Saturday, May 19.

FIRST DIVISION.

RANKINE AND OTHERS *v.* RASCHEN & COMPANY AND OTHERS.

Ship—Reparation—Merchant Shipping Act 1854, *sec.* 514—*Merchant Shipping Act Amendment Act* 1862, *sec.* 54—*Collision—Limitation of Liability.*

After a collision the owners of the offending ship extrajudicially settled the only claim for damage then made. Other claims were afterwards put forward, and, on a petition for limitation of their liability being brought by the owners under the Merchant Shipping Act 1854, sec. 514, and the Merchant Shipping Amendment Act 1862, sec. 54, they lodged a claim to be ranked upon the ascertained fund for the sum of damages already paid and discharged. Objection to their claim *repelled.*

This was a petition at the instance of James Rankine and others, registered owners of the steam-ship "Albicore," of Glasgow, which on 2d November 1874 had come into collision with the steam-ship "Aurora," then lying at anchor in the river Maas in Holland. Damage was done both to the "Aurora" and her cargo, but there was no loss of life, and there was further no fault or privity to the injury on the part of the petitioners. The owners of the "Aurora" some time after made a claim for a sum in respect of damage to their vessel, and by an agreement between them and the petitioners the question of liability was referred to Sir Frederick Arrow, of the Trinity House, London, one of the Elder Brethren and Deputy-Master of the Honourable Trinity Corporation of Deptford. On 17th March 1875 his award was issued, by which he found that the "Albicore" was solely in default, and he awarded the sum of £2115, 15s. 10d. in full of all damage sustained by the owners of the "Aurora." That sum was paid on 28th April following by the petitioners, in the belief that no further claims existed against them in respect of the collision.

It was not until 21st July 1875 that the owners of the cargo of the "Aurora," Messrs Raschen & Company and others, came forward and gave intimation of claims amounting to £2420, 0s. 10d. Several of these claimants raised actions in the Court of Session for payment, and thereupon this petition for limitation of liability was brought, under the 54th section of the Merchant Shipping Act Amendment Act 1862, and the 514th section of the Merchant Shipping Act 1854 (17 and 18 Vic. cap. 104), praying the Court *inter alia* to restrict their liability in terms of the statutes to £8 per registered gross ton on 36,520 tons, being £2921, 12s.

The petitioners, Rankine and others, lodged a claim claiming to be ranked on the proposed fund along with the cargo owners for the sum of £2115, 15s. 10d., with interest thereon at 5 per cent. from 28th April 1875 until payment. This claim was resisted by the other claimants. A joint minute for the parties was put in process whereby they agreed.

Argued for Rankine and others—Their claim was clearly good in equity. Further, there was no obligation upon the owners of the wrong-doing ship to present a petition to the Court under the sections libelled. No claims were made other than that of the owners of the "Aurora," and no claims were "apprehended." It was not necessary to seek out possible claimants, and the cargo owners could not benefit by their delay in coming forward. The sections of the statutes did not give them the advantages they sought.

Argued for Raschen & Company and others—Under the statute claims must be existing claims. Rankine's claim was not such. It had been discharged by payment, and extinguished.

Authorities quoted—*Miller* v. *Powell*, July 20, 1875, 2 Rettie 976; *Leycester* v. *Logan*, February 18, 1857, 26 L.J., Chan. 306; *Burrell* v. *Simpson & Company and Others*, November 24, 1876, 14 Scot. Law Rep. 120.

At advising—

LORD PRESIDENT—The facts of this case are simple. A collision occurred on 2d November 1874, by which the steam-ship "Albicore" ran down the steam-ship "Aurora," and did damage both to the vessel and to the cargo. There was no loss of life. There is further no allegation of fault or of privity to the injury sustained as against the petitioners, who are the owners of the "Albicore." Therefore the case falls under section 54 of the Merchant Shipping Act of 1862. The owners of the ship "Aurora" very soon after the collision made a claim against the owners of the ship "Albicore," and on 30th December, less than two months after the collision, this was referred to Sir Frederick Arrow, one of the Elder Brethren and Deputy-Master of the Trinity Corporation of Deptford. On 17th March 1875 he issued his award, by which he found that the ship "Albicore" was solely in fault, and he awarded the sum of £2115, 15s. 10d. in full of all damage sustained by the owners of the "Aurora." No other claimants having appeared, the owners of the "Albicore" forthwith paid the amount of that award. It was not till the 21st of July 1875 that the owners of the cargo of the "Aurora" came forward with their present claim, amounting to £2420. They raised actions against the owners of the "Albicore" for the purpose of recovering that claim, and they led the owners of the "Albicore" to present the petition which is now under consideration.

The question comes to be, whether in distributing the fund, which has been ascertained under section 54 of the Merchant Shipping Act of 1862 to be £2921, 12s., at the rate of £8 per ton, any effect can be given to the claim of the owners of the "Aurora," seeing that it has already been paid and extinguished. The owners of the cargo maintain that the claim of the owners of the "Aurora" is entirely out of the way and cannot be founded on, and that therefore they are entitled to full payment, which will not extinguish the available fund. This depends on a very narrow view of this case. It rests upon the technical plea that the claim being extinguished by payment it cannot now be taken into account in the present case. That plea seems to be inconsistent with both the spirit and the letter of the Merchant Shipping Acts, particularly with the Act of 1862, which by section 54 alters the corresponding clause of the Act of 1854 by limiting the liability of the owner of the ship to

£8 per ton, whereas by section 514 of the previous statute the limit of liability was the value of the ship and freight. In other respects the second statute makes no alteration in the provision which authorises a petition to be presented of the kind now before us. It is obvious therefore that the two sections with which we have to deal, viz., the 54th section of the Act of 1862 and the 514th section of the Act of 1854, must be read together as if they were parts of the same statute. Taking, in the first place, the 54th section of the Act of 1862, we find that its provision is that "the owners of any ship shall not" in certain cases "be answerable in damages in respect of loss or damage to ships, goods, merchandise, or other things . . . to an aggregate amount exceeding eight pounds for each ton of ship's tonnage." The words are very precise and strong, omitting the details and recurrences to which the conditions are applicable. That is an absolute and unqualified enactment, and it is expressed in negative and imperative words. The plea of the owners of the cargo of the "Aurora" would make the owners of the "Albicore" liable to a greater amount than £8 per ton, and if we can avoid such a result we are bound upon a construction of the statute to do so.

The difficulty is raised under section 514 of the Act of 1854, which may be termed a procedure section. I do not think that section creates any real difficulty. What it provides is—"In cases where any liability has been or is alleged to have been incurred by any owner in respect of loss of life, personal injury, or loss of or damage to ships, boats, or goods, and several claims are made or apprehended in respect of such liability, then it shall be lawful in England or Ireland for the High Court of Chancery, and in Scotland for the Court of Session, and in any British possession for any competent Court, to entertain proceedings at the suit of any owner for the purpose of determining the amount of such liability, subject as aforesaid, and for the distribution of such amount rateably amongst the several claimants, with power for any such Court to stop all actions and suits pending in any other Court in relation to the same subject-matter; and any proceedings entertained by such Court of Chancery or Court of Session or other competent Court may be conducted in such manner and subject to such regulations as to making any persons interested parties to the same, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of costs, as the Court thinks just." This is what may be called a statutory form of procedure, but it is not provided in this clause or anywhere in the statute that the question here raised shall not be tried in any other form. The form provided is a simple form. But it seems just to be equivalent to our well-known process of multiplepoinding where there is a competition among claimants to have a fund distributed. The first thing to be ascertained under the statute here is the amount of the fund for which the owner is liable. That is what would be called the fund *in medio* in a multiplepoinding. It seems to me that if there had been no such section in the Act the question would have arisen exactly as it does now. The clause is by no means necessary for the administration of the statute. That could have been done quite well without it so far as this case is concerned.

Therefore section 54 of the Act of 1862 remains to be considered independently of section 514 of the Act of 1854. Reverting to that section, as I have already said, it is expressed in negative and imperative words that the owners shall not be answerable for more than £8 per ton. Now, it is impossible to give effect to this enactment if we sustain the plea of the owners of her cargo. The only difficulty they suggest is that the claim of the owners of the "Aurora" is not properly here, and cannot be given effect to. Technically, perhaps, the claim is not here, and cannot be given effect to, as the money has been paid. If the owner has satisfied and paid the claim, that will not deprive him of the benefit of section 54 of the Act of 1862, and make him liable to a greater extent than £8 per ton. There is nothing in the statute and nothing in common law to lead to such a result.

If the owner holds the fund, which is insufficient to meet the whole claims, and he pays one claimant in full—it may be in ignorance of the other claims—he may be made answerable for the consequences. What are these? Not surely that a party who makes a claim after such a payment is thereby to get more than he would have got if the holder had raised a multiplepoinding. On the contrary, it is clear to me that the holder of such a fund if he makes a mistake in paying one claimant can only be called on afterwards to pay, not the full amount of the claim, but only to make the balance available after deducting the amount which the claimant whom he has paid in full would have been entitled to receive along with the others. If that is the common law, is not that the position of the owner of the offending ship here? No doubt the fund is provided by himself, and he is not bound to pay it to the claimants, but to put it into the hands of the Court for distribution. He is in the position of the holder of a fund of the real raiser in an action of multiplepoinding.

I am therefore of opinion that in the ranking the claimants, the cargo owners, are not entitled to get more than they would have got if the owners of the "Albicore" had not rashly, but still in perfect good faith, paid away the money to the owners of the "Aurora."

Lord Deas, Lord Mure, and Lord Shand concurred.

Parties were allowed to lodge a scheme in terms of this judgment, which was done, and an interlocutor pronounced giving effect thereto.

Counsel for Rankine and Others—Asher—Keir. Agents—J. & J. Ross, W.S.

Counsel for Raschen & Company and Others—Scott—Strachan. Agents—Walls & Sutherland, S.S.C.; and J. & J. H. Balfour, W.S.