, 70, 94
Hansen *v.* Donaldson, *Hilda*, 1 R. 1066, ... 84
Harper *v.* M'Carthy, 2 B. and P. N. R. 258, 267, . . . 78
Harris *v.* Jacobs, *Wimbledon*, 15 Q.B.D. 247, ... 73

Digitized by Google

PAGE
Hart *v.* The Standard Marine Insurance Co., Ltd., 22 Q.B.D., 499, . 178
Harvey & Co. *v.* Seligmann, *Eunice*, 10 R. 680, . . . 173
Havilland, Routh & Co. *v.* Thomson, *Elizabeth Jane*, 3 Mac. 313, . 41
Hay *v.* De Neve, 2 Shaw's App. Cas. 395, ... 133
Helgoland, The, Swabey, 491, ... 43
Henckell du Boisson & Co. *v.* Swan & Co., 17 R. 252, . . . 9
Henderson, &c., *v.* Lloyd's Association, *California*, 6 R. 835, . . 22, 23
„ and Others *v.* Stevenson, *Countess of Eglinton*, 2 R. (H. of L.) 71, ... 29
Hilda, Owners of *The*, *v.* Owners of *The Australia*, 12 R. 76, . . 128
Hill *v.* Audus, 1 Kay and Johnson, 263, ... 138
Hillstrom, &c., *v.* Gibson & Clark, 8 Mac. 463, ... 81
Hine Brothers *v.* Clyde Trustees, *Horatio*, 15 R. 498, . . . 130
Hislop *v.* Cadenhead, *Catherine*, 14 R. Just. Cases, 35, . . 47
Hogarth *v.* Miller, Brother & Co., *Westfalia*, L.R. A.C. 48, . 117, 118
Holman *v.* Irvine Harbour Trustees, *Gertrude*, 4 R. 406, . 143, 198
,, *v.* Peruvian Nitrate Co., *Constantine*, 5 R. 657, . . 77
Hough *et al v.* Athya & Son, *Polam*, 6 R. 961, ... 106
Houldsworth *v.* Wise, 7 B. and C. 794, ... 176, 177
Howitt *v.* Paul, Sword & Co., *Kishon*, 5 R. 321, . . . 115
Hubbersty *v.* Ward, 8 Ex. 330, ... 42
Hudson *v.* Ede, L.R. 2 Q.B. 578, ... 76
„ *v.* Harrison, 3 B. and B. 97, ... 175
Hunter *v.* Northern Marine Insurance Co., *Afton*, 15 R. (H. of L.) 72, 191
Hutchinson & Co. *v.* Aberdeen Insurance Co., *John George*, 3 R. 682, . 169

Indus, The, 12 P.D. 46, ... 142
Imbro, The, 14 P.D. 73, ... 129
Immanuel, Owners of, *v.* Denholm & Co., 15 R. 152, . . 113, 212
Inglis *v.* Buttery & Co., *United Service*, 5 R. (H. of L.) 58, . . 20
Ireland v. Livingstone, 5 H.L. 395, ... 185
Isca, The, 12 P.D. 34, ... 142

John M'Intyre, The, 9 P.D. 135, ... 135
Johnstone & Sons *v.* Dove, 3 R. 202, ... 89
Jolliffe *v.* Wallasey Local Board, 9 C.P. 62, ... 200
Jordan *v.* Warren (American), ... 38
Jubilee, The, 32 L.T. 594, ... 162
Justicia, The, 12 P.D. 145, ... 55

Kay *v.* Wheeler, L.R. 2 C.P. 302, ... 94
Kenneth & Co. *v.* Moore, &c., *City of Manchester*, 10 R. 547, . . 179
Khedive, The, 8 App. Cas. 795, ... 132
Kidston, &c. *v.* M'Arthur and the Clyde Navigation Trustees, *Rio Bento* and *Toward*, 5 R. 936, ... 140, 144
King *v.* Hinde, L.R. Ireland, 12 Ex. 113, ... 198
Kirby Hall, The, 8 P.D. 78, ... 135
Kish *v.* Corry, L.R. 10 Q.B. 553, ... 2, 103
Kopitoff *v.* Wilson, *State of Virginia*, 1 Q.B. Div. 377, . . . 68, 71

La Cour *v.* Donaldson & Son, *Enniskillen*, 1 R. 912, . . . 82
Laertes, The Cargo *ex The*, 12 P.D. 187, ... 167
Laming & Co. *v.* Seater, *Mula*, 16 R. 828, ... 187, 188

Digitized by Google

PAGE
Lamb *v.* Kaselack, Alsen & Co., *Lewis M. Lamb*, 9 R. 482, . . 116
Lancaster, The, 9 P.D. 14, ... 166
Langton *v.* Horton, 6 Jurist, 910, ... 10
Laurie *v.* Douglas, 15 M. and W., 746, ... 102
Laveroni *v.* Drury, 22 L.J. (Ex.) 2, ... 95
Lawson *v.* Grangemouth Dockyard Co., *Tabasqueno*, 15 R. 753, 159, 165
Lebanon, Owners of *The*, *v.* Owners of *Ceto*, L.R. 14 App. Cas. 670, . 135
Leduc & Co. *v.* Ward and Others, *Austria*, 20 Q.B.D. 475, . 87, 110
Lee *v.* Yates, 3 Taunt. 387, ... 78
Leishman *v.* Christie & Co., 19 Q.B.D. 333, . . . 89, 114
Leitch *v.* Wilson, *Barbata*, 7 Mac. 150, ... 117
Leith, Hull & Hamburg Steam Packet Co. *v.* Lord Advocate,
Danzig, 11 Mac. 597, ... 22
Lightbody's Trustee *v.* J. & P. Hutcheson, *Clara*, 14 R. 4, . . 31
Lindsay *v.* Adamson & Ronaldson, *Mikado*, 7 R. 1036, . . . 34
Little, &c. *v.* Burns, &c., *Ariadne* and *Owl*, 9 R. 118, . . 134, 145
Livietta, The, 8 P.D. 24, ... 157
London Joint-Stock Bank *v.* Stewart & Co., 21 D. 1327, . . 122
London Steamship Owners' Insurance Co. *v.* The Grampian Steamship
Co., 24 Q.B.D. 667, ... 131, 187
Lord Advocate *v.* Bourdais, *Gylfe*, 16 R. (Jus. Cases) 68, . . 189
,, *v.* Clyde Steam Navigation Co., *Bear*, 2 R. (H. of L.) 23, 22
,, *v.* Grant, *Craigellachie*, 1 R. 447, ... 54
,, *v.* Parker and Barrie, *Balmoral Castle* and *Princess of Wales*, 16 R. (Jus. Cases), 5, ... 148
Lucovich, 12 R. 1090, ... 204
Lyon *v.* Mells, 5 East. 428, ... 71

M'Arthurs *v.* M'Brair, 6 D. 1174, ... 11
M'Bain *v.* Wallace & Co., 8 R. (H. of L.), 106, ... 6, 7
M'Cowan *v.* Baine & Johnston, &c., *Niobe* (H. of L.) 7 *Times* L.R. 713, ... 21, 183
M'Gee *v.* Eglinton Iron Co., 10 R. 955, ... 55
Macgregor's Trustee *v.* Cox, &c., *Mikado*, 10 R. 1028, . . . 35
M'Intosh *v.* Sinclair, 11 Irish L.R., C.L. 456, ... 195
Mackenzie *v.* Liddell, *Commodore*, 10 R. 705, . . . 157, 163
Mackessack & Son *v.* Molleson, *Jeanie Hope*, 13 R. 445, . . 29
Mackill & Co. *v.* Wright Bros. & Co., *Lauderdale*, 16 R. (H. of L.) 1, . 90-92
Maclaren *v.* Campagnie Francaise de Navigation à Vapeur, 9 App.
Cas. 640, ... 135
M'Lean & Hope *v.* Fleming, *Persian*, 9 Mac. (H. of L.) 38, . 108, 120, 121
,, *v.* Munck, *Sophia*, 5 Mac. 839, . 31, 41, 108, 109, 113
M'Leod & Co., *v.* Harrison, 8 R. 227, ... 125
M'Naughton *v.* Allhausen & Co., *Samarang* (2), 10 D. 236, . . 42
,, *v.* Halbert, *Samarang* (1), 6 D. 194, ... 42
M'Phail *v.* Hamilton, *Earnsholm*, 5 R. 1017, ... 28
M'Phedron & Currie *v.* M'Callum, *Hebridean*, 16 R. 45, . . 210
Main, The, 11 P.D. 132, ... 129
Malone *v.* M'Gibbon, 11 R. 853, ... 210
Manners *v.* Raeburn & Verel, *Kremlin*, 11 R. 899, . . . 27, 32
Mansell *v.* Clements, L.R. 9 C.P., ... 139

Digitized by Google

PAGE

Marion, The, 10 P.D. 4, ... 29
Mary Ann, The, 1 A. and E. 8, ... 41
Mason *v.* Sainsbury, 3 Douglas Rep. 61, ... 180
Meg Merrilees, The, 3 Hagg Adm. 346, ... 164
Meier & Co. *v.* Kuchenmeister, *Jacob Rothenburg,* 8 R. 642, . . 40
Meredith, The, 10 P.D. 69, ... 32
Mersey Docks Trustees *v.* Gibbs, 1 H.L. 93, ... 200
Miller, &c., *v.* Powell, &c., *Isabella,* 2 R. 976, ... 138
,, & Co. *v.* Potter, Wilson & Co., *Pareora,* 3 R. 105, . . 44, 46
Milne Home *v.* Allan and Others, 6 Mac. 189, . . . 195, 197
Miman *v.* Moss, 29 L.J. 2 Q.B. 206, ... 77
Mitchell, &c., *v.* Burn, &c., *Northumberland,* 1 R. 900, . . 66, 211
Moes, Moliere & Tromp *v.* Leith & Amsterdam Shipping Co., *Ivanhoe,* 5 Mac. 988, ... 69, 107, 110
Monaghan *v.* Buchanan, *Benmore,* 13 R. 860, ... 30
Moon *v.* Caledonian Railway, *Nellie,* 3 R. 806, ... 197
Moss *v.* Cunliffe & Dunlop, 2 R. 657, ... 12
,, *v.* Smith, 9 C.B. 94, ... 176

Nasymth, The, 10 P.D. 41, ... 166
Neilson *v.* Skinner & Co., 17 R. 1243, ... 16
Nelson, Donkin & Co. *v.* Brown, &c., *Menzaleh,* 3 R. 810, . . 188
New Dumbarton Steamboat Co., &c., 8 Mac. 850, . . . 198
,, Steam Tug Co. *v.* M'Clew, *Syren,* 7 Mac. 733, . . . 168
Nielson *v.* Wait, 14 Q.B.D. 516; (C. of A.) 16 Q.B.D. 67, 74, 81, 84, 195
Norman *v.* Binnington, 25 Q.B.D. 475, ... 96, 102
Northumbria, The, 3, A. and E. 6, ... 138
North-Western Bank *v.* Bjornstrom, *Tahti,* 5 Mac. 24, . . 44, 45, 121
Notara and Another *v.* Henderson and Others, 7 Q.B. 225, . . 101
Nottebohn *v.* Richter, (C. of A.) 18 Q.B.D. 63, ... 90
Notting Hill, The, 9 P.D. 105, ... 127

Oakfield, The, 11 P.D. 34, ... 142
Ocean Steamship Co. *v.* Apcar & Co., *Arratoon Apcar,* 15 App. Cases, 37, ... 128
Ohrloff *v.* Briscall, L.R. 1 P.C. App. 231, ... 39, 111
O'Neil *v.* Rankin & Sons, *Earl Grey,* 11 Mac. 538, . . . 42

Palermo, The, 10 P.D. 21, ... 140
Pandorf *v.* Hamilton, 16 Q.B.D. 629, ... 186
Parana, The, 9 P.D. 118, ... 127
Parnaby *v.* Lancashire Canal Co., 11 Adolph and Ellis' Rep., Old Series, Q.B. 223, ... 200
Pearson *v.* Goschen, 17 C.B. N.S. 352, ... 120, 121
Peele *v.* The Merchants' Insurance Co. (American), 3 Mason, 27, . 175
Petersen *v.* M'Lean & Hope and Hertz, *Nayaden,* 6 Mac. 218, . 505
Phillips *v.* Clark, 2 C.B. N.S. 156, ... 69
,, *v.* Rodie, 15 East. 546, ... 120, 121
Pink *v.* Fleming, 25 Q.B.D. 396, ... 205
Pirrie & Sons *v.* Warden *et al.*, *Emily and Jessie,* 9 Mac. 573, . 49, 124
Pontida, The, 9 P.D. 177, ... 43

Digitized by Google

PAGE

Porteous and Others *v.* Watney, L.R. 3 Q.B.D. 534, . . 63, 116
Postlethwaite *v.* Freelands, L.R. 5 App. Cas. 599, . . 76, 77, 80
Priestley *v.* Fernie, 34 L.J. Exch. 172, ... 40
Princess Alice, The, 3 W. Rob. 138, ... 162
Princess Helena, The, Lush. 190, ... 50
Prinz Heinrich, The, 13 P.D. 31, ... 166
Proudfoot *v.* Montefiore, 2 Q.B. 511, 521, ... 170
Provincial Insurance Co. of Canada *v.* Leduc, 6 P.C. 224, . . 175
Pyman Brothers *v.* Dreyfus Brothers & Co., *Lizzie English,* 24 Q.B.D. 152, ... 74

Queen, The, *v.* Williams, Westport, New Zealand, 9 App. Cas. 418, . 200
Quickstep, The, L.R. 15 Prob. 196, ... 21

R. L. Alston, The, (C. of A.) 8 P.D. 1, ... 136
Raisby, The, 10 P.D. 114, ... 165, 166
Randall *v.* Cochran, 1 Ves. sen. 97, ... 180
,, *v.* Lynch, 2 Camp. 352, 355, ... 78
Rankine, &c. *v.* Raschen, &c., *Albicore* and *Aurora,* 4 R. 725, . . 140
Ranking & Co. *v.* Tod, *Reggente,* 8 Mac. 914, . . . 44, 205
Readhead *v.* The Midland Railway Company, 4 Q.B.D. 379, . . 68
Recepta, The, 14 P.D. 131, ... 137
Rennay *v.* Magistrates of Kirkcudbright, *Janets and Ann,* 18 R. 294, . 201
Renpor, The, (C. of A.) 8 P.D. 115, ... 154
Restitution Steamship Co. *v.* Pirie, 61 L.T. 330, . . . 63
Reynolds, 34 L.J., Q.B. 255, ... 78
Rhoshina, The, 10 P.D. 131, ... 202
Richardson *v.* Nourse, 3 B. and A. 237, ... 45
Rigborgs Minde, The, (C. of A.) 8 P.D. 132, ... 143
Robertson *v.* Dennistoun, *Elizabeth Walker,* 3 Mac. 829, . . 32
Robinows and Marjoribanks *v.* Ewing's Trustees, *Warrior,* 3 R. 1134, ... 184
Rodocanachi *v.* Milburn, (C. of A.) 18 Q.B.D. 67, ... 59
Roelands *v.* Harrison, 9 Ex. 444, ... 192
Ross & Duncan *v.* Baxter & Co., &c., *Greetlands,* 13 R. 185, . . 19
Ross, Skolfield & Co. *v.* State Line Steamship Co., 3 R. 134, . 36, 211
Rothwell *v.* Hutchison, &c., *Neptune,* 13 R. 463, ... 55
Roy *v.* Hamilton & Co., *Lucetta* and Others, 5 Mac. 573, . . 28
Russell *v.* Niemann, 34 L.J., C.P. 10, ... 66, 100

Salvesen & Co. *v.* Grey & Co., *Matador,* 13 R. 85, . . . 1, 103
Sanguinetti *v.* The Pacific Steam Navigation Co., L.R. 2 Q.B.D. 238, 103, 106
Sara, The, 12 P.D. 158, ... 41
Saunders *v.* Drew, 3 B. and Ad. 445, ... 117
Schuster *v.* M'Kellar, 7 E. and B. 704, ... 67
Sea Insurance Co. *v.* Gavin, 4 W. and S. 17, ... 194
Seath & Co. *v.* Moore, *Elms, Brighton, Satanella, Bonnie Princess, &c.,* 13 R. (H. of L.) 57, ... 47
Serraino & Sons *v.* Campbell, *John Bamfield,* 25 Q.B.D. 501, . . 66, 96
Seville Sulphur and Copper Co., Limited *v.* Colvils, Lowden & Co., *Ethelwolf,* 15 R. 616, ... 97
Seward *v.* Ratter, 12 R. 222, ... 52
Sewell *v.* Burdick, *Zoe,* L.R. 10 App. Cas. 74, . . . 59, 125

Digitized by Google

PAGE

Shankland *v.* Athya & Co., *Indiana*, 3 Mac. 810, ... 39
Sharp *v.* Rettie, *Escurial*, 11 R. 745, ... 52
Shepherd *v.* Henderson, *Krishna*, 9 R. (H. of L.) 1, . . . 175
Short *v.* Simpson, 35 L.J. Com. Pl. 147, ... 49, 124
Simey *v.* Peter, *Ocean Farer*, 3 Mac. 883, ... 115
Simpson *v.* Duncanson, 1786, M. 14,204, ... 257
,, & Co. *v.* Thomson, *Fitzmaurice* and *Dunluce Castle*, 5 R. (H. of L.) 40, ... 180
Sinclair, &c. *v.* Spence, *Gladiolus*, 10 R. 1077, ... 150
Solway, The, 10 P.D. 137, ... 211
Spencer & Co. *v.* Dobie & Co., *Firth of Tay*, 7 R. 396, . . . 8
Stainbank *v.* Fenning, 11 Scott's C.B. Rep. 51, ... 46
,, *v.* Shepard, 13 Scott's C.B. Rep. 418, ... 46
Steele & Co. *v.* Dixon, &c., *Brazilian*, 3 R. 1003, ... 33
Steel & Craig *v.* State Line Steamship Co., *State of Virginia*, 4 R. (H. of L.) 103, ... 67, 71, 94
Stein *v.* Stirling (not reported), ... 195
Stevens *v.* Gourlay, *Cleadon*, 14 More's P.C., Rep. 92, . . . 183
Stewart *v.* Macbeth & Gray, *British India*, 10 R. 382, . . . 210
Stoomvaart Maatschappy Nederland *v.* P. & O. Steam Navigation Co., 7 App. Cas. 795, ... 131
Strang, Steel & Co. *v.* A. Scott & Co., *Abington*, 14 App. Cas. 601, . 49
Strickland and Others *v.* Neilson & MacIntosh, *Tornado*, 7 Mac. 400, 37, 85
Stumore, Weston & Co. *v.* Breen, *Lilburn Tower*, 12 App. Cas. 698, . 42
Sturgis *v.* Boyer, *American*, 24 Howard's Rep. 110, ... 21
Sunniside, The, 8 P.D. 137, ... 167
Symington *v.* Symington, 1 R. 1006, ... 207

Tapscott *v.* Balfour, L.R. 8 C.P. 46, ... 73
Tasmania, The, 13 P.D. 110, ... 146
,, Owners of, *v.* Smith and Others, L.R. 15 App. Cases, 223, 128
Taylor *v.* Dunbar, 4 C.P. 206, ... 185
,, *v.* Liverpool and Great Western Steam Co., L.R. 9 Q.B.D. 546, 96
,, *v.* Taylor, 1820, F.C., ... 207
,, & Sanderson *v.* Perrin & Sons, 1883 (not reported), . . 100
Thames, Owners of, *v.* Owners of *Lutetia*, 12 R. (H. of L.) 1, . . 135
Thames and Mersey Marine Insurance Company *v.* Hamilton, Fraser & Co., 12 App. Cas. 484, ... 185
Thiis and Others *v.* Byers, L.R. 1 Q.B.D. 249, ... 77
Thomas Allen, Owners of the, *v.* Gow, 12 App. Cas. 118, . . 165
Thomson, &c. *v.* Greenock Harbour Trustees, *Albatross*, 3 R. 1194, . 199
Thorogood *v.* Bryan, 18 C.B. 115, ... 56
Thyatira, The, 8 P.D. 155, ... 127
Tillet *v.* *Cwm Avon*, 2 *Times* L.R. 675, ... 80
Toward, Owners of, *v.* Owners of *Turkistan*, 13 R. 342, . . . 129
Tredegar Iron & Coal Co., Ltd. *v.* Owners of *Calliope*, L.R. 1891, A.C. 11, ... 201
Tully *v.* Terry, L.R. 8 C.P. 679, ... 114

Ulysses, Cargo *ex The*, 13 P.D. 205, ... 162

Digitized by Google

PAGE
Union Steamship Co. *v.* Owners of the *Aracan*, 6 P.C. App. 127, . 183
United Service, The, 8 P.D. 56, ... 154

Valery *v.* Scott, 3 R. 965, ... 10, 212
Victoria, The, 13 P.D. 125, ... 140
Vindobala, The, 13 P.D. 42, ... 27, 33
Vindomora, Owners of *The*, *v.* Lamb and Others, L.R. 1891, A.C. 1, 135
Vulcan, Owners of *The*, *v.* Owners of *The Berlin*, 9 R. 1057, 157, 159, 162, 164

Wagstaff *v.* Anderson, L.R. 5 C.P.D. 171, ... 59, 67
Walker, Donald & Co. *v.* Birrell, Stenhouse & Co., 11 R. 369, . . 15
Warkworth, The, 19 P.D. 20, ... 141
Watson *v.* Board of Trade, *Vicksburg*, 22 S.L.R. 22, ... 48
„ *v.* Duncan, *John Watson*, 6 R. 1247, ... 11
Watson & Co. *v.* Shankland *et al Janet Cowan*, 11 Mac. (H. of L.) 51, ... 123, 187
Wegener *v.* Smith, 15 C.B. 285, ... 63
Werra, The, 12 P.D. 52, ... 166
West India and Panama Telegraph Co. *v.* Home and Colonial Insurance Company, 6 Q.B.D. 51, ... 185
Westbourne, The, 14 P.D. 132, ... 155
White *v.* Munro, *Europe*, 3 R. 1011, ... 13
Whites, &c. *v.* Steamship Winchester Co., *Winchester*, 13 R. 524, . 75
Wights *v.* Burns, *James Wishart*, 11 R. 217, ... 49, 57
Williams *v.* Dobbie, *Agnes and Helen*, 11 R. 982, . . . 39, 211
Wilkinson *v.* Alston, 48 L.J. Q.B. 733, ... 16
Wilson, Sons & Co. *v.* Owners of Cargo per the *Xantho*, 12 App. Cas. 503, ... 94
Winch *v.* Conservators of the Thames, 9 Q.B. 378, ... 200
Woodley *v.* Michell, 11 Q.B.D. 47, ... 94
Woodrop Sims, The, 2 Dods, 83, ... 127, 131
Wright *v.* New Zealand Shipping Co., 4 Ex. D. 165, ... 80
Wyllie, J. & A., *v.* Harrison & Co., *Mandarin*, 13 R. 92, . . . 80

Xantho, The, 11 P.D. 170, ... 95

Yan-Yean, The, 8 P.D. 147, ... 154
Yates *v.* Whyte, 4 Bingham's New Cases, 272, ... 180
Youle *v.* Cochrane, &c., *Marcellus*, 6 Mac. 427, ... 116

Zadok, The, 9 P.D. 119, ... 136

Digitized by Google

INDEX TO NAMES OF SHIPS.

Abercarne, 48.
Abington, 49.
Accomac, 102.
Afton, 191.
Aglaia, 149, 162.
Agnes Otto, 142.
Agnes and Helen, 39, 211.
Albatross, 199.
Albicore, 138.
Alice, 104.
Amelia, 136.
Andalusia, 86, 198.
Andalusian, 136.
Andrew Wilson, 150.
Anglia, 151, 156, 163.
Ann, 109.
Anna Alida, 44.
Annot Lyle, 143.
Araminta, 28.
Aracan, 183.
Argentino, 126.
Argo (1859), 142.
„ (1877), 71, 178.
Ariadne, 133, 145.
Arina, 50.
Arklow, 128.
Arran, 32.
Arratoon Apcar, 128.
Ashdale, 48.
August, 38.
Aurora, 138.
Australia, 128.
Austria (1888), 87, 110.
„ (1890), 27.
Avon, 2, 84, 88.

Balmoral Castle, 147.
Barbata, 116.
Bear, 22.
Benlarig, 155.
Benmore, 30.
Berlin, 157, 162, 164.
Bernina (1), 97.
„ (2), 30, 56.
Beta, 136.
Betsy, 168.
Black Eagle, 43.
„ Prince, 127.
Blendenhall, 150.
Blenheim, 97.
Brazilian, 33.
British India, 210.
„ Princess, 88.
Buenos Ayrean, 25.

California, 23.
Calliope, 200.
Camellia, 166.
Carfin, 47.
Carron Park, 102.
Catherine, 47.
Cavendish, 204.
Cereal, 45.
Ceto, 135.
Chieftain, 41.
City of Chester, 166.
„ Manchester, 178.
„ Peking, 127.
Clan Sinclair, 140.
Clara, 31.
Cleadon, 183.
Colina, 141.
Commodore, 155.
Constantine, 77.
Countess of Eglinton, 29.
Craigellachie, 54.
Cruiser, 159, 162.
Cuba, 150.

Digitized by Google

Danzig, 22.
Dordogue, 135, 136.
Duke of Sutherland, 187.
Dundee, 10.
Dunluce Castle, 180.

Earl Grey, 42.
Earl of Dumfries, 211.
Earnholm, 28.
Ebor, 135, 136.
Edgar Cecil, 209, 210.
Edwin, 41.
Elizabeth Jane, 41.
„ Walker, 32.
Emily and Jessie, 123.
Ems, 212.
Enniskillen, 82.
Erato, 162.
Escurial, 52.
Ethelwolf, 97, 98.
Eunice, 173.
Europe, 13.
European, 72.

Fanny M. Carvill, 128.
Fairfield, 79.
Fairport, 41.
Feronia, 41.
Fitzmaurice, 180.
Flora, 137.
Florida, 10.
Flying Serpent, 183.
Frances, 178.
Fram, 144.
Franconia, 129.
Frankland, 135.
Freedom, 10.
Frey, 80.
Frith of Tay, 8.

Gaetano and Maria, 212.
Galatea, 163.
Garston, 102, 192, 194.
George Moore, 59, 63-65, 99, 184.
Gertrude, 143, 198.
Gladiolus, 150.
Glamorganshire, 90, 128.
Glenfruin, 71, 167.
Glentanner, 41.
Greetlands, 19.
Gylfe, 188.

Harvest Queen, 151, 156, 164.
Hayward, 28.
Helgoland, 43.
Hilda (1874), 83.
„ (1884), 128.
Horatio (1887), 146.
„ (1888), 130.
Howick, 155.
Hyndeford, 41, 46.
Huron, 207.

Imbro, 129.
Immanuel, 113, 212.
Inchrhona, 94.
Indiana, 39.
Indus, 143.
Isabella, 138.
Isca, 142.
Ivanhoe, 107.

Jacob Rothenburg, 39.
James Wishart, 57.
Janet Cowan, 123, 187.
Janets and Ann, 201.
Jeanie Hope, 29.
Joan Cunllo, 17.
John Banfield, 65.
„ George, 169.
„ M'Intyre, 135.
„ Watson, 11.
Jubilant, 71, 101.
Jubilee, 162.
Julie, 157.
Justicia, 55.

Kestral, 135.
Khedive, 132, 133.
Kirby Hall, 135.
Kishon, 114.
Kremlin, 27, 32.
Krishna, 173.

L. E. Cann, 177.
L. de V. Chipman, 173.
Laertes, 167.
Lake Ontario, 178.
Lancaster, 166.
Lauderdale, 90.

Digitized by Google

LEBANON, 135.
LEWIS M. LAMB, 115.
LILBURN TOWER, 42.
LISMORE, 104.
LIVIETTA, 157.
LIZZIE ENGLISH, 74.
LORENA, 154.
LOUDON CASTLE, 16.
LUCETTA, 28.
LUTETIA, 134.

MACEDON, 10.
MAGDALA, 206.
MAIN, 129.
MANDARIN, 80.
MARCELLUS, 116.
MARGARET (1884), 132.
" (1885), 140.
MARION, 29.
MARY, 211.
" ANN, 41.
" LOUISA, 154.
MATADOR, 103.
MATIN, 151, 156.
MEG MERRILEES, 164.
MENNYTHORPE, 73.
MENZALEH, 188.
MEREDITH, 32.
MIKADO (1880), 34.
" (1883), 35.
MULA, 187, 188.

NASMYTH, 166.
NAYADEN, 205.
NELLIE, 197.
NEPTUNE, 55.
NIOBE, 21, 183.
NORTHUMBRIA, 139.
NORTHUMBERLAND, 66, 211.
NOTTING HILL, 127.

OAKFIELD, 142.
OCEAN FARER, 115.
OWL, 133, 145.

PALERMO (1882), 95.
" (1884), 140.
PARANA, 127.
PAREORA, 44, 45, 46.
PERSIAN, 108.
PETREL, 37, 38.
POLAM, 106.
PONTIDA, 43.
PRESIDENTE WASHINGTON, 72.
PRIMA, 137.
PRINCESS ALICE, 162.
" HELENA, 50.
" OF WALES, 147.
PRINZ HEINRICH, 165.
PUCK, 29, 115.

QUICKSTEP, 21.

R. L. ALSTON, 136.
RAISBY, 165, 166.
RECEPTA, 137.
REDEWATER, 84.
REGGENTE, 44, 205.
RENOWN, 42.
RENPOR, 154.
RESTITUTION, 63.
RHOSHINA, 202.
RIGBORGS MINDE, 143.
RIO BENTO, 140, 143.

ST. FERGUS, 73.
" GEORGE, 28.
SAMARANG, 42.
SARA, 41.
SKYLARK, 208.
SOLWAY, 211.
SOPHIA, 31, 41, 108.
STATE OF FLORIDA, 170.
" VIRGINIA, 67, 94.
SUNNISIDE, 167.
SYREN, 167.

TABASQUENO, 159, 162, 165.
TAGUS, 56.
TAHTI, 121.
TASMANIA (1888), 146.
" (1890), 128.
TEDDINGTON, 51.
THAMES, 134.
THEODORE H. RAND, 136.
THOMAS ALLEN, 165.
THYATIRA, 127.
TILKHURST, 103.
TORNADO, 37, 85.
TOWARD (1885), 129.
" (1878), 140, 144.
TRUTH, 111.
TURKISTAN, 129.

Digitized by Google

ULYSSES, 162.
UNA, 82.
UNITED SERVICE (1878), 20.
„ „ (1883), 154.

VICKSBURG, 48.
VICTORIA (1881), 60.
„ (1883), 166.
„ (1888), 140.
VINDOBALA, 27, 33.
VINDOMORA, 135.
VULCAN, 158, 162, 164.

WALTON, 157.
WARKWORTH, 141.
WARRIOR, 184.
WERRA, 166.
WESTBOURNE, 155.
WESTFALIA, 117.
WIMBLEDON, 73.
WINCHESTER, 75.
WOODROP SIMS, 127, 131, 132.

XANTHO (1867), 154.
„ (1887) 94.
„ (1886) 95.

YAN-YEAN, 154.

ZADOK, 136.
ZOE, 59, 125.

Digitized by Google

GENERAL INDEX.

Abandonment, PAGE
repudiation by underwriters of, ... 175
Affreightment,
contract of, Chapter III., ... 58-125
(See also BILL OF LADING, CHARTER-PARTY, FREIGHT, &c.)
'all other conditions as per charter,' meaning of, . 63
ambiguous clause in bill of lading to be read in shipper's favour, ... 96
bill of lading. (See separate heading.)
breakage, ... 110
cesser clause in charter-party, ... 103
charter-party over-rides bill of lading, ... 59
charterer's obligations, ... 72
master signs bill of lading as agent for, . 66
'clean bill of lading,' meaning of, ... 60
days—working days, ... 74 (*note*)
running, ... 74 (*note*)
lay, ... 106
dead freight, ... 120
weight, ... 90
delivery on rafts, ... 82
by master, without production of bill of lading, 123
in good condition, ... 88
breaking bulk, ... 89
demurrage, ... 72, 83
deviation, unjustifiable, ... 85
justifiable, ... 86
'to proceed to,' meaning of, ... 86
order of ports altered, ... 87
knowledge of intended deviation, . . . 87
errors or neglect of navigation, ... 97-103
duty of a master when injury done is due to an excepted cause, ... 101

Digitized by Google

PAGE

Affreightment—*continued.*
foreign port, quarantine, ... 75
holidays at Iquique, ... 77
freight. (See FREIGHT.)
knowledge of intended deviation not admissible to vary terms of bill of lading, ... 87
lay days, computation, ... 106
leakage, loss by, ... 108
master signs bill of lading as agent for charterers, . 66
should procure freight from consignee, . . 116
delivery without production of bill of lading, . 123
negligence clause in bill of lading, ... 93
perils of the sea, ... 93
collision, ... 95
rats, ... 94
tempestuous weather, ... 96
port of discharge, custom of, ... 79
must be clear, . . . 81
primage, or hat-money, . 114
seaworthy ship, meaning of, ... 67-71
apparatus of, ... 71, 72 (*note*)
shippers, obligations on, ... 107

'All other Conditions as per Charter,'
meaning of, ... 63

'All other Perils,'
meaning of, ... 185

Apparatus of Seaworthy Ship, ... 71, 72 (*note*)

Apprentice Seaman may be Chastised, ... 50, 57

Appurtenances,
meaning of in sale of ship, ... 10

Arrestment, &c., Chapter VIII., ... 203-212
definitions, ... 203
ad fundandam jurisdictionem, ... 207-210
bottomry bond, on, 203, ... 204
English decree followed by, ... 205
expenses, ... 207
freight, arrestment of, ... 210
illegal, ... 205
recall, ... 210
ship may not be pursued to sea, ... 209

Digitized by Google

PAGE

'All our Risk,'
meaning of, ... 184
Ayr Harbour Trustees, ... 197
Ballast,
from tidal river, ... 196
Baltic Bill of Lading, 1885, ... 65, 66
Bankruptcy,
of builders, ... 3, 6
engineers, ... 3
owners, ... 3
Russian purchasers; stoppage *in transitu*, . . . 124
Bill of Lading,
over-ruled by charter-party, ... 59
clean, ... 60
'all other conditions as per charter,' meaning of, . 63
master signs as agent for charterers, ... 66
ambiguous clause to be read in shipper's favour, . . 96
'not answerable for breakage,' meaning of, . 107, 110
statements therein are conclusive as against more signing, ... 108
goods not on board, ... 111
delivery without production of, ... 123
Bill of Sale,
followed by possession vests property in purchaser, despite sequestration of seller while still registered owner, ... 11
Bottomry Bond,
arrestment on, ... 203, 204
granted by master, ... 42-45
Breakage,
not answerable for, ... 107; 110
Breaking Bulk, ... 89
Breaking-up Vessel,
accident arising from, ... 56
Caen Harbour, ... 198
Campbeltown, Port of, ... 195
Cardiff, Port of, ... 192
Cargo,
meaning of term, ... 3 (*note*)

Digitized by Google

PAGE

Cargo in Bags, ... 39, 109

Cargoes,
whale blubber, ... 37
pepper, ... 38 (*note*)
cement, ... 39, 87
coal and iron, ... 63
wheat, ... 67, 70, 178, 187
iron, ... 73, 80, 95, 173, 178
ash and bones, horns, hoofs, and piths, ... 81
railway sleepers, ... 82, 92
barley, ... 86
jute, ... 88
salt, ... 88
hemp, ... 89
coal and machinery, ... 90
sugar, ... 103, 111
coal, ... 105, 197, 199
oil, ... 108
wine, ... 115
guano, ... 115
cattle, ... 23

Carriers, ... 107, 151

Cesser Clause in Charter-Party, ... 103

Charter-Party,
accidents of navigation (See Perils of the Sea), 97, 100, 102
advances by charterer's agents who may insure, 44, 121, 123
'all conditions as per charter,' 60, 63, 99
omission of these words in bill of lading, . . 63, 65
negligence clause as per Baltic bill of lading, 1885, 65, 66
'all dangers and accidents of the sea' (See Perils of the Sea).
'alongside' delivery, meaning of, ... 89
bill of lading's terms over-ruled where disconform to, . 59
cesser clause, ... 103-106
clean bill of lading (See Bill of Lading), . . . 60
custom of the port,
Bristol, ... 79
Glasgow, ... 80
Iquique, ... 77
must be clear, ... 81
where no custom, ... 88

Digitized by Google

PAGE

Charter-Party—*continued.*
dead weight, guarantee as to, ... 90-93
demurrage, 60, 63, 72, 77, 79, 80, 83, 84, 100, 103, 104, 167
at port of loading is not sopited by extra despatch at port of discharge, ... 84
discharge by lighters, ... 74, 79
trucks, ... 80
rafts, ... 82
holidays (foreign) as affecting delay in loading, . . 77
lay-days, ... 73, 74, 76, 106
'master to sign bill of lading as required,' . . . 66
negligence clause, ... 93
perils of the sea, meaning of, ... 93
collision, ... 95
muddy water in boiler, ... 97
rats, ... 94
tempestuous weather, ... 96
'proceed to ——, and load in —— working days,' . 72
'proceed to ——, or so near thereunto as she may safely get,' 73
'to proceed to,' 86
alteration of order of ports, ... 87
knowledge of intended deviation, ... 87
quarantine as affecting delay in loading, . . . 75
seaworthy ship, ... 67-72
cargo voyage implies that ship is to be seaworthy on return voyage, ... 71
'ship's risk,' meaning of, ... 90
surf days at Iquique as affecting loading, . . . 77
time freight, ... 117, 119
wreck before freight payable, ... 116

Chastisement of Apprentice, ... 50, 57

Chronometer
is included in sale of a ship, ... 10

'C. i. f.,'
meaning of, ... 185

'Clean Bill of Lading,'
meaning of, ... 60

Clyde,
port of, ... 191, 195, 198, 200

Digitized by Google

PAGE

Collision,
Chapter IV., ... 126-148
anchored ship, ... 129, 142
compensation, ... 127
compulsory pilotage, ... 141
daylight collision, ... 130
equal damage, ... 131
negligence, ... 131
excepted risk as 'peril of the sea,' 95
fog, ... 135
improper navigation, ... 141
justiciary cases, ... 146
limitation of liability, ... 136-141
expenses of application, ... 140
manœuvring, wrong, ... 130
overtaking ship, ... 128, 129 (*note*)
pilotage, compulsory, ... 141
principles of law relative to, ... 126, 127
procedure under M.S. Act, 1854, sec. 512, . . . 144
regulations for preventing collisions, 127 *et seq.*, . 134
river collisions, ... 133, 136, 143
trustees, ... 143
stranded vessel, ... 143
transhipment of goods, ... 97, 185 (*note*)
tug and tow, ... 146
underwriter's liability, ... 180

Consignee,
charterer's agent acts as owner's agent when collecting freight from, ... 29, 115
advances for ship's disbursement, ... 122
obligation to pay demurrage, ... 79, 81, 83
non-liability, ... 80
variation of terms of bill of lading from charter-party, with express consent of, ... 87
breaking bulk of damaged goods, ... 89
primage or hat-money, liability for, ... 114
master's duty to procure freight from, ... 116
sale of cargo in vessel under bottomry by, ... 204
drawing for balance of freight upon, ... 185

Contracts,
for building, ... 8, 9

Digitized by Google

PAGE

Contracts—*continued.*
for definite carrying capacity, ... 8
for repairs, ... 20

Daylight Collision, ... 130

Dead Freight, ... 60, 61

Dead Weight, ... 90

Delivery,
of ship at certain port, ... 9
of cargo on rafts, ... 82

Demurrage,
cases as to, . 60, 63, 72, 77, 79, 80, 83, 84, 100, 103, 167
at port of lading is not sopited by extra despatch at port of discharge, ... 84

Derelict,
sale by salvors, ... 177

Desertion by Seamen, ... 51

Deviation,
justifiable, ... 86
unjustifiable, ... 85

Discharge,
by lighters, ... 74, 79
rafts, ... 82
trucks, ... 80

Dumbarton Burgesses,
exemption from certain river dues, ... 198

English Law
practically identical with Scots law as to shipping, . 1, 4
decree followed by arrestment in Scotland, . . 205

'Errors or Neglect of Navigation,'
meaning of, ... 97, 103

Evidence, ... 211, 212
engineer's log, ... 211
knowledge of intended deviation not admissible to vary terms of bill of lading, ... 87
lighthouse returns, ... 211
local customs, how far relevant to explain written documents, ... 77, 81
manager's books, ... 211

Digitized by Google

PAGE

Evidence—*continued.*
master's letter, ... 21
meteorological returns, ... 211
parole, ... 87, 211
usage, ... 196

Expenses
of application for limitation of liability, ... 140

Eyemouth Harbour, ... 195, 196

Falmouth Harbour Trustees
liable for fault of harbour master, ... 202

Fog,
collision in, ... 135

Foreign Law, ... 211, 212
average settlement, ... 184
owners, ... 9, 10
sale and flag, fictitious, ... 169

Freight,
advances to account of, ... 34, 44, 121
collection by charterer's agents, ... 29, 115
no power to compromise, ... 29
arrestment of, ... 44, 210
of cargo for, ... 205
'at any rate of,' 60
loss of cargo set off against balance of, ... 102
retention of freight under Danish law, ... 113
retention against advances, ... 35
collection by charterer's agents, ... 29, 115
dead, ... 120
lien for, ... 115
loss of, circumstances where owner not entitled to claim as against underwriter, ... 182
master to procure freight from consignee, ... 116
primage or hat-money included in, ... 114
time, ... 117
wreck before freight payable, ... 116

Glasgow, Port of, ... 191, 195, 198, 200

Gloucester, Port of, ... 195

Grangemouth Harbour, ... 197

Greenock Harbour, ... 191, 199

Digitized by Google

PAGE

Harbour,
Chapter VII., ... 190-202
definitions, ... 190, 192
master's misdirections, ... 202
open roadstead, ... 194
pilots, ... 198
port, Sir M. Hale's definition, ... 190
repairs executed in a, ... 17
reparation for damage in, ... 199
safe port, ... 80, 84
sandbank in Clyde, ... 200
trustees, powers of, ... 197
liability for harbour-master's misdirections, . 202
pilots, ... 198
reparation, ... 199
Ayr, ... 197
Caen, ... 198
Campbeltown, ... 195
Cardiff, ... 192
Clyde, ... 191, 195, 198, 200
Dumbarton burgesses' exemption from Clyde dues, . 198
Eyemouth, ... 195, 196
Glasgow, ... 191, 195, 198, 200
Gloucester, ... 195
Grangemouth, ... 197
Greenock, ... 191
Tail of the Bank, ... 80
Kirkcudbright, ... 201
Newry, ... 195
Usk river, ... 201
Westport, New Zealand, ... 200
Whitehaven, ... 197

Hat-money, ... 114

Improper Navigation, ... 178

Indorsees of Bill of Lading,
cannot claim larger quantity of goods than is actually shipped, ... 41, 108
are not entitled to deduct contents of bottomry bond from arrested freight, ... 44
original holders may still raise action in their own names for damage to cargo, ... 90

Digitized by Google

PAGE

Indorsee of Bill of Lading—*continued.*
action against, for freight, and defence under Danish law, ... 113
delivery without production of bill of lading, . . . 123
bill of lading indorsed in blank, ... 125

'Iron' in marine policy includes 'Steel,' 178

Jettison, ... 47

Justiciary Cases,
marine insurance, ... 188
collision, ... 146

Kirkcudbright Harbour, ... 201

'Known Danger,' rule of common law does not apply to seamen in case of accident, ... 55

Lay Days, ... 73, 74, 76, 106
their computation, ... 107

Leakage, loss by, ... 108

Lien,
captain, ... 41, (*note*) 103
owner's, ... 84, 104, 115, 120
shipwright, ... 17

Lloyd's Register, ... 23

Log-book,
entry of ship's draught, ... 50
seaman's wilful neglect of duty, ... 52
engineer's log as evidence, ... 211

Managing Owner or Ship's Husband,
Chapter II., ... 31-36
commissions received should be shared, ... 32
disbursements, ... 32
powers of general manager, ... 35
remuneration, ... 32
repairs in a home port, ... 33
sequestration, ... 34

Digitized by Google

PAGE

Marine Insurance,
Chapter VII., ... 169-189
abandonment of ship, repudiation of, ... 175
alleged misrepresentations, ... 173
'all other perils,' meaning of, ... 185
'at our risk,' meaning of, ... 184
average settlement in foreign country, ... 184
broker's knowledge, ... 170-172
collision, liability for, ... 180
both vessels the property of one person, . . 180
compromise of owner's claims, ... 27
constructive total loss, ... 173-177
sale of a derelict by salvors constitute a, . . 177
defrauding insurers, ... 188
derelict, sale by salvors of, ... 177
fictitious sale voids policy, ... 169
foreign average settlement, ... 184
improper navigation, ... 178
'insurance at our risk,' meaning of, ... 185
'iron' in policy includes 'steel,' 178
Justiciary case, ... 188
mortgagee's powers to prevent vessel sailing when uninsured, ... 187
process, ... 187
repudiation of abandonment, ... 175
time policy, ... 178-180
tug and tow, ... 182
war risks, ... 212
warranty, breach of, ... 172

Master. (See SHIPMASTER.)

Misrepresentation
in contract of marine insurance, ... 173

Mortgagee
has power to prevent vessel sailing uninsured, . . 187
no obligation upon holder of a bottomry bond to communicate with, ... 43 (*note*)

Negligence clause in bill of lading, ... 93

Newry,
port of, ... 195

Digitized by Google

PAGE

'Not Answerable for Breakage,'
meaning of, ... 107, 110

Owners,
Chapter II., ... 26-30
carrier's contract, ... 30
disputes between, ... 28
freight, collection of, ... 29
but charterer's agent cannot compromise claims, 29
majority binds minority, ... 27
master's act, how far liable for, ... 113
passenger's luggage, responsibility for, . . . 29
public safety, ... 30
trustee in sequestration, ... 29
sequestration, ... 11, 29
(See MANAGING OWNER, 31-36; CONTRACT OF AFFREIGHTMENT, 58-125; MARINE INSURANCE, 169-189, &c.)

Passenger's Luggage, ... 29

Passenger Ship, Survey of, ... 25

Perils of the Sea, ... 93, 95
collision, ... 95
muddy water in boiler, ... 97
rats, ... 94
tempestuous weather, ... 96

Pilotage compulsory,
harbour trustees responsible for fault of unlicensed pilot, ... 198

Port. (See HARBOUR.)

Process,
marine insurance, ... 187
collision causing personal injury, ... 144

Rafts, delivery on, ... 82

Rats, as 'perils of the sea,' 94

Regulations for preventing Collisions at Sea,
infringement presumes ship in fault, ... 127

Roadstead
may be a port, ... 194

Digitized by Google

PAGE

Sale of a Ship,
commission on, ... 12-16
what is included in, ... 10

Salvage and Towage. Chapter V., ... 149-168
defined, ... 149
agreements as to, ... 154
award of salvage, how calculated, ... 163
elements to be considered, . . . 164
demurrage arising out of towage contract, ... 167
liability for salvage, ... 150
life salvage, ... 154 (*note*)
misconduct of salvors, ... 154 (*note*)
salvage or towage, ... 154, 157, 163
(See also Towage.)
salving vessel arriving too late, ... 155
Sheriff-Court actions, ... 149
record of evidence, ... 149
ship as common carrier, ... 151-154
two salvors, ... 156

Sandbank in the Clyde, ... 200

Seamen,
berthage may be deducted from gross tonnage, . 182, 22
decisions as to, ... 51-57
apprentice, chastisement of, ... 57
desertion, ... 51
retention of wages, ... 52
injuries, compensation for, ... 54
'known danger,' common law rule does not apply to, 55
wages, retention of, ... 52

Seaworthy Ship,
meaning of, ... 67-71

Ship, the,
Chapter I., ... 1-25
agreement to build, ... 2
definite carrying capacity, ... 8, 9
appurtenances, meaning of, ... 10
bankruptcy of builders, ... 3, 6
engineers, ... 3
owners, ... 11, 29

Digitized by Google

PAGE

Ship, the—*continued.*
builder's bankruptcy, ... 3, 6
contracts for building, ... 8, 9
for definite carrying capacity, ... 8
impossibility of performance does not free builders, ... 9
for repairs, ... 20
delivery at fixed port, ... 9
draught, is to be duly recorded in log, . . . 50
engineer's bankruptcy, ... 3
foreign owner, ... 9, 10
husband. (See MANAGING OWNER.)
instalments of price, ... 3
Lloyd's Register, ... 23
owner, foreign, ... 9, 10
sequestration after execution of bill of sale. . 11
passenger ship's survey, ... 25
payment for ships by instalments, ... 3
property in unfinished ships, ... 3
repairs, ... 17-20
sale, commission on, ... 12-16
fictitious, voids marine policy, ... 169
what is included in, ... 10
seaworthy, meaning of, ... 67-71
shipbroker's commission, ... 12-16
tug and tow, ... 21
(See CONTRACT OF AFFREIGHTMENT, 58-125; COLLISION, 126-148; SALVAGE AND TOWAGE, 149-168; MARINE INSURANCE, 169-189; HARBOUR, &c., 190-202; ARRESTMENT, &c., 203-212.

Shipmaster,
Chapter II., ... 36-50
bill of lading, signs as agent for charterers, . . 66
error by master in, ... 41
delivery without production of, . . 123
bottomry bond granted by, ... 42-45
certificate, ... 46
consignee, duty to procure freight from, . . . 116
chastisement of apprentice, ... 50, 57
demurrage claim, ... 65
draught of ship to be recorded in log when leaving port, ... 50

Digitized by Google

PAGE

Shipmaster—*continued.*

duties, ... 37, 50, 51
icemaster, ... 47
jettison, ... 47
log, entry of ship's draught, ... 50
seaman's desertion, ... 51
negligence, ... 65
onus when cargo damaged, ... 39
powers, ... 37, 113
authority to order necessaries alone, . . . 41
grant bottomry bond, ... 42
grant obligations, ... 44
apprehend seaman, ... 46
stevedore is under his directions, ... 90
suing, ... 39

Statutes,

17 & 18 Vict. c. 104 (1854).
section 21, subsection 4, ... 22
section 65, ... 28
section 136, ... 46
section 191, ... 41 (*note*)
section 242, ... 48
sections 307, 312, 318, ... 25
Part V. 330 *et seq.*, ... 198
section 388, ... 141
section 464, ... 149
section 512, ... 144
section 514, 136, ... 138
section 536, ... 149
18 & 19 Vict. c. 111 (1855), ... 125
21 & 22 Vict. c. 149 (1858).
section 149, ... 195
section 108, ... 198
24 Vict. c. 10.
section 8, subsection 2, ... 29 (*note*)
25 & 26 Vict. c. 63 (1862).
section 3, ... 28
section 54, 136, 137, 138, 140, ... 182
36 & 37 Vict. c. 85 (1873).
section 17, ... 134
39 & 40 Vict. c. 80 (1876).
sections 14, 15, ... 25

Digitized by Google

PAGE

Statutes—*continued.*
42 & 43 Vict. c. 72 (1879).
section 2, ... 47, 48
50 & 51 Vict. c. 35 (1887).
section 9, ... 148
sections 8 and 60, ... 188
Stoppage of goods ***in transitu***, ... 124
Survey of Passenger Ship, by Board of Trade, . . 25

Time policies, ... 178-180
'To proceed to,'
meaning of, ... 86
Towage,
bad weather may convert towage to salvage, . . 163
good weather may convert salvage to towage, . . 163
demurrage arising out of contract for, ... 167
imperfect salvage becomes towage, ... 155
special service short of salvage, ... 161
tow damaged but not unseaworthy, ... 157
tow damaged by negligence of tug, ... 154 (*note*)
tow sunk by her tug, ... 146
when converted into salvage, ... 157, 160, 163
Transhipment of Goods, ... 97, 185 (*note*)
Tug and Tow, ... 21, 146
damage by tug to tow, ... 182
Usk,
obstruction in bed of, ... 201
War risks, ... 212
Warranty,
seaworthiness, ... 67
in policies of marine insurance, ... 172
'No St. Lawrence,' 172
no warrant of seaworthiness in time-policy, . 178-180
Westport Harbour, New Zealand, ... 200
Whalers,
cases as to, ... 10, 47
Whitehaven,
port of, ... 197

LORIMER AND GILLIES, PRINTERS, 31 ST. ANDREW SQUARE, EDINBURGH.

Digitized by Google

Digitized by Google

Dewar's Liquor Laws.

The Liquor Laws of Scotland, including the Licensing and Excise Enactments presently in force; with Report by Royal Commission on Grocers' Licenses, ruling decisions of the Supreme Court from 1862 to 1884, and Explanatory Notes and Index. By DAVID DEWAR, Chief-Constable, Dundee. Crown 8vo. 5s.

"Has been put together with much ability, and will be found a most satisfactory compendium of the law."—*Dundee Advertiser.*

"Invaluable to licensing and prosecuting authorities."—*Scotsman.*

Spink's Handbook of Procedure and Redress at Law:

Comprising the Procedure of the Civil Courts of Scotland and in the House of Lords; Treatise on Actions and Diligence, and Procedure and Redress under Special Statutes; Dictionary of Terms, &c.; with Forms and Accounts of Costs. 8vo. 10s. 6d.

Mackenzie on Cessio.

Manual of the Law of Cessio. With an Appendix containing the Statutory Provisions and Forms for all matters occurring in the Process of Cessio. By A. MACKENZIE, Solicitor. 8vo. 5s.

"With such a manual the trustee ought to be well furnished with all the information he needs."—*Journal of Jurisprudence.*

"The work is brought well up to date by the incorporation of recent decisions, and is in every way a practically useful handbook."—*Scotsman.*

Seton's Registration Acts.

A Practical Analysis of the Acts relating to the Registration of Births, Deaths, and Marriages in Scotland (17 and 18 Vict. cap. 80, 18 Vict. cap. 29, and 23 and 24 Vict. cap. 85), with an Appendix containing the Statutes, Sheriff Forms, Tables of Burghs, Sheriffdoms, Fees, Penalties, &c., and a copious Index. By GEORGE SETON, Advocate. Fifth edition. 8vo. 7s. 6d. *nett.*

Burns on Conveyancing.

A Handbook of Conveyancing, for the use of Students. By JOHN BURNS, B.L. 6s.

"A good pendant to reading the professor's lecture and Montgomery Bell."—*Scottish Leader.*

"It would be difficult to speak too highly of the merits of this book."—*Student.*

"We heartily commend this work."—*Journal of Jurisprudence.*

Lorimer's Joint-Stock Companies.

An Outline of the Law of Joint-Stock Companies. By J. CAMPBELL LORIMER, LL.B., Advocate. Crown 8vo. 5s.

"It is called an 'Outline,' but it is more than an outline, for it contains within itself many of the materials for filling it up, and indicates very fully where the rest of such material is to be found, and it wants that sketchiness which is the failing of so many 'outlines.'"—*Journal of Jurisprudence.*

Digitized by Google

William Green & Sons.

Report of the Trial of the Dynamitards before the High Court of Justiciary, at Edinburgh, December 1883, for Treason-Felony. By C. T. Couper, Advocate. 8vo. 1884. 9s.

Moncreiff on Review.

A Treatise on the Law of Review in Criminal Cases by the High Court and Circuit Court of Justiciary, and on Procedure in Criminal Cases in Inferior Courts in Scotland, including the Text of the Summary Procedure Act 1864, and the Summary Prosecutions Appeal (Scotland) Act 1875, with full Notes and Cases, and an Appendix containing Forms, Tables of Fees, &c. By Hon. H. J. Moncreiff (Lord Wellwood). 8vo. 15s.

"This is as honest and painstaking a piece of workmanship as has been contributed to the legal literature of Scotland for many a day."—*Journal of Jurisprudence.*

A Practical Manual for Justices of the Peace and other Magistrates in Scotland, with Introduction, References to Decided Cases, Acts of Parliament, and Forms of Proceedings and Procedure. By Alexander Macdonald, Writer, Glasgow. 8vo. 2s. 6d. *nett.*

Styles of Writs in the Sheriff Courts of Scotland. By James Forrest, Advocate, and R. B. Shearer, Writer, Greenock. 8vo. 12s.

"The largest and most comprehensive Style Book yet produced for the Sheriff Courts."—*Scotsman.*

Exemption from Local Rates of Scientific, Literary, and Artistic Societies. By David Crichton, Advocate. 8vo. 1881. 1s.

THE NEW LAW MAGAZINE.

The Juridical Review: Published Quarterly. Subscription, 14s. Vols. 1 and 2, in half morocco, price 14s. each.

Each number of the *Juridical Review* contains a Photogravure Portrait of some distinguished member of the legal profession, and has, in addition to its special Articles, short Articles on current Legal Topics, Reviews of contemporary Legal Literature, and careful notes on the leading Cases of the quarter. *All articles are signed by the authors.*

Engravings of Portraits of the following have appeared:—Lord President Inglis, Mancini, Lord Fraser, David Dudley Field, Professor Muirhead, Professor Lorimer, Lord [illegible] Palles.

"Will rank among the for[illegible]

UVa Law Library

Digitized by Google