been said by my noble and learned friend opposite (Lord Watson) about "constructive corruption." I think that that and similar expressions are only used by persons who have a desire to bring about a certain result, and do not know how to do so by the use of ordinary and intelligible expressions.

I just wish to make one other remark. I do not believe that this case would have found its way here but for the magnitude of the stake.

LORD HERSCHELL and LORD MORRIS concurred.

Their Lordships affirmed the decision appealed from and dismissed the appeal with costs.

Counsel for the Appellants—Sol.-Gen. Sir C. Pearson, Q.C.—Law. Agent—A. Beveridge, for Alexander Campbell, S.S.C.

Counsel for the Respondents — D.-F. Balfour, Q.C.—Ferguson. Agents—Dyson & Company, for T. J. Gordon & Falconer, W.S.

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*Monday, December* 1.

(Before the Lord Chancellor (Halsbury), and Lords Watson, Herschell, Bramwell, and Morris.)

## HOGARTH AND OTHERS *v.* MILLER, BROTHER, & COMPANY.

(*Ante*, March 15, 1889, vol. xxvi., p. 459, and 16 R. 599.)

*Ship—Charter-Party—Freight—Payment of Hire to Cease if Working of Vessel Stopped until Efficient to Resume Service—General Average.*

A charterer undertook to pay a certain hire per month for a steamship, the owners undertook to provide officers, crew, and stores. The charter-party provided—"In the event of loss of time from deficiency of men or stores, breakdown of machinery, want of repairs, or damage, whereby the working of the vessel is stopped for more than 48 consecutive working hours, the payment of hire shall cease until she be again in an efficient state to resume her service."

On the voyage the high-pressure engine broke down, and the vessel put into Las Palmas, where she was pronounced unseaworthy. As the port afforded no means of repair the owners and charterers agreed to send a tug from England to bring her to her destination at Harburg, and to regard the cost as general average. The vessel made that port with the aid of the tug and her low-pressure engine. The charterer paid £867 as his share of general average.

The shipowner sued the charterer for hire from the time the vessel left Las Palmas with the tug till she was discharged of her cargo at Harburg. The Second Division *held* (*rev.* Lord Trayner) that while the owners were not entitled to hire from Las Palmas to Harburg, they were entitled to payment while the ship was necessarily engaged in discharging cargo—four days or £60 being taken as a reasonable view.

*Held* (*per* the Lord Chancellor (Halsbury) and Lords Watson and Herschell) that no hire was due from Las Palmas to Harburg, but that the full ten days actually occupied in discharge of cargo should be paid for.

Lord Bramwell concurred in the latter but not in the former view.

Lord Morris was of opinion that no hire at all should be paid.

This case is reported *ante*, March 15, 1889, vol. xxvi., p. 459, and 16 R. 599.

The pursuers Hogarth and others appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR — My Lords, the whole of this case, as it appears to me, turns upon the true construction of the contract which regulates the relations between the parties, and there are two very diverse views which have been presented to your Lordships upon the true construction of the language of that instrument. I think that each part of the contract must be looked at with care, and that it must be remembered that in the construction of the contract we are not bound simply by the exact words. We must remember that it is a mercantile contract, and we must remember the nature of the subject-matter with respect to which each of the parties was contracting.

Now, the contract is for the hire of a ship, and each of the parties must be taken to know what are, in the ordinary course, the duties to be performed by a ship, and it must be taken that each party is contemplating the possibility of the benefit which he is contracting to obtain being interrupted by various causes. That clause of the contract which has to be interpreted is in these terms, and each part of it, I should say, ought to be looked at with care and with reference to the words which are found associated with it in the particular instrument which we have to construe. It is, "That in the event of loss of time." That is the leading and guiding principle by which we are to ascertain what it is with reference to which the succeeding words are used. What the hirer of the ship is guarding against by this contract with the owner of the ship is, that he is not to pay during such period of time as he shall lose (that is, lose time) in the use of the ship by reason of any of the contingencies which this particular clause contemplates—"That in the event of loss of time from deficiency of men or stores, breakdown of machinery, want of repairs or damage, whereby the working of the vessel is stopped for more than forty-eight consecutive working hours." The language is consonant with what I have indicated to be the general intention of the parties in

entering into this part of the contract. In the first place, it is "in the event of loss of time," and then the parties proceed to show that that contingency which is to give rise to the actual operation of the clause is, that the working powers of the vessel are interfered with, and "the working of the vessel is stopped for more than forty-eight consecutive working hours," and upon that there is to be a cessor. What the parties to this contract contemplated was this: The hirer of the vessel wants to use the vessel for the purpose of his adventure, and he is contemplating the possibility that by some of the causes indicated in the clause itself, namely, "the deficiency of men or stores, breakdown of machinery, want of repairs or damage," the efficient working of the vessel may be stopped, and so loss of time may be incurred; and he protects himself by saying, that during such period as the working of the vessel is stopped for more than forty-eight consecutive hours, payment shall cease; and now come the words upon which such reliance is placed: "until she be again in an efficient state to resume her service." If the contention which has been put forward at your Lordships' bar were well founded, one might have expected that the parties in contemplating what upon that view was said to be the intention of the parties if they had intended that the test should be the efficient state of the vessel as it originally was might very readily have used the words "until such time as the deficiency of men or stores has been removed, or the breakdown of the machinery has been set to rights, or the want of repairs has been supplied, or the damage has been remedied," and so forth; or the terms might have been inserted that the resumption of the payment shall be dependent upon the vessel being restored to full efficiency in all respects as to seaworthiness and otherwise as she was at the time when she was originally handed over. But the parties have not used such language. On the contrary, the test by which the payment for the hire is to be resumed is the efficient state of the vessel to resume her service, so that each of those words, as it appears to me, has relation to that which both of the parties must be taken to have well understood, namely, the purpose for which the vessel was hired, the nature of the service to be performed by the vessel, and the efficiency of the vessel to perform such service as should be required of her in the course of the voyage.

As to the first part of the claim which has been insisted upon here, I confess that I entertain no doubt whatever that the vessel was not efficient in any sense for the prosecution of her voyage from Las Palmas to Harburg. I decline altogether to enter into the question of the contracts of insurance, with which these parties have nothing to do—I mean, have nothing to do with respect to the performance or the construction of this contract. This contract must receive the same construction whether the vessel was insured or not, and the question what other rights might have been obtained by the shipowner by supplying that which by the hypothesis he did not supply, is a question which is not before your Lordships, and upon which, at all events, I decline to express any opinion. As a matter of fact, this vessel did not and could not pursue her voyage as a vessel from Las Palmas to Harburg. That another vessel took her in tow, that another vessel accomplished the voyage and brought this vessel, not as an efficient steamer, but as a floating barge, whereby the goods were brought to Harburg, seems to me to be nothing to the purpose. I use that phrase, although I am aware that it is suggested that the low-pressure engine was used for the purpose of easing the work of the tug, that appears to me to be entirely irrelevant when one is ascertaining whether this vessel of its own independent power was efficient for the purpose of prosecuting the voyage. All that is suggested is that the tug was assisted by the use of the low-pressure engine. I find as a matter of evidence — as each Court I think has found—that the vessel was not seaworthy for the purpose of accomplishing her voyage without the assistance of a tug; she did not accomplish her voyage without the assistance of a tug; and in truth, as it appears to me, upon these facts it is clear that the voyage which was accomplished, and the service which it was contemplated this hired vessel was to perform, was performed by another vessel, and that the auxiliary assistance which she gave to that other vessel was not making the vessel herself an efficient vessel for the working of which the hirer was to pay.

It appears to me that the various hypotheses which have been put dispose of this part of the case, because the greater or less degree of efficiency of the vessel which these hypotheses have suggested appears to imply in all cases this admission, that without the additional assistance the vessel could not have accomplished that object which both the shipowner and the hirer had contemplated as being that which was to be supplied by the shipowner to the hirer. If so, how can it be said in any business sense, apart from the mere words, that the vessel was "in an efficient state to resume her service?" That being once admitted as a question of fact (and if it were not admitted I certainly should find that upon the evidence), it appears to me that she was not herself seaworthy or efficient to perform the voyage, and did not herself perform the voyage. That is conclusive upon the first part of the case, and therefore no payment for the hire was due during the period that she was passing from Las Palmas to Harburg.

With reference to the second question which has been argued, it appears to me that one has again to refer to each of these clauses of the contract to see what the parties were bargaining for. I should read the contract as meaning this, which I think one of the noble and learned Lords suggested in the course of the argument, that she should be efficient to do what she was required to do when she was called upon to do it; and accordingly, at each period, if

what was required of her was to lie at anchor, if it was to lie alongside the wharf, upon each of those occasions, if she was efficient to do it at that time she would then become, in the language of the contract, to my mind "efficient," reading with it the other words, "for the working of the vessel." How does a vessel work when she is lying alongside a wharf to discharge her cargo? She has machinery there for the purpose. It is not only that she has the goods in the hold, but she has the machinery there for the purpose of discharging the cargo. It is not denied that during the period that she was lying at Harburg there was that machinery at work enabling the hirer to do quickly all that this particular portion of her employment required to be done. It appears to me, therefore, that at that period there was a right in the shipowner to demand payment of the hire, because at that time his vessel was efficiently working; the working of the vessel was proceeding as efficiently as it could with reference to the particular employment demanded of her at the time.

Under these circumstances it appears to me that the pursuer here was entitled to payment for the hire of the vessel during the period of discharge. That would make the pursuer entitled, I think, to a sum of £136, 4s., and for that I think judgment should be entered.

My Lords, I wish to say one word as to the other view which has been presented, that the shipowner was not entitled to anything in respect of the period during which she was discharging. It has been put in various forms by the learned counsel. What reason or good sense would there be in construing a mercantile contract so that all right for payment should cease when the other party to the contract was getting everything he could out of the use of the vessel if the vessel was in an efficient state? I can see none. And what was put this morning seems to me conclusive—if some other part of the steam-gearing not used for the purpose of navigation had gone out of working in mid-ocean, and there had been no longer any use for that particular thing, the reason why such a breakdown of the machinery in mid-ocean would not have created a cessor of payment under the contract would, I suppose, have been this—it would have been argued, and argued justly, "It is very true that there has been a breakdown of machinery, but that breakdown of machinery is not the only event contemplated, it does not of itself entitle you to a cessor of payment. There must be to entitle you to a cessor of payment a loss of time arising from a breakdown of machinery. Not even then does the cessor of payment arise, but there must be a loss of time by the breakdown of the machinery whereby the working of the vessel is stopped for the contracted time." That appears to me to reflect great light upon the other question—What was the breakdown of the machinery which was contemplated by both parties? It appears to me that the resumption of the right of payment is correlative with that, and inasmuch as when the vessel got to Harburg the vessel became "efficient" for the purpose for which alone she was wanted at that time, it appears to me that the right of payment arose.

Now, under ordinary circumstances, when a substantial claim has been established, having been successfully prosecuted at your Lordships' bar by the pursuer or plaintiff, the result is that he shall be entitled to costs, but in this case, certainly, there are difficulties in either view of this question. For my own part it seems to me that both parties have 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 pursuer 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. Under those circumstances while I move your Lordships that the interlocutor be amended by entitling the pursuer to judgment for £136, 4s., on the other hand it appears to me that the course of litigation has been such that neither of the parties is in a position to ask for costs. I therefore move your Lordships that the costs both here and below, from the original rise of this litigation to the present moment, shall not be given to either of the parties, but that each of them shall pay their own costs.

LORD WATSON—My Lords, if the appellants were suing for freight in respect of cargo which had been safely carried to its destination notwithstanding the unseaworthiness of the ship, that consideration might have gone a long way in their favour. Such is not the nature of the claim which they prefer. They hired their ship and the services of its crew for an all-round voyage from this country to the West Coast of Africa, and thence to a home port or a port on the Continent. Hire is payable according to a monthly rate, subject to a special stipulation, which provides, in the first place, that the shipowner shall maintain the hull and machinery throughout in a thoroughly efficient condition, and in the second place, that under certain circumstances payment of hire shall cease.

The high-pressure engine of the vessel broke down on her way from Africa, and in consequence she put into the port of Las Palmas, which she reached with the aid of her low-pressure engine assisted by her sails. The parties seem to be agreed that

the condition of the vessel upon her arrival there brought her within the condition of the contract as to cessor of hire. Loss of time was incurred through the breakdown of the machinery, and the vessel was stopped for more than forty-eight hours, having been detained by the cause I have mentioned, before she ultimately sailed, from the 1st to the 18th of October. The appellants do not claim hire for that period. Whilst the vessel lay at Las Palmas, it was found not to be expedient to repair her at that port, from want of workmen and want of materials, and accordingly an arrangement was entered into, of the details of which we know nothing beyond this, that the parties, hirers and charterers, agreed to bring her to Harburg, which was her first port of destination, at their joint expense, by means of a tug, and that the cost of bringing her should be defrayed by them on the same footing as if it had been general average loss. Accordingly the vessel sailed under tow of a tug, and reached Harburg on the 1st of November, almost in due course.

The first question which arises is this—Was the vessel, when she started under tow for Harburg, in an efficient state to resume her service within the meaning of the contract? I have no hesitation in answering that question in the negative. The service contemplated was a service to be performed by the vessel without foreign aid, the means of propulsion through the water being her own machinery. But the fact is, that she did not proceed from Las Palmas to Harburg in that condition; she was towed; and I think that is quite sufficient to bring the whole period from her leaving Las Palmas till she reached the pier at Harburg within the terms of the condition I have referred to, and that no hire is due for that period.

It was suggested in the course of the argument that a reasonable allowance was due from the charterers in respect of the amount of use which they undoubtedly had, because their cargo was conveyed to the port of destination, and safely conveyed, in a hull which was the property of the shipowner. They had undoubtedly that use, and they had besides, to some extent, the aid during the voyage of steam power supplied by the shipowner.

I do not mean to cast any doubt upon the suggestion that there may be circumstances, which, as matter of commercial expediency or as matter of equity, may justify the conclusion, that where a contract payment has ceased there may, notwithstanding, be a *quantum meruit* due to the shipowner; but in all such cases it must be of the nature of a reasonable payment, warranted by the circumstances, in exchange for a use from which the charterer has benefited. But what are the facts here? If the shipowner had chosen to pay for a tug to tow the steamer to Harburg, and had thereby supplied at his own cost an equivalent for an efficient vessel, which his was not at the time, it may be that that would have been considered (I think it might fairly have been considered) by the Court as so substantial an equivalent for the stipulations of the contract which he had violated that he was entitled to recover hire for that period. But that equivalent was not in this case given by the shipowner—it was paid for to the extent of £860 odd by the charterers, the balance of the hire of the tug, to the amount of some £230, being borne by the shipowner. If the shipowner had at his own cost paid for the tug, he would have expended about £800 more than the hire he would have earned. On the other hand, under the arrangement which was entered into and was acted upon, the charterers have paid considerably more than double the hire which they stipulated to pay for an efficient vessel in terms of the contract. In that state of facts I cannot find any consideration which points to the propriety of making an allowance by way of *quantum meruit* to the appellants; and therefore I have come to the conclusion that upon this first branch of the case the judgment of the Court below is well founded.

In regard to the second branch of the case, the claim for hire whilst the vessel was under discharge at Harburg, I have come to a different conclusion, because it appears to me, for the reasons which have been already indicated by the Lord Chancellor, that from the moment when she reached the pier at Harburg the vessel was in an efficient state to perform that part of the contract work for which she was hired, and for which she was in the possession of the respondents. Her steam-winches were in perfect order, and it humbly appears to me, that if charterers keep possession of a vessel which is in a thoroughly efficient state for all the purposes contemplated at the time by the contract, and required by them, they must, in terms of the contract, pay the stipulated hire. No doubt on the record there is a statement made by the respondents to the effect that the discharge of the cargo proceeded leisurely, and that it was known to the defenders and their agents that the repairs would last for a considerable time. I venture to doubt whether that statement if admitted would afford a good answer to the claim for hire. But the evidence shows that the statement is not justified by the facts. The agent for the charterer at Harburg did everything in his power to expedite the unloading of the cargo, and it is apparent that he was not able to effect his purpose in a shorter time than was really occupied by that proceeding. Therefore the only inference which I can draw from the evidence in this case, if it were necessary to draw it, would be this, that no more than an ordinary time, according to the circumstances of the port, was occupied at Harburg by the discharge.

I therefore come, upon the second point, to a conclusion adverse to the decision of the Court below. I concur, upon both points, in the judgment which has been moved by the Lord Chancellor, and also in the proposal which he has made with respect to costs.

LORD BRAMWELL—My Lords, my opinion differs from those which have been expressed by my noble and learned friends who have already addressed your Lordships, and from those opinions which are entertained by my two noble and learned friends who have not yet spoken. I said that I did not wish to hear Mr Barnes for the purpose of convincing me, because really it would be of very little use—it would make no difference in the judgment which your Lordships would pronounce, and the case is of no great consequence in point of amount, nor I should think in point of precedent—there is not very likely to be another case like this, I should think; therefore Mr Barnes was stopped on one point very much at my instance. But I must say (Mr Finlay and his junior must forgive me) that I do not know that I have heard a stronger argument in support of what they contended for than that which Mr Barnes used in support of his opposition to the other part of their case; so that practically I did hear Mr Barnes, I may say, very much in support of the opinion which I entertain, and not against it.

My Lords, I cannot help thinking that most undue importance has been attached to the word "efficient." Now, I look at the meaning of this contract as being this—when there is a breakdown which occasions a loss of time of a substantial character, that is to say, for forty-eight hours at the least, during that lost time no hire shall be paid; but when there is no loss of time in consequence of that breakdown, that is, no total loss though a delay, then the hire shall be paid. That is the meaning I attribute to this contract. It seems to me to be the ordinary mercantile and reasonable meaning, when you get the benefit of the ship you shall pay for its hire. Well, but it will be said they did not get the benefit of the ship on the voyage from Las Palmas to Harburg. I say they did—I say the charterer got the benefit of the ship on that voyage. It is true he paid or largely paid for a tug; I think it does not matter at all that he was insured, because the question is precisely the same as it ought to be if he had not been insured. I am of that opinion. If he thought fit to pay for the services of a tug for the purpose of accelerating the arrival of the vessel at Harburg, he thought fit to do it for his own purposes. He did not stipulate that if he did so he should not pay for the hire of the vessel; it seems to me that he ought to have done so. He might have refused to do it if he had liked—he might have said, "I have nothing to do with getting your vessel to Harburg; that is your affair;" but he thought fit to do it, and did not think fit to stipulate that in consideration of his doing it he should not pay for the hire.

It cannot be said that the vessel did not reach Harburg, for she did. It is true she was helped; and then the sort of argument used is, "she was not 'efficient'—she was not efficient for the purpose of her service." I say she was efficient, *sub modo*, even if the very word "efficient" is to be regarded, because she could do it with help. I accept what has been assumed to be true, that she was not fit to go from Las Palmas to Harburg without help; but she was fit to do it with help, and did it with help. It seems to me, as I have said before, I am afraid more than once that an undue importance is attached to the word "efficient." I think it is an example of *qui hæret in litera hæret in cortice*. The substantial matter to my mind is that the charterer has got the benefit of the carriage of his goods in that ship from Las Palmas to Harburg, and ought to pay for it.

I think that is all I need say about the first point. With respect to the second point, of course, with the opinion which I entertain, I must concur in the judgment which has been moved and the opinions that have been expressed.

LORD HERSCHELL—My Lords, I concur with the view which has been put before your Lordships by the Lord Chancellor and by my noble and learned friend beside me (Lord Watson).

I do not lay any special stress upon the word "efficient" in the phrase "efficient working of the vessel." If the word "efficient" had been left out and the word "working" had been the only word there, I think I should have come to the same conclusion as that at which I have arrived. The subject-matter of this contract of hire is a steamer as a steamer, not either as a hulk to serve as a warehouse for goods, or as a vessel to be propelled without steam by means of her sails. The hire is estimated with a view to the fact that she is a steamer and that the goods are to be brought on her intended voyage or voyages during the time of the hire by the ordinary means of propulsion by which a steamer passes through the water. When, therefore, the vessel at Las Palmas ceased to be able to prosecute her voyage as a steamer, it appears to me that there was a breakdown of the machinery, the result of which was a stoppage of the working of the vessel; and I should come to that conclusion even though it were shown that the vessel could have proceeded under sail. That condition of things, therefore, having come about that the working of the vessel was stopped for more than forty-eight consecutive working hours, the payment of hire was to cease until she was again in an efficient state. I should have said the same if it had been "in a state to resume her service," her service being the carriage of goods as a steamer upon the stipulated voyages.

Now, it is said on behalf of the appellants that she did become in an efficient state as soon as she was taken in tow. My Lords, I am unable to accede to that argument, if it is intended to assert by it that no matter who provides the tug, or under what circumstances she takes the vessel in tow, the vessel is to be regarded as in a condition to resume her service and so earn hire. I put, during the course of the argument, the case of this vessel being in a desperate condition, only to be saved from total loss by a salving vessel which takes

her in tow and brings her into port, making of course for her services a large claim. Is it to be said that as soon as she was in tow of a steamer she became efficient or became in a condition to resume her service without looking at all at where that steamer came from or who was to pay for it? I cannot think so. I do not intend to assert that if the owner himself provided a steamer to tow the vessel into her port of destination, if he did not recover, strictly speaking, the hire under this contract, he would not be entitled to recover as for a substituted service in the same way in which, under other contracts, a shipowner who has contracted to carry goods in a particular ship on a particular voyage may recover although he does not bring them on that voyage in that ship, but tranships them and brings them in some other ship. It has never been doubted that he may, in such a case, recover in respect of the carriage of those goods. So there might have been a right (it is quite unnecessary to consider whether there would have been) of the same sort if the owner had substituted steam power outside the vessel instead of putting the machinery into a fit state within the vessel. But that is not the case here. In the present case, the vessel having broken down and not being in a condition to prosecute her voyage as a steamer, it is agreed between the owner of the cargo or the charterer and the shipowner, that it shall be treated as a joint loss, and that the vessel shall be brought home at joint expense, treating that joint expense as a general average loss arising from a disaster in the course of the voyage. That was the arrangement come to.

Now, it seems to me that, when the vessel is brought home under an arrangement of that description, she is not really prosecuting her voyage under this contract at all, and cannot be so regarded, inasmuch as she is being brought home at joint cost by an arrangement of that description, in order to save the shipowner from inconveniences and to save the cargo owner from inconveniences; and therefore it being the interest of both parties that the vessel shall be in that way brought on, the vessel for the benefit of the shipowner, and the cargo for the benefit of the cargo owner, at their joint expense, proportioned to the value of the vessel and of the cargo respectively, I cannot regard that as in any way affording a right to a resumption of this hire, which was to be paid for the use of a steamer which could carry the goods, as a steamer from the port where she took them on board to the port of her destination.

My Lords, on the other point I agree with the view which has been already stated. It seems to me that it would be somewhat extravagant to hold that when a vessel has been thus by arrangement brought home, or rather brought to the port of discharge, at the joint expense, as soon as she arrives at the port of discharge you are to look back to see how she arrived there, and not rather to see what was the service then required of her, and whether she was in a condition to perform that service. It seems to me that during those ten days, whether you lay any stress on the word "efficient" or not, she was in a condition to perform the service that was required of her.

LORD MORRIS—My Lords, I entirely concur with the judgment which has been moved by the Lord Chancellor and with the opinions which have been expressed by him and by my two noble and learned friends opposite (Lords Watson and Herschell) as regards that portion of the voyage for which hire is claimed, namely, the part of it between Las Palmas and Harburg. But I am further of opinion that the pursuer is not entitled to recover anything.

In order to arrive at a conclusion upon this case, I think it necessary to refer to the charter-party. It appears to me that in the argument of this case in the Court in Scotland and before this House there has been some confusion between what would be the rights of the parties in the earning of freight, and under the contract contained in this charter-party for the hire of this steamvessel out and out. The first portion that I would refer to is at the conclusion of the appellants' case: "That the owners agree to let, and the charterers agree to hire the said steamship for a voyage" afterwards mentioned—that is, a voyage from certain ports mentioned to the West Coast of Africa and back again—"she being ready to receive cargo, with a clear hold, and being tight, staunch, strong, and every way fitted for the service."

Now, the first question which I would ask is, What is the service contemplated there? The service contemplated there is her being a steamship fitted in all respects to go from the ports mentioned to the West Coast of Africa and back again. She was to be a vessel fit for that service. The clause proceeds on the assumption that she was fitted for the service at the starting; it provides that "the owners shall maintain her in a thoroughly efficient state in hull and machinery for the service." What service? The service of being a steamship fit to go from the ports which are defined in the concluding paragraph.

I now come to the clause in question, and I agree with my noble and learned friend who has preceded me (Lord Herschell) that we should not give any peculiar importance to the word "efficient." I shall use it as if the word "fit" were used. The clause in question is, "That in the event of loss of time from deficiency of men or stores, breakdown 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." I read, as I have said, "fit" for "efficient," "until she shall be in a fit state to resume her service." What service? The service contemplated of being a steamship which was originally fit to go from certain ports to the West Coast of Africa and back again. The owner contracted, under the second clause to which I have referred, to keep her in that efficient or, if you will, fit state to

perform that service, namely, to go to the West Coast of Africa and back again. But as the owner would only be liable under the clause in an action for damages, the parties very wisely chose to measure their damages, and accordingly the measure is that the hire is to cease on the contingency of there being "a loss of time from a deficiency of men or stores, breakdown of machinery, want of repairs, or damage, whereby the working of the vessel is stopped for more than forty-eight consecutive working hours, until she be again in a fit state to resume her service." I say that I read for "efficient" "fit" only. What service? She was to be a vessel which was fit to go on certain voyages described in the concluding portion of the clause. Now, was she that? On the portion of the voyage from Las Palmas to Harburg she was clearly unable to do it. When was the moment that she again became fit? Nothing was done to her to make her fit on the first day of the discharge. When did the period begin at which she was again fit for the performance of "that service," namely, the service between these ports? I say, only upon the day when she was put by repairs into a state in which she was fit to perform the voyages which she was originally required to perform, and in which state the owner undertook that she should be during the whole period.

For these reasons, my Lords, I of course concur with the judgment of the Lord Chancellor and of my two noble and learned friends opposite with regard to the portion of the voyage from Las Palmas to Harburg. But I have also come to the conclusion that the pursuer is not entitled to any portion of the sum which he has claimed. The Court in Scotland appear to have given the sum of £60 in a vague sort of way. I am of opinion that if the pursuer is entitled to anything he is entitled to payment for the entire ten days occupied in the discharging, and that we cannot go into the question of dawdling in the discharge. But I am of opinion that he is entitled to nothing; and therefore I do not agree with the view which has been expressed by the majority of your Lordships that the interlocutor of the Court of Session in Scotland should be amended as proposed.

Their Lordships affirmed with variation the judgment appealed against without costs in their Lordships' House or in the Court below.

Counsel for the Appellants—Finlay, Q.C. —D. C. Leck. Agents—Lowless & Co.

Counsel for the Respondents—J. Gorell Barnes, Q.C.—F. W. Hollams. Agents—Hollams, Sons, Coward, & Hawksley.

# COURT OF SESSION.

*Saturday, January* 17, 1891.

## OUTER HOUSE.

[Lord Stormonth Darling.

### ORR *v.* SMITH.

*Process—Expenses—Approval of Auditor's Report—Tender—Extract.*

An unsuccessful complainer in a note of suspension and interdict against the erection of a boundary wall tendered the taxed amount of expenses under deduction of the expense of approval and decree and of extracting the interlocutor. The Lord Ordinary *found* that the respondent was entitled to an extract at the complainer's expense, and that the tender was insufficient, and he accordingly approved and decerned in the ordinary form for the taxed amount.

Complainer's authorities — *Allan* v. *Allan's Trustees*, 13 D. 1270; *Magistrates of Leith* v. *Gibb*, 19 S.L.R. 399; *Bannatyne* v. *M'Lean*, 21 S.L.R. 479.

Respondent's authorities—*Hunter* v. *Stewart*, 20 D. 60; *Scott* v. *North British Railway Company*, 22 D. 922.

Counsel for the Complainer—G. W. Burnet. Agent—F. J. Martin, W.S.

Counsel for the Respondent—C. N. Johnston. Agents—Thomson, Dickson, & Shaw, W.S.

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*Thursday, March* 19.

## FIRST DIVISION.

[Lord Low, Ordinary.

### ABDY AND ANOTHER (RELIANCE MUTUAL LIFE ASSURANCE SOCIETY TRUSTEES), AND OTHERS *v.* BRINGLOE (HALKETTS' JUDICIAL FACTOR) AND OTHERS.

(*Ante*, vol. xxvii., p. 551.)

*Husband and Wife—Marriage-Contract—Income of Trust-Estate—Assignation of by Wife.*

By antenuptial marriage-contract a wife conveyed to trustees her *acquisita* and *acquirenda* with a direction to pay to herself the free annual income of the trust-estate during the subsistence of the marriage, such payment being made exclusive of the *jus mariti* and right of administration of her husband, her own receipt being a sufficient discharge to the trustees.

In security of certain funds borrowed by the husband, the spouses granted a bond and assignation in which the wife, with the special advice and consent of her husband, assigned to defender her whole right and interest under the marriage-contract, including the capital, and income payable to her thereunder.