of the right of retention being relaxed by the Court.

In the present case the pursuer moved that the ship should be delivered to him on payment of part and on consignation of the balance of the defenders' account without any security being given for possible future expenses of process. I am of opinion that that motion should be granted. But unfortunately there is a little difficulty here. In the motion No. 6 of process it is stated that the pursuer has paid the sum of £200 and has consigned the balance of £50 in Court. But apparently that is not the full amount of the defenders' account, because we are now informed that the amount is about £275, which if £200 has been paid and £50 consigned would leave £25 to be consigned, and in the judgment which I propose your Lordships should pronounce I think we must make provision for £25 being consigned. As we differ from the learned Sheriff's finding that the defenders' right of retention over the vessel extends to the expenses to be incurred by them in this process, I propose that we should recall his interlocutor, and that upon consignation of the additional sum of £25 we should order delivery to the pursuer of the vessel in dispute.

LORD DUNDAS—I am of the same opinion and I have very little to add. The learned Sheriff-Substitute has found "that the right of retention over the said vessel extends to the expenses to be incurred by the defenders in this process; therefore, in respect that no sum has been consigned to meet the defender's claim for expenses," he refused the pursuer's motion *hoc statu;* and he states in his note that "until the pursuer consigns a reasonable sum to cover expenses" he does not think his motion can be granted. One observes upon that that the learned Sheriff-Substitute has not indicated what in his opinion would be "a reasonable sum." I confess I think there is difficulty there, for I do not see how anyone can make even a fairly approximate estimate of what the expenses of this process may be; it all depends upon the pertinacity of the parties, and the length to which matters may be pressed by them. But leaving that aside, I agree with what Lord Ardwall has said, and I think the Sheriff-Substitute is wrong, for the defenders cannot be said to have a *jus exigendi* (as for a debt) for any expenses due to them. There are no expenses due to them, and whether or not there may ever be expenses due to them is matter of pure conjecture. It seems to me that the defenders' present position is that they have a lien entitling them to hold the pursuer's ship in security for payment of the amount of their account whatever that may be. If the Court substitute consignation for that form of security, I do not see why the Court should be called upon to enlarge the scope of the security, and to extend it so as to include expenses wholly future and contingent.

LORD JUSTICE-CLERK—I am of the same opinion. The general principle as regards expenses is that there is no ground for a litigant asking for security for expenses merely because it can be said that the party opposed to him is impecunious. Such a demand for security for expenses has been refused over and over again. The Court will not inquire whether a person will ultimately be able to pay expenses or not. The contention of the defenders in this action in effect is just the same thing. It is enlarging a security which covers the principal sum claimed so as to make it include a supposed sum for future expenses that may be incurred, so that the party may be secured, if the opponent is not successful, for his expenses. But on principle he is not entitled to any such security at all, and therefore I agree with your Lordships.

I also concur with Lord Ardwall that this secured subject should not be freed without some addition to the amount which is to be consigned, and I agree with the course which has been suggested.

The Court pronounced this interlocutor—

"Sustain the appeal and recal the . . . interlocutor appealed against: Find that the pursuer, in respect of the sum of £200 already paid by him to the defenders, and the further sum of £50 consigned in the Sheriff Court, and the balance of £25 to be consigned, is entitled to delivery of the steamship 'Staffa,' together with her whole gear, machinery, &c., all as prayed for, and that within three days from the date of this interlocutor, consignation of said £25 having been duly made," &c.

Counsel for Pursuer (Appellant)—Aitken, K.C.—A. R. Brown. Agents—Whigham & MacLeod, S.S.C.

Counsel for Defenders (Respondents)—D. Anderson—J. R. Dickson. Agents—Steedman, Ramage, & Company, W.S.

Tuesday, December 7.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

KLEIN AND OTHERS (OWNERS OF THE "TATJANA") *v.* LINDSAY AND OTHERS (CARGO-OWNERS).

Ship—Unseaworthiness—General Average—Onus—Pumping Power—Cast-Iron Coamings—Outlays in Port of Refuge—York-Antwerp Rules 1890, 10 *and* 11.

A steamship which had been built in 1872, and which had been laid up for about eighteen months, after a careful survey was purchased in 1905. After a survey of the engines and some testing in harbour she sailed on 8th April from Libau for Leith with a general cargo, but between one and a-half and three hours out she broke down owing to a fracture of a valve casing of the feed-pumps. The engineer, under an erron-

eous belief that both feed-pumps would be affected, reported that the vessel could only proceed by using the donkey pump to supply salt water, but that this could be done in safety while within the Baltic. The donkey pump could have been connected with the hot well so as to have supplied fresh water. The master resolved to proceed to Elsinore. The vessel met with bad weather. The ventilator coamings, which were of cast-iron and not of malleable iron as required by the Board of Trade regulations (issued subsequent to 1872), were broken. Some sea water got amongst the oats and linseed forming part of the cargo. On 11th April the vessel made Elsinore, and was surveyed and detained some days for the necessary repairs. There was no evidence that the fracture of the valve casing was due to any defect, latent or otherwise, and its appearance suggested the reverse. In a claim for general average by the shipowners against the cargo-owners, the latter pleaded that the vessel was unseaworthy, that she put into port solely in the interest of the ship, and in any case that certain expenses, *e.g.*, outlays on the crew, should not be included in the average.

Held (1) that the *onus* of proving unseaworthiness was on the cargo-owners, pleading it; (2) that it had not been proved as to either (*a*) the pumping power, for even if there had been a defect proved in the valve casing there remained sufficient pumping power for the vessel, or (*b*) the coamings, for the subsequent issue of the Board of Trade regulations did not make all vessels then existing with cast-iron coamings unseaworthy; (3) that any unseaworthiness proved was due to the unnecessary use of salt water through the error of the engineer, which error was excepted by the bill of lading; (4) that general average, including therein the outlays on the crew, was due, the vessel having been in a disabled condition.

Ship—Bill of Lading—Exceptions—Exemption of Liability for Default of Master and Crew—Master also Part-Owner—Erroneous Belief of Engineer—Liability of Cargo-Owners for General Average Due to the Error.

A bill of lading exempted the owners from the consequences of any "act, neglect, or deviation whatsoever of the pilot, master, or mariners or other servants of the shipowner." The master was part, and sole registered, owner. The engineer, a valve casing of the feed-pumps having fractured, erroneously believed that both the feed-pumps were affected and that the only way to proceed was by using sea-water supplied by the donkey pump. The master proceeded in this way.

In a claim for general average by the shipowners against the cargo-owners, *held* that the latter could not plead the error of the engineer, as that fell within the exemption clause.

Ship — Average — Particular Average Charges—Duty of Master to Communicate with Cargo-Owners—Liability of Cargo-Owners.

A vessel put into a port of refuge. The master, who did not know who the cargo-owners were, communicated with the only firm who to his knowledge had acted for the shippers at the port of loading, and they referred him to Lloyd's agent. He advised a survey. The surveyor recommended the discharging of the portion of the cargo, oats and linseed, affected by sea-water, its reconditioning and reshipping. This was done, involving considerable expense, and as things turned out, it would have been better to have saved the delay and left the cargo alone. The cargo-owners had taken no steps to prevent the discharge. The damaged condition of the cargo would not have endangered the vessel.

Held (1) that the cargo-owners were liable for the charges incurred in unloading, reconditioning, and reloading, and (2) were not entitled to have them included in general average.

On 16th May 1907 August Klein, shipowner, Libau, registered owner of the iron screw steamship "Tatjana" of Libau, for himself, and as representing the other owners, *pursuer*, and Beveridge, Sutherland, & Smith, S.S.C., Leith, his mandatories, brought an action against W. N. Lindsay, grain merchant, 138 Constitution Street, Leith, and others, the partners of the firm of W. N. Lindsay, as such partners and as individuals. Decree was sought against the defenders, conjunctly and severally, for (1) the sum of £42 odd, being the defenders' proportion of general average payable by the cargo-owners, and (2) the sum of £175 odd, being their proportion of the charges incurred in discharging and reloading the cargo at an intermediate port.

The following narrative is taken from the opinion (*infra*) of the Lord Ordinary (SALVESEN)—"On the 18th of March 1905 the pursuer Klein, as master of the steamship 'Tatjana,' granted bills of lading to the shippers of certain parcels of oats and linseed which had been loaded on board that vessel in order to be carried to Leith. There being no charter-party, these bills of lading constituted the only contract of carriage. They are so far in the ordinary form, but on the margin they have a clause entitling the captain to call at any port or ports for any purpose without being deemed a deviation. The exceptions embrace a negligence clause, exempting the owners from the consequences of any 'act, neglect, or deviation whatsoever of the pilot, master, or mariners or other servants of the shipowner.' There is also the usual clause with regard to general average, which was to be payable according to York and Antwerp rules.

"The defenders were the receivers o various parcels of oats shipped on separate

bills of lading in the same form, and they are now sued (*first*) for their proportion of a general average contribution; and (*second*) for a contribution towards the expenses incurred in the course of the voyage by the pursuers in unloading, reconditioning, and reloading the cargo in the forehold. The amounts sued for are in accordance with an average statement made up by a firm of average adjusters in London.

"The material facts connected with the voyage of the 'Tatjana' from Libau to Leith are as follows:—She sailed on the 8th of April 1905 with a general cargo consisting of oats and linseed in her holds, and bales of cork and barrels of tar on her deck. After she had been under steam for a few hours, a cast-iron pipe, forming part of the valve casing of the feed-pumps, broke, and the engines required to be stopped until the breakage was repaired or other arrangements made for feeding the boilers. The engineer made some attempt to repair the damage, but ultimately reported that no repair could be carried out at sea, as a new casing required to be cast. He accordingly cut the broken casing from the copper pipe leading to the hot well, and put a blind flange on the open end of the copper pipe. This operation occupied about three-quarters of an hour. The engineer, believing that the break in the valve casing had the effect of throwing both the feed-pumps out of action, thereupon reported to the master that the vessel could not proceed until the boilers were fed with sea-water by means of the donkey pump, but that he believed this could be done with safety so long as she remained in the Baltic, where the water is brackish. The master thereupon elected to proceed on the voyage as far as Elsinore, where the necessary repairs could be conveniently effected without materially deviating from the voyage. The barometer at the time was falling, and very shortly after the steamer had proceeded with the new arrangement for feeding the boilers in action, she encountered exceptionally heavy weather. By noon of the 9th there was a heavy head sea and squalls, so that the engines had to be put to half-speed, and shortly thereafter a regular storm set in, with heavy head seas which flooded the decks. The storm continued to increase until the morning of the 10th, when about five o'clock some of the deck cargo broke loose; and about the same time it was discovered that one of the ventilators of the forehold had been carried bodily away and the cast-iron coamings had been broken. Through the opening thus caused a considerable quantity of sea-water got into the cargo in the forehold before it was possible to cover the hole with tarpaulin and to secure the deck cargo. The pursuer was unaware to what extent water had entered the hold, but he knew that its presence in a grain cargo was apt to set up heating. The 'Tatjana' reached Elsinore on the morning of the 11th of April, by which time the water in her boiler had become very salt and the boiler tubes themselves were leaking. The donkey engine had been strained by the unusual work to which it had been put; and in the condition in which the vessel then was it would have been unsafe to continue the voyage to Leith.

"On arrival at Elsinore the pursuer called a survey, and was recommended by the surveyors to get the broken part of his engines at once repaired. He communicated also with a firm at Libau called Helmsing & Grimm, who had acted for the ship in connection with the voyage in question, stating what had happened, and asking them to inform the shippers or cargo-owners and to wire instructions whether a survey on the cargo was to be held at Elsinore. In reply he was recommended to apply to Lloyd's agent at Elsinore. At this time the receivers of the cargo were not known to the master; but there can be no doubt that the shippers were duly informed, and they in turn seem to have communicated with the receivers or their representatives. In the absence of express instructions from the shippers or receivers, the captain accordingly applied to Lloyd's agent in Elsinore to hold a survey on the cargo; and on the surveyor's instructions part of the cargo from the forehold was discharged with the view of ascertaining the extent of the damage. Ultimately the surveyors recommended the discharge of the whole cargo in the forehold, as the linseed which was in the bottom was badly damaged and was commencing to heat, and a portion of the oats had also suffered. This was accordingly done, and the damaged seed and oats were dried so that they might be reshipped without injury to the remainder of the cargo. These operations occupied a comparatively long period and involved great expense; and it was not until the 1st of May that the reloading of the vessel was completed. In the first instance the pursuer had to bear the whole charges, which amounted *in cumulo* to over £1100, and for that purpose he required to borrow a sum of £1000 on bottomry bond. On the vessel's arrival in Leith the usual average bond was signed by the defenders and other receivers of the cargo as a condition of their getting possession of their respective parcels, and the average statement on which the action is laid was thereafter made up."

The pursuer pleaded, *inter alia*—"(2) The defenders as holders of the bills of lading condescended on, being liable for a proportion of general average and other charges condescended on, the pursuers are entitled to decree as concluded for. (3) *Separatim*, the defenders having agreed to contribute their proportion of said general average and other charges, and the said proportions having been, in terms of the York-Antwerp rules, adjusted at the sums sued for, the pursuers are entitled to decree as concluded for."

The defenders, *inter alia*, pleaded—"(3) The said ship 'Tatjana' having been in an unseaworthy condition when she commenced her voyage from Libau, and the loss and damage condescended on having

been thereby caused, the defenders are not liable in general average or other charges, and should accordingly be assoilzied from the conclusions of the summons with expenses. (4) The said losses having been caused through the fault and negligence of the pursuer, he is not entitled to recover any portion of them from the defenders. (5) The pursuer having been in breach of his contract under the bills of lading by carrying deck cargo, and by starting on the voyage in question with such an insufficient quantity of coals as to necessitate a deviation from the voyage, is not entitled to found on the exceptions contained in the said bills of lading. (6) In any event all the loss founded upon in connection with these defenders being general average loss, no part of it may be properly charged against the defenders' cargo."

On 12th December 1908 the Lord Ordinary (SALVESEN), after a proof, the import of which sufficiently appears from his opinion (*infra*), granted decree as craved.

Opinion.—". . . [*After the narrative ut supra*] . . . The main defence to the action is that the 'Tatjana' was unseaworthy when she commenced her voyage from Libau, and that the whole expenses which are sought to be recovered from the defenders resulted from this initial unseaworthiness. The unseaworthiness is said to have consisted (1) in the defective condition of the engines; (2) in the deck cargo having been insufficiently secured; and (3) in the coamings of the ventilators being made of cast-iron instead of malleable iron. A separate point is raised with regard to the amount of coal which the vessel had on board, which is said to have been insufficient for a voyage from Libau to Leith, allowing a reasonable margin for bad weather on the voyage.

"An immense body of evidence has been led in connection with these various matters, a large part of it having been taken on commission. Since the hearing I have read the whole of the evidence on both sides, and I shall endeavour to state as shortly as possible the conclusions in fact at which I have arrived. The 'Tatjana' was built on the Clyde by Messrs Macmillan & Son of Dumbarton in 1872; and she was supplied with her engines and boilers by Messrs J. & J. Thomson of Glasgow. During her somewhat long life she passed through various hands. Ultimately she became the property of some Russian shipowners, who employed her in trade for several years and laid her up about June or July 1903. In the beginning of 1905 she was bought by the pursuer Klein for himself and two co-owners, each of them being interested to the extent of one-third, for a sum of £2000, which was not very much more than breaking-up value. At that time she was classed in the lowest class of German Lloyd's, and her class expired in June 1905. The pursuer had the vessel carefully surveyed before he purchased her, and considered that he had obtained her at a bargain. No money was expended on the engines, but some £70 was spent in caulking the decks and other small repairs. *Prima facie* it would therefore not seem improbable that the engines were defective at the time when the vessel started from Libau, and that their breakdown within three hours (or one and a-half hours, as the second engineer says) of full speed having been got up was attributable to this initial defect. In a question of seaworthiness due to initial defect it is of course immaterial whether the defect was latent or was capable of being discovered on a careful examination of the engines. The warranty of seaworthiness is absolute unless qualified by contract between the parties; and there is nothing in the contract here which qualifies the obligation to provide a seaworthy ship.

"This being the law, I confess I do not attach very much importance to the conflicting evidence as to the survey of the engines which was made before the vessel started. My opinion, however, is that the survey was reasonably sufficient for the purpose for which it was made. When the vessel was laid up her engines were all opened out and greased, so as to prevent any of the parts becoming damaged through frost or rust, and the former engineer, who was re-engaged by the master, regularly visited the ship and saw that the engines were kept properly greased. No defects of any kind were discovered, but I cannot affirm that the survey was of such a kind that a crack or other flaw in the valve casing of the feed pipes would be likely to be detected. On the other hand, there is no evidence that any defect of this kind was in fact observed.

"The defenders argued that the fracture of the valve casing must have been due to some defect existing at the commencement of the voyage. Relying on the second engineer's evidence, they contended that the fracture showed itself not more than one and a-half hours after full steam had been got upon the boilers, and that there was nothing in the working of the engines which could account for the valve casing having given way so soon after the voyage commenced except the existence of an initial flaw. If this were so, and if it be the fact that the fracture which actually occurred threw both feed pipes out of action, as the engineer assumed at the time, I should have no hesitation in drawing the inference of unseaworthiness. If so, however, one would have expected to find some corroboration in the examination at Elsinore of the fractured valve casing, as well as some intelligible theory of how the part which gave way should have become injured during the period that the vessel was laid up at Libau. I shall, accordingly, examine the evidence with regard to these points.

"In the first place, I have no difficulty in rejecting the view that the break occurred through some latent flaw in the metal from which the casing was made. It had been originally supplied along with the engines, and had served its purpose during a period of over thirty years. It is therefore inconceivable that a flaw which had existed in the metal all that time should not sooner

have made itself apparent. On the other hand, it was quite a likely thing that the casing might have become corroded, and rendered dangerously weak in consequence. The evidence as to this, however, is all to the opposite effect. The two independent surveyors, who made a careful examination of the break when at Elsinore, corroborate the master and first engineer's evidence that the original thickness of the metal had not been materially reduced, that the break was a clean one, and showed no evidence of a flaw in the casting, and that it had not occurred through any weakness or defect that could be traced. It was said that the broken piece of pipe was not seen by the surveyors, but they saw the fractured edge which remained upon the casing; and it is the condition of the metal at the point of fracture that is material. Further, it is difficult to understand why the engines should have worked under full pressure of steam for even one and a-half hours without the defect being observed if it had been there from the commencement. All this would have been beside the question if the necessary inference to be drawn from the fracture was that the casing must have been defective when the vessel started upon her voyage. There is, however, abundant evidence that no such inference can be drawn; and the pursuer's experts suggest many ways in which the fracture may have occurred consistently with the engines having been in good condition when the voyage commenced. No doubt some of the suggestions made reflect on the management of the engines by the engineer in charge, but as there is a negligence clause in the bill of lading this is immaterial. The *onus* of proving unseaworthiness is upon those who allege it, and in my opinion the defenders have entirely failed to discharge that *onus*. They have really nothing to go upon but the occurrence of the fracture so soon after the vessel left port, and the probability of engines which had been built thirty years before being in some respects defective. As the engines, however, have been regularly utilised since, although no material repairs apart from the replacement of the valve casing have been made, this latter consideration carries the defenders but a little way in proving the presence of the defect before the voyage commenced.

"The defenders raise an incidental point which is not properly tabled on record. They say that from the chief engineer's evidence it appears that the fracture of the valve casing which occurred had the effect of putting both feed pumps out of action, whereas it could only have affected the aft feed pump, and they argue that as neither pump would work after the fracture occurred, the forward feed pump must also have been out of repair. I think it is proved that if the engineer had put a blind flange on both the discharge and delivery side of the pipe connected with the aft feed pump, the forward feed pump would have remained operative notwithstanding the fracture of the valve casing; and the second engineer says that the forward feed pump did, in fact, continue to work. If it did, it is plain from the amount of salt which accumulated in the boilers that it cannot have been efficient; but this is explained by the circumstance that the engineer put a blind flange on only one side, with the result that the fracture of the casing must have greatly affected the working of the forward feed pump. This was, no doubt, an error on his part, as the facts have now emerged, but from such errror, even when amounting to negligence, the shipowners have taken care to protect themselves in their contract. At the same time the defenders' argument raises the question whether a steamer can be regarded as unseaworthy for a voyage of five days' duration because one of her feed pumps is out of order, there being another which was sufficient to supply all the necessary water for the boilers in addition to the reserve supply obtainable by means of the donkey engine.

"An attack is also made on the condition of the donkey engine. When the vessel was new there was a connection between the donkey engine and the hot well, so that if the donkey engine required to be used for pumping water into the boilers, there was no necessity for sea-water being used at all. It is admitted that when the vessel started from Libau the original connection to the hot well was no longer there, and that in ships of modern build such a connection is always provided. This, no doubt, is a wise precaution in the event of both the feed pumps becoming disabled; but I think it impossible to affirm that a vessel which has two pumps in good order, either of which is sufficient to supply her boilers with fresh water, is unseaworthy because she has not got a third means of providing a fresh-water supply.

"The only other attack on the machinery of the ship is that the cargo or deck pumps were in an unworkable condition. There is no evidence of this, but the defenders now say that what they meant was the bilge pumps, which are worked in connection with the main feed pumps. After the whole evidence is led I cannot allow the defenders to take up this position. The bilge pumps, for aught I know, may have become unworkable from various reasons not connected with their original condition, and apart from this there is no evidence at all that the cargo was damaged from any accumulation of water in the bilges which would have been removed by the bilge pumps. No part of the cargo in the afterholds, where the bilge water would chiefly accumulate, was at all damaged, and either the bilge pumps must have been working or the accumulation of water must have been comparatively small. I incline to the former opinion, because if it be true that 75 tons of water would flow from the hot well into the bilges after the main feed pumps were put out of action, as the defenders' witness Smail says, it is inconceivable that damage would not have been done

in heavy weather to the cargo in the afterholds.

[*His Lordship then dealt with the complaint that the deck cargo ought not to have been carried, or at all events that it must be held to have been improperly secured, which he repelled.*]

"There remains, therefore, only the other point, whether the fact of the ventilator coamings being of cast-iron rendered the 'Tatjana' unseaworthy in relation to the particular cargo which she carried. It appears that some twenty-four years ago the Board of Trade issued regulations prescribing that in future all ventilator coamings should be at least 2 feet high and should be made of malleable iron. These regulations were made specially in view of the dangers connected with the carriage of coal cargoes, but they appear to be of general application. It also appears that malleable-iron coamings are stronger than cast-iron coamings. The regulation of course does not apply to foreign vessels.

"At the time when the 'Tatjana' was built, cast-iron coamings for ventilators seem to have been general if not universal. If the defenders' contention therefore is right, the 'Tatjana' has all along been unseaworthy in relation to a cargo which might be damaged by salt water. I cannot accept this view. The coamings which gave way had not been materially reduced in strength from the time when she was built, and were quite capable of resisting any blow except one of unusual violence. The master says that it was the direct action of a breaker which caused the coamings to fracture and carried away the ventilator itself. The defenders say it was the breaking loose of the deck cargo. If the latter was well secured, as I have held, it is immaterial what the cause was, because in either view it would be a peril of the sea. In the circumstances I do not think that malleable-iron coamings of the pattern now in vogue would have stood any better chance of remaining intact. Their greater height would have given greater leverage to the blow, and any blow which broke the solid cast-iron coamings only 9 inches high, would, I think, equally have wrenched off malleable-iron coamings constructed in terms of the Board of Trade regulations.

[*After disposing of the objection that the vessel had not a sufficient supply of coal on board, his Lordship proceeded*—]

"The next point for the defence is that the master, when the breakdown of his feed pump occurred, ought to have gone into Libau and not to have attempted to prosecute the journey to Elsinore. As matters turned out this would certainly have been the better course to follow, as in all probability the accident which broke the coamings would not have occurred, and the cargo would accordingly not have suffered any damage. But in order to judge of the captain's conduct it is necessary to put oneself as far as possible in his place. The 'Tatjana' was at that time on a lee shore with a falling barometer, and she would not have been admitted into Libau during the night, but would have required to anchor outside. There is conflicting evidence as to the nature of the anchorage, but I think the balance is to the effect that while good anchorage may be found by a person well acquainted with the locality, there are shoals and sandbanks which make the position of a stranger attempting to find an anchorage at night a somewhat precarious one. The captain besides believed that the engineering shops in Libau would not have the same facilities for supplying a new valve casing as those in Elsinore, and in any case if he had put back to Libau similar general average charges would have been incurred, and there is no evidence that they would have been any less in amount than the corresponding charges at Elsinore. The captain had no motive to select Elsinore as his port of refuge instead of Libau except the interests of the ship, of which he was a part owner, and I am unable to hold that he committed even an error in judgment in deciding to prosecute the voyage. The only item charged to general average which might have been avoided was the expense of freeing the boilers from salt; but there is reason to suppose that at the particular time when the accident occurred the delay in getting the engines repaired would have been greater in Libau than at Elsinore. Added to all this there is a clause exempting the shipowners for the consequences of negligence on the part of the master, and it has been held that the fact that the master is also a part owner does not in any way affect the application of this clause—*West Port Coal Company*, L.R., 1898, 2 Q.B. 130—an authority which in my opinion would be equally applicable although the master were the sole owner of the ship, provided the negligence occurred within the sphere of his duty as master and was not negligence in his capacity as owner. Here, however, it is sufficiently proved that although the master was the sole registered owner of the 'Tatjana,' there were in fact other two owners.

"I have now dealt with all the points which affect the liability for a general average contribution. It was, however, also maintained that the particular average charges should be disallowed on the ground that if the master had exercised a sound judgment it would have been much more in the interests of the cargo owners that none of these expenses should have been incurred. No defence of this kind is pleaded on record, but as evidence has been led on the point it is right that I should express my opinion upon it. The case made is as follows—"Granted that the cargo in the forehold was to some extent heated, as the repairs of the engines only involved a delay of five days, there would have been no material depreciation of the cargo if it had simply remained in the forehold and been carried to Leith, where it would have been taken out of the ship within eight days of her arrival at Elsinore.

"*Tota re respecta*, I agree with the cargo owners that in all probability it would

have been better for them if the master had adopted this course, for the expenses in connection with the discharge, reconditioning, and reloading of the cargo appear to be heavy. But here again one has to judge of the captain's conduct by the facts which were or ought to have been present to his mind at the time. I have no doubt he would have been only too delighted to have left the cargo in the forehold at the cargo owner's risk if he had received instructions to that effect. It would have been greatly to the interest of the ship not to have incurred the long delay at Elsinore which the reconditioning of the cargo involved, especially as the ship in the first instance had to provide from a somewhat lean exchequer the funds out of which to meet these charges; but I do not think he would have reasonably discharged his duty as agent for the cargo-owners if he had adopted that course. The exact length of time that the repair of the engines would take was a matter of conjecture; and they seem to have been effected in half the time for which the parties were prepared. The rapidity with which the damaged cargo would deteriorate and communicate heat and sweat to the undamaged portion in the same hold was also matter of conjecture. What was known for certain was that such damage would be likely to go on at an increasing rate. Above all the captain was, I think, bound to act on the opinion of the surveyors appointed by Lloyd's agent in the interest of the cargo and its underwriters, and would have rendered himself liable to serious consequences if he had disregarded their advice. The cargo-owners kept aloof all the time and allowed the whole responsibility to rest upon the captain; and even when one of the defenders came over to Elsinore to attend to the interests of the consignees, he took no exception to what had been done, nor did he take any steps to prevent further expense being incurred. It was argued that the master is responsible if he does not in fact adopt the best course, however reasonably he may have acted. That doctrine is no doubt applicable where he commits a breach of his contract in the supposed interests of the cargo, as, for instance, when he sells it without instructions, but is I think quite inapplicable to the relation of agent and principal. The agent is no doubt liable for fault, but he does not guarantee that the course which he adopts in the interests of his principal shall prove to be the most advantageous. The captain had to consider all the contingencies, including the possibility of the repairs taking a much longer time than they actually did take, and if the cargo-owners really ever did contemplate leaving the heated cargo in the holds during the period of the vessel's possible detention at Elsinore, it was for them to give instructions to that effect, and to relieve the captain of responsibility for what would *prima facie* have been a breach of duty on his part.

"The alternative defence stated on record, that the sums charged as particular average ought really to have been included in general average, also fails on the facts. Had it been necessary for the safety of the ship that the cargo in the forehold should be discharged, no doubt the ship would have had to contribute to the expense, as, for instance, if there had been any risk of the cargo so swelling in consequence of the heat as to burst the decks. All the evidence, however, is to the contrary effect. So far as the ship was concerned, there would have been no risk though the cargo had rotted in the hold, and all the charges have accordingly been rightly debited to the cargo.

"The result of my opinion is that the pursuers are entitled to decree in terms of the conclusions of the action."

The defenders reclaimed. At the hearing in the Inner House Captain A. P. Marshall, Elder Brother of Trinity House, acted as nautical assessor.

Argued for reclaimers—(1) The "Tatjana" was unseaworthy. She was so when she sailed from Libau, in respect that (*a*) the pumping power was deficient, and (*b*) the ventilating coamings were made of cast, instead of malleable, iron. (*a*) Where, as here, the main feed pump broke down soon after starting, there was a presumption *in fact* (if not in law) that the vessel was unseaworthy sufficient to transfer the *onus* of proof from the cargo-owners to the shipowner—Arnould on Marine Insurance (8th ed.), 885; *Watson* v. *Clark*, (1813) 1 Dow's App. 336; *Pickup* v. *Thames Insurance Company*, (1878) L.R., 3 Q.B.D. 594; *Westoll* v. *Carter*, (1898) 3 Com. Cas. 112; *Ajum Goolam, Hossen & Company* v. *Union Marine Insurance Company*, [1901] A.C. 362. The pursuer had not discharged that *onus*. No proper examination of the vessel was made before she left Libau, nor was any proper trial made of her engines. She had been lying for two years in a Russian port, so that a skilled survey was absolutely necessary. Where, as here, the question was between the cargo-owners and the ship, the presumption in favour of the cargo-owners was stronger than where the question was with the under-writers, for the latter took the risk of unascertainable causes—*per* Lord Lindley in *Ajum Goolam, &c.* (*cit. sup.*) at p. 371. (*b*) The coamings ought to have been of malleable iron. Cast iron coamings were not suitable where, as here, the vessel carried a deck cargo. The "Tatjana's" coamings were broken by the cargo washing about the deck, and she was therefore unseaworthy in that respect also—Carver's Carriage by Sea (4th ed.), sec. 17; *Gilroy, Sons, & Company* v. *Price & Company*, [1893] A.C. 56; *Steel* v. *State Line Steamship Company*, (1877) L.R., 3 A.C. 72. A vessel had to be seaworthy *quoad* the particular cargo on board—*Stanton* v. *Richardson*, (1874) L.R., 9 C.P. 390; *Tattersall* v. *National Steamship Company*, (1884) L.R., 12 Q.B.D. 297; "*The Maori King*," [1895] 2 Q.B. 550; "*The Schwan*," [1909] A.C. 450. The evidence showed that the "Tatjana" had not a proper margin of safety, and without that a vessel was unseaworthy.

Esto, however, that there was no initial unseaworthiness, the "Tatjana" became so owing to the negligence of the engineer, and where, as here, the negligence was that of the owner or his servants the clause of exemption in the bills of lading could not be founded on. (2) The defenders could not be called on to contribute *quoad* the expenses incurred at Elsinore. These expenses were incurred solely for the benefit of the ship, *e.g.*, the repair of the main feed pump. Such repairs were not a subject of general average where, as here, no voluntary sacrifice had been made —*Harrison* v. *Bank of Australasia*, (1872) L.R., 7 Ex. 39, at p. 50. To establish a claim of average there must be either extraordinary sacrifice or extraordinary expenditure incurred to preserve the cargo from an imminent peril, and neither was present here. In any event the defenders could not be called on to contribute towards the outlays made on the crew (*e.g.*, provisions, wages, &c.) at Elsinore—*Power* v. *Whitmore*, (1815) 4 Maule & Selwyn 141; *Hallet* v. *Wigram*, (1850) 9 C.B. 580. The "Tatjana" should have put back to Libau. The pursuer went on to Elsinore for the benefit of the ship, viz., to get cheap coal. *Esto* that the pursuer had power to deviate, the power had not been honestly exercised, for he had decided *ab ante* to proceed to Elsinore. That being so the defenders were not liable in the average charges thereby incurred—*Worms* v. *Story*, (1855) 11 Ex. (H. & G.) 427. (3) The cargo ought not to have been handled at Elsinore without first advising the cargo-owners by wire. Not having been so advised they could not be called on to pay the cost of handling—*Svensden* v. *Wallace*, (1884) L.R., 13 Q.B.D. 69, *aff.* (1885) L.R., 10 A.C. 404. As to the captain's duty towards the cargo-owners reference was made to Carver's Carriage by Sea (4th ed.), secs. 295, 299, 300; "*The Pontida*," (1884) L.R., 9 P.D. 177; *Acatos* v. *Burns*, (1878) L.R., 3 Ex. Div. 282; Scrutton on Charter-Parties (5th ed.), p. 213, note *u*.

Argued for respondent—(1) The defenders had failed to establish unseaworthiness. The *onus* lay on the party alleging it, and he took the risk of unascertainable causes—*Pickup* (*cit. supra*); *Ajum Goolam, &c.* (*cit. supra*). Unseaworthiness was not an absolute but a relative term; it was relative *quoad* the ship, the voyage, and the cargo. *Esto* that the "Tatjana" was an old vessel, it was as a ship of that class that she must be tested, and so tested she was initially seaworthy. The evidence showed that a careful examination of the ship, and a proper trial of her engines, had been made before she started, and had there been any initial defect it would have been discovered. Moreover, the real evidence was in favour of the pursuer, for the break in the valve casing was a clean one. *Esto* that the valve casing was defective, the vessel had sufficient potential pumping power which might have been used. She had therefore a sufficient margin of safety *quoad* the particular voyage, viz., Libau to Leith, with permission to call at certain Baltic ports. The fact that, owing to the engineer's ignorance, the best use was not made of what was available did not render the ship-owners liable, for they were protected by the exemption clause in the bills of lading—Carver (*op. cit.*), sec. 373 (*b*); "*The Carron Park*," (1890) L.R., 15 P.D. 203, approved in *Milburn & Company* v. *Jamaica Fruit Importing and Trading Company of London*, [1900] 2 Q.B. 540. *Esto* that if the pursuer had been the sole owner he could not have contracted against his own negligence as master, he was only part owner, and therefore the exemption clause was valid—*Westport Coal Company* v. *MacPhail*, [1898] 2 Q.B. 130. (2) The defenders were clearly due the general average charges. The question was—what was the master's position off Elsinore, not off Libau. The evidence showed that the vessel was then in peril owing to the breakdown of the pumps and to the engineer's ignorance, and in these circumstances the master acted rightly in putting into Elsinore. The defenders were therefore liable—Carver (*op. cit.*), sec. 384; *Greenshields, Cowie & Company* v. *Stephens & Sons*, [1908] 1 K.B. 51. The cases cited by the reclaimers on this point were many of them—(*e.g. Power, Svendsen, &c.*) —prior to the York-Antwerp Rules 1890, by which, according to the bills of lading, the average charges were to be governed. These cases therefore were not in point. [For the rules in question, *vide* Carver (*op. cit.*), p. 895, Rules 10 and 11.] As to the meaning of general average reference was made to the Marine Insurance Act 1906 (6 Edw. VII, c. 41), sec. 66. (3) A master was not bound to communicate with the cargo-owners save in the case of a sale—Scrutton (*op. cit.*), p. 213; *Phelps, James, & Company* v. *Hill*, [1891] 1 Q.B. 605. *Esto*, however, that he was bound to do so, he had done so here, for he communicated with the shipper's agents. He was therefore entitled to recover the charges sued for—Carver (*op. cit.*), sec. 293; "*The Rona*," (1884) 51 L.T. 23; *Notara* v. *Henderson*, (1872) L.R., 7 Q.B. 225; "*The Savona*," [1900] P. 252; *Garrioch* v. *Walker*, October 31, 1873, 1 R. 100, 11 S.L.R. 16.

At advising—

LORD PRESIDENT—The Lord Ordinary has so carefully and accurately set forth the material facts connected with the voyage of the "Tatjana," that I feel it is useless to recapitulate them. The case has been anxiously and ably argued before us, and we have had the assistance of a nautical assessor; and I shall now indicate briefly the result at which I have arrived after careful consideration of the evidence.

The first and chief point to be decided—for it lies at the root of the case for a general average contribution—is, Was the "Tatjana" seaworthy when she left Libau? The pursuer admits, on the authority of *Strang, Steel & Company* v. *Scott & Company* (L.R., 14 App. Cas. 601), that this, if

made out, is a good defence; for the pursuer warranted a seaworthy ship at the beginning of the adventure, and if the loss was occasioned through his default he cannot claim contribution to make good the consequences of that default. The *onus*, however, it is agreed, lies on the party alleging unseaworthiness. By seaworthiness is meant, it is also agreed, that the vessel is in a fit and proper condition to prosecute the adventure in hand.

Now, the two respects in which the defenders allege that the ship was unseaworthy are (1) the condition of the pumps, and (2) the condition of the ventilators.

I take the latter point first. The ventilators are alleged to have been insufficient to such an extent as to render the vessel unseaworthy, because the coamings were made of cast iron instead of malleable iron. It is doubtless the fact that malleable iron is tougher than cast iron; and that the Board of Trade have insisted for some time on having the coamings made of malleable iron. This vessel, however, was built before the issue of these regulations, and I cannot think that the mere issuing of the regulations had the effect of stamping with the character of unseaworthiness every vessel which at the time had its ventilator coamings made of cast-iron. The existing coamings had proved sufficient up to the voyage in question, and I do not think there was any reasonable probability of their proving less sufficient on that voyage. I am therefore of opinion—and the nautical assessor concurs—that there cannot be said to have been unseaworthiness on that account.

The question of the condition of the pumps I have found to be one of considerable difficulty. The difficulty has been much enhanced by the fact, which the learned counsel who addressed us did not attempt to deny, that much, indeed nearly all, of the cross-examination on behalf of the defenders was taken upon an assumption which is now recognised to be erroneous, viz., that the break in the casing or wall of the pipe was at a place which involved equally the supply of the aft and the fore pumps—the truth being that the pipe with the hole occasioned by the fracture was shut off by the application of the blind flange at the joint between the copper and the iron pipe, and that there was nothing whatever to prevent the circulation to and from the fore pump going on as usual. There is no reason whatever to suppose that there was anything wrong with the valve on the discharge side of the aft pump, and even if there had been it would have been equally easy to shut that off by a blind flange, as had already been done in the case of the supply side. It is not altogether to be wondered at that this erroneous idea had invaded the minds of the pursuer's advisers, for we find that indubitably it had also at the time invaded the mind of the engineer in charge, viz., Lange. Not only does he say so in his evidence, but that he really did think so is borne out by, first, the ship's log and the engineer's journal, and, second, his actual actings at the time. The ship's log is in these terms—"At 10 p.m. the engineer reported that the main feed-pump had broken, and the engines required to be stopped to get the pump repaired." It will be observed that the main feed-pump is spoken of as, so to speak, one machine, and no distinction is made between the fore and aft pumps which together constitute the whole main feed-pump. But the engineer's journal is quite explicit—"Proceeding at 10 o'clock p.m. I observed that the casing of the feed-valve had burst at three places and was therefore put out of action. As the other pump was combined with the one broken down it was likewise put out of action." And this is more strongly borne out by his acting at the time, for he at once began to feed the boiler with sea water—a perfectly inexplicable proceeding except upon the assumption that he could not obtain sufficient fresh water from the hot well. That is made clear by his account of it. Lange says—"The cast-iron pipe and the valve-box are cast in one piece. The break I have referred to was upon the condenser side of the pumps, and the result of the break was that neither of the feed-pumps could be used." And then a little further on—"I reported to Captain Klein that I could disconnect the pump and work the ship with the donkey pump. . . . I disconnected the broken casting from the copper pipe, and closed and covered the open end of the copper pipe. Then I used the donkey pump to feed the boilers with sea water."

Now I have already mentioned where the break was, and the first matter for consideration is, Was the crack which developed into the break present at the start or was it not? It is not easy to answer this question with certainty. On the one hand, there is the shortness of time between the start and the breakdown, and the point that there is no observed fact which can be brought forward as the *causa causans* of the accident. On the other hand, there are the facts that there was no rust on the line of the fracture, that no crack was discovered by Lange and Klein in their inspection made before starting, and that the engine worked satisfactorily, although not for very long, when the ship was being moved about in the harbour. Upon these balanced considerations I think it is difficult to say that the *onus* of fixing that the crack or weakness existed at the start has been discharged.

The matter, however, scarcely ends there, for even assuming that there was at starting an inherent weakness which might develop into a fracture which would put the aft pump *hors de combat*, the question remains, Was that unseaworthiness? It is, I think, conclusively proved that even if one pump was out of action the boiler could still be effectively filled by the other if in full efficiency, or at least by the other with the aid of the donkey. Now that the fore pump was not entirely thrown out of action is, I think, certain. All that can be said against it is (first) that there may have been regurgitation through the discharge valve of the aft pump, which is

entirely speculative; or (second) that its own valves may not have been quite efficient, and the defenders point to the fact as supporting this that a repair was done on them at Elsinore. The repair, however, seems to have been trifling, and the mere fact that an opportunity is taken advantage of to repair a valve is not evidence that the valve was not working at all before the repair. Be that, however, as it may, it is quite certain that the fore pump in whatever state, plus the donkey pump, were quite efficient to maintain as far as quantity was concerned, a sufficient flow of water in the boilers; for they did so; and that the engine was working efficiently is not denied by anybody. What was the matter was that what the donkey was pumping was salt water from the sea instead of hot water from the well. Why was this? As I have already said, Lange, assuming that both fore and aft pumps were *hors de combat* by the break, began pumping salt water at once. He did so, he says, because there was no connection from the donkey to the hot well. Now, this is denied. The vessel was certainly made originally with such a connection, and it has such a connection now. But it is said that some pipes were stolen at Libau during the long laying up of the vessel, and that the present copper pipe is somewhat different in shape from the original one, as delineated on the plan. It seems to me that it is immaterial where exactly in this matter the truth lies. Lange was so stupid, or so careless, as not to recognise that the break occurring where it did still left the fore pump free to act, and he may easily have been equally so stupid and careless as not to have recognised that he only required to turn a cock to allow the donkey to suck from the hot well. Be that as it may, however, the fact is certain that the donkey had a nozzle connection fit and appropriate for connection with the hot well, and even if the copper connection pipe were gone nothing would have been simpler than to have substituted for it an ordinary piece of hose which, as the pipe was purely for suction and had no pressure, would have acted perfectly well. I therefore come to the conclusion that *de facto* the unseaworthiness of the ship was due solely to the fault of Lange. I ought to add that the assessor is also of opinion that the unseaworthiness at the start cannot be affirmed of the ship. If that be so, the matter is at an end, because by the contract contained in the bill of lading an exception in favour of the owner of the fault of the master and crew, the fault of Lange, is, as it is expressed by Sir James Hannen in the case of the "*Carron Park*" [L.R., 15 P.D. 203], as foreign to him as it is to the person who has suffered by it. I do not hesitate to say that I agree with Lord Justices A. L. Smith and Romer in the case of *Milburn* (1900, 2 Q.B. 540), and that in my opinion they are right in holding that that decision is the legitimate outcome of what was laid down by Lord Watson in the Privy Council case of *Strang, Steel & Company* v. *Scott & Company* (L.R., 14 App. Cas. 601).

This seems to me to end the whole case. No doubt other points were pled, but in none of them, I think, is there any difficulty.

As regards the propriety of going back to Libau instead of proceeding forward, looking to the regulations then in force as to the harbour at Libau, and the comparative nearness of ports such as Elsinore, Dantzig, etc., where the vessel could put in in order to get such repairs and stores as she might be in need of, I think we cannot affirm that the master was in fault in electing to proceed.

On the details of the general average claim the reclaimers could scarcely maintain that we were in a position to dispute the result arrived at by the average adjuster, keeping in view that the contract was to be governed by York-Antwerp rules, and that rules 10 and 11 are exactly in point.

There remains, however, the question as to the charges for dealing with the grain. If it is permissible to be wise after the event, I agree with the Lord Ordinary that it was a pity the grain was touched. But I cannot say the captain was wrong in the circumstances in calling a survey, and the survey having taken place, he was, I think, bound to do what the surveyor recommended. It was strongly argued that he ought to have communicated with the owners of the cargo, but he did not know who were the owners, and he did communicate with the only firm which (to his knowledge) had acted for the shippers at the port of loading.

Upon the whole matter I am of opinion that the Lord Ordinary is right and that his judgment should be affirmed.

LORD KINNEAR—I concur.

LORD DUNDAS—I am of the same opinion and I have nothing to add.

LORD M'LAREN and LORD JOHNSTON were absent.

The Court adhered.

Counsel for the Pursuer (Respondent)—Murray, K.C. — Sandeman, K.C. — J. B. Dickson. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Defenders (Reclaimers)—Horne—Lippe. Agents—Boyd, Jameson, & Young, W.S.