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A DIGEST OF DECISIONS

IN

SCOTTISH SHIPPING CASES.
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.

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TO

THE RIGHT HONOURABLE

JAMES PATRICK BANNERMAN ROBERTSON,

LORD JUSTICE-GENERAL OF SCOTLAND,

THIS BOOK

IS

(WITH HIS PERMISSION) RESPECTFULLY

DEDICATED.
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
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.
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THE SHIP.

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CASES:


The term ‘ship,’ as understood in marine law, comprehends all kinds 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
THE SHIP.

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.

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,
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 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).
'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 assailed (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
SALE.

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 agreement 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 appellants 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 proposition, 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
THE SHIP.

'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 con-
sideration by the House of Lords in M'Bain v. Wallace
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 in-
stalments 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 accom-
modation 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
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 difficulties 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 Amendment 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.
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 Mc'Laren’s edition of Bell’s Comment., pp. 463-4 and cases
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 Rutherturd 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. Hovden & 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 fulfill their contract, and if so (2), for what amount of damages they were liable?

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.

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
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.

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.

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, I Haggart’s Admiralty Cases, 109. The case of a chronometer is

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 McArthurs 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," whenever 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
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.'

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
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 ship-owners, 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
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 purchasing 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. Barlett, May 30, 1853, 32 L.J., C.P. 261; 14 Scott’s C.B. Rep. 681, said that the broker’s introduction must be the
'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 negotiations, 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-
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 commission. 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 introduction, 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 1½ 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 assoilized the broker (Neilson v. Skinner & Co., 'Loudon Castle,' July 18, 1890, 17 R. 1243).
Repairs.

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.

The Joan Cunullo 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 shipkeeper. After the repairs were completed, the shipbuilders replaced the Joan Cunullo 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,
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 Cunillo') 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—inso much 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 continues 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
REPAIRS.

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
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.

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).
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 (*McCowan 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 collision 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 circumstances.' 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
—a matter of occasionally very considerable difficulty.

The space below the hurricane deck of the *Dansig*, 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, 'Dansig,' 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
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.

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
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-
'citation 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.

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 difficulty 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).
CHAPTER II.

THE OWNERS—MANAGING OWNER—MASTER—
AND SEAMEN.

OWNERS—POWER OF MAJORITY TO BIND MINORITY—DISPUTE BETWEEN CO-OWNERS—TRUSTEE IN SEQUESTRATION—CHAR-
TERER'S AGENT'S POWERS WHEN ACTING AS OWNERS' AGENT—
PASSENGERS' LUGGAGE—SAFETY OF PUBLIC—MANAGING
OWNER—RENUMERATION—COMMISSION—DISBURSEMENTS—
REPAIRS—SEQUESTRATION OF SHIP'S HUSBAND—HIS HYPO-
THECATION 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 immedi-
ately connected with the ship—viz., the owners; the ship's husband or managing owner; the shipmaster or captain; and the seaman. It is true that this list might be consider-
ably 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.


26
MAJORITY MAY BIND MINORITY.

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.

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. Macellan, _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.

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.

The s.s. *Earnholm* was built for H. McPhail and J. Hamilton, and was owned by the joint-adventurers as part-owners. McPhail 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 'Hoyward,'* 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 shipowner 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 (*McPhail 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
interested person within the meaning of the Act, and that the application is competent,' p. 1022.*

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.

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.

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

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* 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.
‘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.

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 Craig- hill 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.

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

A person appointed to act on behalf of a number of Ship's 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.
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.

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).

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
'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, provisioned, 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 proprietor 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.

It was decided in the case of *Steele & Co. v. Dixon, &c.*, Repairs. 'Brasilian,' 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 *Brasilian* lay at Greenock; the owners were all in England.
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.
'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 unchallengeable 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).

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
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 anticipa-
tion 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 Ship-
ment in Bills of Lading—Bottomry Bonds—Advances by
Charterer's Agents to Master, &c.—Apprehension of
Deserter— Master's Certificate—Jettison by Negli-
gence of Master—Failure to record Draught in Log.**

Strickland, &c. v. Neilson & Mackintosh; Garriock v. Walker;
Williams v. Dobie; Meier & Co. v. Küchermeister; Drain &
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, Inst. bk. iii.; tit. 3, sec. 43, 'on the mandate which is presumed to be given by the executors 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.

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
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 beneficent 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
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. BriscaU, 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.

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.
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, Rutherford 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 judgment 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
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 absolvior. 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.

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). *

In the well-known case of M'LEAN & Hope v. Munck, Bill of lading. '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 (Haviland, Routh & Co. v. Thomson, 'Elisabeth 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 Glenlannan, Swa. 415, approved.
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 Hubbersy 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).

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 vid 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 (Anderton 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-
'dentia bond granted in such circumstances, and embrac- 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 Heigoland, 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.
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.)

Endorses 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).

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 Ben-
holme, '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.
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,
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, ‘Hyndesford,’ Nov. 25, 1864, 3 Mac. 114).

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 imprisonment 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.

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
Masters Certificate.

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 certifi-
cate, 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 com-
mand 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 certifi-
cated 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 McLaren dissenting) quashed the
conviction (Hislop v. Cadenhead, 'Catherine,' June 4, 1887,
14 R. (Just. Cases), 35).

The master of the Carfin, while in charge of his vessel 42 & 43 Vict.
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
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).

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.

While the following recent case was an English case, it does not appear inappropriate to include it in this summary
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 ordinary 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 jettison 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 jettison 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
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noticed—i.e., already noticed in his Lordship’s judgment.*

Miscellaneous.

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.

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 assoilsied 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).


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.).
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.

The Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, 17 & 18 Vict. 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 person 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.
(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:—

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).

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* `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
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 forfeiture 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 cannot 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
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.

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
injuries.

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.*

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 McGee 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.*

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,

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* It may perhaps be in place here to refer to the case of The Bemia (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.
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).

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 solutum and damages in respect of systematic cruelty shown towards Wight during the voyage to Rangoon. During the action Wight’s father was decreed 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 Rutherford Clark reserved their opinion on the point (Wrights v. Burns, Nov. 30, 1883, 11 R. 217).
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.


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'La ren'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 shippers, the bill of lading operates
"prima 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.

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 refer-
ence to the conditions in the charter-party. It was, how-
ever, 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 declin-
ing 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.
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 indorsor 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
'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
reparable 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,
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.

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 cwt. 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

All other conditions as per charter.'
CONTRACT OF AFFREIGHTMENT.

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, decreed 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
'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-
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).
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
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. 
McKellar, 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.

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 condi-
tion. The jury returned a special verdict, finding that the 
wheat had been damaged by sea water, due to the negli-
gence 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
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 concurred 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 contract to carry passengers upon land, there had been a good deal of reasoning in the Exchequer Chamber to the effect that the obligation there was 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 bona fide, endeavoured to make her fit. The Court, when it came to be con-
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
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-
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 provision 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.

In the case of the 'Jubilant' (Adam v. J. & D. Morris, Apparatus. 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 seaworthy, 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-
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.*

A seaworthy vessel being provided, the business of char-
terer 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 undertak-
ing 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 inter-
fere with the ordinary working of a ship.

(a.) The charter-party of the Presidente Washington stipu-
lated 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 '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).
'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 Ardwillan, 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, 1886 (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
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 undertakes 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.'*

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* 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 satisfactory 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
(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 
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.'
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-implementation 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. Eda, L.R. 2 Q.B. 578, and Postlethwaite v. Freelandis, 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 ordinary 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 practice 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 provision is necessary for the charterer's protection. I believe that quarantine has sometimes been also included with perils of the sea and other risks excusing 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.
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.

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 Thies 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
"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 Blackburn 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 This v. Byers, was considered recently in
Budgett & Co. v. Binnington & Co., June 28, 1890, L.R. 25
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 consignees to pay demurrage is "absolute," as was decided in *This 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 unreasonable 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 contract, 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.*

Any custom or practice of a particular port which the Glasgow charterer cannot overcome by the use of reasonable diligence ought to be taken into consideration. Thus in *Postlethwaite 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
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. Freeland's.'

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. Cum 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,
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.

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
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. 111). 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 separation 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 shipowners. 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*).

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
DEMURRAGE.

'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.

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
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 solpied 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 discharging this is usually stated expressly in the charter-party, and the second is that if the defendants' 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).
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.

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 argument 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 pursuers' 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 discharge, 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
'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.*

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.

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.
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).

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).

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;
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.,*
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 completed, 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.

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
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,
cause the damaged bales to be opened at his own ware-
house, 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 avail-
able for the benefit of those truly interested (The

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
Nottebohm 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.

The charter-party of the steamship Lauderdale pro-
vided 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-
'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 Rutherford 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 Rutherford 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,
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 measuring 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 immaterial. 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,
'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.

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 Zanths*, 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

'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 (Lavergne 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. Cox, 1 Binney, Penn. 592.

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 Xanthe, June 8, 1886, 11 P.D. 170).

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
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 assailed (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.

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
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.**

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
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 defendants, 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 discussion 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 defendants 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 defendants 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
ship, and that this was just as likely to happen from the negligence 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 arising 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.*

The charter-party of the George Moore (Delaurier v. George Moore. 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 judgment 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 conditions 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 preestable 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.'
'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
'foresaid 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."

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

Campbell, 1891, 1 Q.B. (C. of A.), 283.
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 endeavouring 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
'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 Associa-
tion, 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 ship-
owner'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.

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
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., 'Tulkhurst',* Feb. 27, 1891, 18 R. 569.

*Cesser Clause.*

‘When you have in a charter-party such a clause as this, *Cesser Clause.*

' 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 capitán 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.'

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
"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.'

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'Cruinell & Co., 'Lismore,' March 20, 1889, 16 R. 658).

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
'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
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 demurrage having been enforced." Hence, though it may well be that though freed from all liability under the charter-party the charterer is still liable aitunde 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.

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
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, Onus, not being a carrier, lies upon the owner of the goods,'
pp. 991, 992. Lords Cowan, Deas, and Ardmillan dissented from the finding of the majority of the Court.

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 McLean & 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 McLean & 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 McLean & 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.*

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 indemnity under the guarantee; but, on their

* Yet by some error a learned judge in 15 R. 156, is made to refer to Munck v. McLean & 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.
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 assailed 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 contained in bags, and that when it comes to the port of delivery that it is not in bags but in bulk—that it never
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
document 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

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

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 defendants, 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 assolizied (Grieve,
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 captain has a limited duty to perform in the navigation of the ship, and the receipt and delivery of the cargo, including 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 prepared 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 immaterial 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
master had known of the contract of sale, and had put the date on the bill of lading in order to deceive the purchasers 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].

The owners of the Danish ship Immanuel brought an action against the indorsee 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 indorsee 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 indorsee 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 indorsee 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.
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.

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).

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
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.

The responsibilities which may attach to charterer's Collection of 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).


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 demurrage.' 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,
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.

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 subfreighter 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.

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
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
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
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 proportion 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 payment 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.
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'Lea...
'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-
rulled,' 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.

In the case of The North-Western Bank v. Bjornstrom,
'Tahiti,' Nov. 9, 1866, 5 Mac. 24—a leading case—
where a bill was drawn by the master of the ship
Tahiti, 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
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-Judge 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 disbursements 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,
he must be held to have made such insurance a part of his security. This was the ground of judgment in the following case:—

The charter-party of the ship Janet Cowan contained this clause,—'Sufficient cash for ship's ordinary disbursements 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 shipowner. 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.

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
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. 520].'

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 Company, 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 transit when
stopped *(McLeod & 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.
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.


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
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.'

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.*

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 *Violation of Regulations*.

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* '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).
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, how- ever, 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. Apocar & Co., 'The Arratoot Apocar,' 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.

(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
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.*

(2.) The case of The Owners of the s.s. 'Toward' v. The Ship at Anchor, 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 ast, 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.
that the approximate cause of the accident was the insuffi-
ciency 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 Ruther-
furd 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).

(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 manoeuvring of another ship, 
and her captain, in exercising his best judgment for the 
safety of the vessel, commits an error which causes or con-
tributes 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
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.*

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 Maatschappij Nederland v. Peninsular & Oriental Steam Navigation Co.*, 'The 'Khedive', 7 App. Cas. 795. 'The amount of the joint 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.**

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

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* '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 n).
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,' Valin, 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 Margaret' (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-
'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.

In an action brought by the owners of the Ariadne Collision in
against the owners of the Owl for damage caused by river,
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
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 falling 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 ‘Collisions 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.

The 18th sailing rule under Orders in Council of 14th August, 1879, provides—‘Every steamship, when approaching 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

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

Two vessels approaching each other in a dense fog, 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 relatively 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 Mc'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 manoeuvre executed, or which prevented that manoeuvre from being a wrong manoeuvre.

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.

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;
(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, or 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.

(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).
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,
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 multipleshooting. 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
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 multiplexpounding. 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.*

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

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* 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.
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 compulsory.'

In the following case a collision occurred when the Pilotage 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
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

* 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).
' 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).

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

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
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.’
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
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 navigating, directing, managing, or steering steam vessels, when a collision took place, and the lives of the lieges
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 reversing, contrary to article 18 of the Regulations for Preventing 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—
COLLISION.

(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).
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.


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.

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,
'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.

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
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 Rutherford 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.
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 saying 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 difficulty 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 answerable 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 dealing 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 whatever 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 circumstances 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 position of common carriers, in a different sense from that in which the owners of a foreign-going ship are to be considered as carriers, because they carry from one port in
LIABILITY FOR SALVAGE.

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 salver 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-
Salvage and Towing.

...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.

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).
her 130 miles, the hawser 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 Carthageina, and agreed to tow her to Gibraltar for £600. The next day the weather was still worse, and all the hawser broke, save one. The Howick, therefore, towed the Westbourne to Carthageina 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 Aeneas 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 September, 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-
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.
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 (Rutherford 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?*

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 extraordinary 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
on her voyage. On the afternoon of Wednesday, the 28th, the steamship Vulcan, 372 tons, on a voyage from Middlesbrough 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
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 Ses-
sion 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 Tabas-
queno, 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 com-
penation 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 pro-
ably 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
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 reclaimed 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 assistance 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 danger because they invoked the services of the tug. They put up signals of danger or distress, and upon that invitation 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
'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 assistance 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 healing 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
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 signallng 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
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.*

In arriving at the measure of salvage to be paid, it was observed by Lord Rutherford (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
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 salvaging 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.

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 salvaged 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.
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

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 Tabascoeno, 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. Gov.*, 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
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 £52,695, 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
the shipowners for the actual services rendered, and referred to the registrar and merchants to ascertain cost of repair to the saving 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 saving vessels, as well as to her captain and crew, p. 203. Evidence of loss of earnings by a saving 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 saving 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 accident, unless for detention arising therefrom, to be paid for
'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'Clure, 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.
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.


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

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

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 £1,500 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 &
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
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.

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

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).

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;
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 underwriters 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
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 con-
structive 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,

Lord Penzance distinguished this case from Hudson v. Repudiation
Harrison, 3 B. & B. 97, by the underwriter's distinct
There was the same want of repudiation in The Provincial
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
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
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,
L.R. 13 App. Cas. 160). In this case the vessel had been scuttled and deserted by master and crew.

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.

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
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 to R. 547). Lord Young observed:—' The counsel for the undervriters endeavoured to make the distinction between 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.
'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.

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
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 ob-
served:—'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-
ning 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
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 substantially caused by its own owner, and he could not be liable to himself for the damage so caused. And if he could not be liable to himself he could not assign any right, either expressly or by implication of law, to any third person as he had none to convey. No doubt the rights of underwriters are well established, and it is one of these that on payment of the risk as for a total loss they are entitled to all the rights in the injured ship which belonged to its owner, but they are not entitled to more. And if the owner of the Dunluce Castle had no right to sue the owner of the Fitzmaurice, neither can the underwriters on the Dunluce Castle, whose rights were derived from the owner of that vessel,' 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 berthing 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.
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 Rutherford 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 'Arakan',* 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.*
In the following case a foreign average settlement was considered.

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 principles of general average,' and a second statement was made up, embodying the first. In an action by the policyholders 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 (*Robinow & Marjoribanks v. Ewing's Trustees, 'Warrior,' July 20, 1876, 3 R. 1134).

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*
"ALL OTHER PERILS."

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 premiums, 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 substance, 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 underwriters,' p. 189. See also as to insurable interest in cargo, Lowndes' Law of Marine Insurance, pp. 8, 9.*

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., Inchmearie, 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).
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 under-
writers 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 under-
writers 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 insur-
ance 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 Pandolf
'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
'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).*

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 Rutherford 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.*

The owners of the *Menzelik* sued fifty underwriters, under *Process.*

* 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.
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 & Cunningham, 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-
ˈtively, 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 amend-
ment 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.

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
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).
CHAPTER VII.

HARBOUR, &c.


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-'ing 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-
"PORT OF GREENOCK.

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

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 shipbuilder'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, assoilzed 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
‘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.

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 tem-
porary 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, particu-
larly of harbour and port, are of little moment when we
find the words used loosely in so many cases.

‘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.
'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
next test you would apply? If you find that the authori-
ties, 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 discipli-
ne, 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.

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,
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
used and treated as an integral part of the port by vessels frequenting it, as well as by the port authorities.*

As to 'the port of Newry,' see Caffarini v. Walker, 1876, Port of Newry. 10 Ir. L.R. C.L. 250, and McIntosh 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.

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:—

By section 98 of the Clyde Navigation Act, 1858 (21 & Clyde. 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 warehouse.' 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 transferred 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. Galbraith, 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.
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 deter- ' mining 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.

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.
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.

(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
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).

(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).

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.

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.
The ship *Albatross* was removed by the orders of the Harbour Trustees; Reparation; Culpa.

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,
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.

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.

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
Company, Limited v. The Owners of the 'Calliope,' Dec. 15, Usk. 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 condition of safety unless it was kept as level as a billiard-table,' pp. 23-4.

Four days later a similar case was decided by the Court of Session (Renney v. Magistrates of Kirkcudbright, 'Janet and Ann,' Dec. 19, 1890, 18 R. 294). The Janet 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
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.
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 DECREES 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.


Arrestment.

ARRESTMENT may be considered under two heads. It is Definitions. 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, jurisdictio nis fundanda 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.

(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
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
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).

A vessel may be arrested on the dependence of an illegal arrestment, 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.

On 14th November, 1884, judgment was obtained against a shipping company in the High Court of Justice, Arrestment in Scotland under English Decree.
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 certifi- cate so registered shall, from the date of such registration, 'be of the same force and effect as a decree 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 decree originally 'pronounced in the Court of Session. ...' On 15th November, the Lord Ordinary on the Bills, granted 'con- 'currence 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 judg- ment 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
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 Admiralty summons 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).

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 fundande causa.

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

The *Edgar Cecil*, a Swedish vessel lying in Glasgow harbour, having been arrested on 3rd Oct. 1877, *ad fundandum jurisdictio*em, 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 dismantled 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,
and who had a common end to serve with him in securing the vessel (Borjeson, &c. v. Carlberg, &c., second case, 'Edgar Cecil,' July 9, 1878, 5 R. 217).

In Carlberg v. Borjeson, 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 siste, or enters appearance without stating ' any objections to the jurisdiction.' *

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 fundandae 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 McPhedron & 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.
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
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.
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