

ployed for that purpose, or to advise them as to part of the securities whether they should be retained or not, unless he is asked for his advice.

LORD SHAND—I also am of the same opinion. I think even if an inquiry were to be allowed, it is quite evident that the pursuers would labour under very great difficulty in the course of that inquiry. Ten or eleven years have elapsed since the occurrences with regard to which the action arises. All the parties—the two Currors, Walker himself, and the clerk, who acted under Walker in the management of this estate—are dead. If the parties got to the stage of an inquiry there would be a great deal of groping in the dark as to the facts. There would be a question as to what may have passed between the Currors and Walker in conversation, and it appears to me if there was conversation between them, and Walker explained the law on this matter to the Currors, they may very well have said that they were satisfied of the soundness of the security, and that they would run the risk of holding it.

Undoubtedly the amount of difficulty attending the inquiry might be very great, but I would rather take the case on the assumption that the pursuers can prove the averments they make on record, and they aver that Mr Walker “through gross and culpable recklessness, or in gross neglect and breach of his duty failed to advise Mr Adam Curror or Mr John Curror that it was their duty as trustees to obtain payment of the said loan, or that the security upon which the money stood was not such as trustees were entitled to hold as a trust investment.”

Now, the question is whether that is a statement relevant to support a claim for damages, and I do not think it is a relevant statement, even if it were proved in the circumstances as they are stated on record. I assume, and with no difficulty, that the investment was of a class not allowed in the case of trust-estates. I assume that not only was it of that class, but that it was peculiarly objectionable as being a loan to one of the trustees themselves. I assume that the trustees were bound within a reasonable time to realise the debt due by Adam Curror, and that if they continued to hold it as an investment they could only do so by a breach of trust for which they became personally responsible—that is to say, I assume rather more than the Lord Ordinary has done in favour of the pursuers, for the Lord Ordinary has taken it only to have been an imprudent investment, whereas I agree on the criticism which has been made on the Lord Ordinary's note, that it was more than an imprudent investment, that it was an investment not sanctioned but condemned by our law; and I assume further, that if advice or information had been asked of him it was the agent's duty to tell the trustees of the character of the investment, and that they might incur personal responsibility by holding it. But assuming all that, I see nothing in the case which raised on his part the duty of giving advice. If he had been asked for advice of course he was bound to know the law, and he would no doubt have advised the trustees that this investment was not a proper one for them to hold. But there is no suggestion on record that his advice was ever asked, and the question comes to be whether from the mere relation of agent and client a duty of this kind arises to give advice

when advice has never been asked, and when we may perhaps assume it was not wanted.

All that is alleged here is a general appointment as factor and law-agent “to make up the trustees' title to the trust-estate, and to do whatever might be necessary for the confirmation of the executors, and in regard to the general management of the estate, and to make all necessary payments and disbursements therefor.” There is nothing more than an averment that Mr Walker was employed as agent for the trustees, and the case is that his general appointment as agent imposed on him a duty to go over the investments, and say which are to be realised under a penalty of personal responsibility for failure.

I do not think that the duty of a law-agent goes that length. Some circumstances must occur to create such a duty. Either the subject of the propriety of the investments must have come up for discussion or his advice must have been asked, or some circumstance must have occurred to impose the duty.

An illustration was given in the argument from what was said to be an analogous case, namely, the proposal of an investment. I do not think that any argument can be founded on the analogy between the two cases for this reason—When we are dealing with the question of the liability of an agent for not having given advice as to an investment we must have the whole circumstances; we must know whether the trustees looked to the agent for advice, or whether the subject was ever talked between them. In this case nothing of the kind is averred, but it is said that although the Currors never spoke to Walker on the subject, he was bound as agent to volunteer his advice. I cannot carry the obligation of an agent that length. I do not think such an obligation arises necessarily out of the relation of agent and client, and there is no further averment here than an averment of that relation. I therefore agree with the conclusion to which the Lord Ordinary has come.

LORD ADAM concurred.

The Court adhered.

Counsel for Pursuers—D.-F. Mackintosh, Q.C.  
—Low. Agents—A. P. Purves & Aitken, W.S.

Counsel for Defenders—Muirhead—Blair.  
Agents—Blair & Finlay, W.S.

Friday, December 21, 1888.

## FIRST DIVISION.

[Lord Kinnear, Ordinary.

CUNNINGHAM v. COLVILS, LOWDEN, &  
COMPANY.

*Ship—Seaworthiness—Charter-Party—Exception*  
—“Errors or Negligence of Navigation.”

A charter-party exempted the owners of a steamship from liability for loss arising from “the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and error or negligence of navigation, of whatsoever nature and kind

during the said voyage." Before starting on a return voyage from a foreign port the boilers were filled with muddy water. When she was at sea some of the mud clogged the valves of the water-gauge, and the engineer, led by "false water" in the gauge-glass into the erroneous belief that there was an over supply of water, shut off the boiler feeds. In consequence the water was reduced so low in the boiler that the crowns of the wing furnaces collapsed, with the result that the vessel was lost through the failure of steam power.

In an action by the charterers against the shipowners for damages on account of the loss of the cargo, the Court *assoliated* the defenders, in respect that the ship was lost through "error or negligence of navigation" on the part of the engineer (1) in not "blowing out" the muddy water after the ship got to sea, which it was proved could have been done, and (2) in shutting off the boiler feeds, and keeping them shut off till the water was reduced dangerously low in the boiler.

*Ship—Charter-Party—Exceptions—Out and Home Voyage—Error of Navigation during the Voyage.*

By a charter-party it was agreed that a steamship should proceed to a port in Spain and there take in a cargo, and the shipowner was exempted from liability, *inter alia*, for loss of the ship through "error or negligence of navigation . . . during the said voyage."

*Opinion (per Lord Shand)* that if the vessel was rendered unseaworthy through "error or negligence" on the part of her master or crew in the port of lading the shipowners would not be freed from liability on account of her loss by the exceptions in the charter-party, it being an implied term of that contract that the ship should be seaworthy at the time she left with her cargo.

*Vide The Seville Sulphur and Copper Company (Limited) v. Colvils, Lowden, & Company, ante, vol. xxv. 437, and 15 R. 616.*

By charter-party dated Glasgow, 2nd September 1886, it was agreed between Colvils, Lowden, & Company, owners of the steamship "Ethelwolf," and J. R. Cunningham junior, merchant, Glasgow, *inter alia*—"That the said ship, classed 100 A1, and being tight, staunch, strong, well manned, victualled, equipped, and in every way seaworthy, and well fitted for the voyage, shall, with all possible speed, sail and proceed to Seville, Spain, and after being well and sufficiently ballasted with ore or lead if required, and not sand or mud, or anything which may be prejudicial to the cargo, the said master shall take and receive on board the said ship, from the agent of the said charterer, a cargo of fruit, say not less than 3000 H/chests oranges, or other lawful merchandise which the said charterer agrees to ship, not exceeding what she can safely stow and carry, over and above her tackle, apparel, provisions, and furniture. . . . The cargo being thus loaded, the said owner engages that the said ship shall proceed therewith with all possible speed direct to one of the under-noted ports (as ordered on signing bills of lading),

and there deliver the said cargo at the place and in the manner directed by the consignees, to whom the ship is to be addressed. . . . The master to sign bills of lading at any freight required by charterers, but without prejudice to this charter-party. . . . Penalty for non-performance of this agreement—Estimated amount of freight (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and error or negligence of navigation, of whatsoever nature and kind, during the said voyage, always excepted)."

The "Ethelwolf" left Swansea on 20th November, and arrived at Seville on 27th November 1886. The agent of the charterer there shipped on board her 3200 boxes of oranges, for which the master signed a bill of lading in the following terms:—"Shipped in good order and well conditioned by J. S. Macdougall, in and upon the good ship or vessel called the 'Ethelwolf,' whereof Cargill is master for the present voyage, and now lying in the harbour of Seville, and bound for Antwerp, 3200 boxes best Seville China oranges, being marked and numbered as in the margin, and are to be delivered in the like good order and condition at the foresaid port of Antwerp, act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever excepted, unto order or to assignees, freight for the said goods, as *per* charter-party, with primage and average accustomed. In witness whereof the master or purser of said ship hath affirmed to two bills of lading of this tenor and date, the one of which being accomplished, the other one to stand void."

The "Ethelwolf" sailed from Seville for Antwerp on the 5th December. Shortly after leaving Seville she grounded on a bank on her way down the river Guadalquivir, where she remained about an hour. On getting off she proceeded to sea. The weather was fine on the 6th and 7th, but on the 8th it began to blow hard, with a high sea. About half-past four on that afternoon the crowns of the wing furnaces of the boiler came down, and the engineer, to avoid an explosion, drew the fires. About two hours afterwards the captain, finding the vessel was being driven on shore, ordered the fires to be re-lighted, which was done. The boiler, however, leaked to such an extent that sufficient steam pressure could not be got up to keep the vessel off shore, and after an ineffectual attempt had been made to navigate her under sail, she and her cargo were lost on the coast of Spain, near Vigo, on the afternoon of 10th December.

In October 1887 the charterer J. R. Cunningham junior raised an action in the Sheriff Court of Lanarkshire against Colvils, Lowden, & Company for payment of £1536 in respect of their failure to deliver the cargo of oranges.

The pursuer averred, *inter alia*—"She was further unseaworthy, in respect that prior to leaving Seville the boiler was filled with excessively muddy water. Such water is very injurious to boilers, and apt to derange the boiler connections, and to lead to injury to the furnace crowns. The sails were old and defective, and insufficient in number, and no spare sails were provided, and her bridge-steering gear was out of order and useless."

The defenders in answer 4 denied these state-

ments, and explained that the vessel was in all respects seaworthy when she left Seville. Her loss was due to perils of the sea, or to error and negligence in navigation, or to both of these causes combined.

The pursuer pleaded—“(2) Said goods having been lost in consequence of the unseaworthiness of the ‘Ethelwolf’ when she sailed on the voyage in question, decree should be granted as craved.”

The defenders pleaded—“(2) The loss of the ‘Ethelwolf’ having been due to causes falling under the exceptions specified in said charter-party, the defenders ought to be absolved.”

The defenders appealed to the First Division of the Court of Session, and their Lordships of consent appointed the cause to be tried without a jury, and remitted to Lord Kinnear to proceed therewith.

The evidence consisted partly of evidence taken in the action at the instance of the Seville Sulphur & Copper Company (Limited) against Colvils, Lowden, & Company, and partly of additional evidence taken in the present case. It is examined in detail in the opinions of Lord Adam and Lord Shand. The material facts held to be established were as follows—The boiler of the ‘Ethelwolf’ was filled with muddy water from the river Guadalquivir about thirty-six hours before she started from Seville. It was the regular practice of steamers like the ‘Ethelwolf’ to fill their boilers with river water not only in the Guadalquivir but in other rivers of the same character, such as the Seine and the Garonne. While proceeding down the river from Seville the vessel took the ground on a mud bank. In the course of an hour she was got off, and a small quantity of water was taken in to replace the loss occasioned in the effort to float the steamer. The tide was running up the river at the time. At sea on the morning of the 8th December the valves of the water-gauge got clogged with mud, and the glass consequently showed ‘false water.’ The engineer, misled by the appearance of the glass into the belief that there was an over-supply of water, shut off the feeds, and kept them shut off till the water got so low in the boiler that the crowns of the wing furnaces were bared, and were consequently so over-heated that they collapsed. Taking it as proved that the mud which led to the loss of the vessel was taken in when the boiler was filled with muddy water at Seville (and the majority of the Court inclined to that view), it was also proved that that muddy water could have been blown out by a method well known to engineers when the vessel got to sea.

The Lord Ordinary (KINNEAR) on 17th February 1888 pronounced the following interlocutor—“Decerns against the defenders and appellants for the sum of £1536, with interest at the rate of 5 per cent per annum from the tenth day of December 1886 until payment: Finds the defenders liable in expenses, &c.

“*Opinion.*—This is an action against a shipowner for damages for failure to deliver a cargo shipped at Seville on board the defenders’ steamer ‘Ethelwolf.’ The contract is contained in a charter-party, by which it is stipulated that the penalty for non-performance shall be ‘the estimated amount of freight, the act of God, the Queen’s enemies, and fire, and all and every other dangers and accidents of the seas, rivers,

and errors or negligence of navigation of whatsoever nature and kind during the voyage always excepted,’ and the only question is whether the defenders have proved that the loss of their vessel and their cargo was due to one or other of these excepted causes.

“The ‘Ethelwolf’ sailed from Seville on the 3rd of December 1886. On the afternoon of the 8th, while she was off the coast of Spain, and in very rough weather the crowns of the furnaces were found to be sinking, and the engineer considered it necessary to draw the fires in order to prevent an explosion of the boiler. But the ship could not make headway under sail, and as the only means of keeping her off shore the master ordered steam to be got up, while the boiler was not yet cool enough to allow of its being filled with cold water without injury. The boiler was filled accordingly by pumping water from the sea, and the natural effect of that operation was to cause serious leakage, so that it was found impossible to get up steam enough to work the engines. The ship drifted towards the shore, and ultimately went on the rocks, and was abandoned by the master and crew, and became a total loss.

“In these circumstances there can be no question that the loss was caused by a peril of the sea in the ordinary sense of these words, and it has been decided by the House of Lords in the case of the ‘*Xantho*,’ L.R., 12 App. Cas. 503, that the words must have the same meaning in a contract of affreightment as in any other maritime instrument. But that decision does not affect the general rule that a stipulation for exemption from the enumerated risks will not relieve the shipowner of his obligation to provide a ship that shall be seaworthy, and in every way well fitted for the voyage which he engages that he shall perform. Nor does it alter the rule that if he fails to deliver the cargo the burden lies upon him to prove that his failure is attributable to a cause for which he is not responsible under his contract. The defenders therefore must prove that the failure of the boiler which occasioned the loss of the ship was attributable to causes arising subsequently to the departure of the ship from Seville. If it was attributable to the negligence during the voyage of persons in their employment, they will not be responsible, because they have expressly stipulated that they incur no liability for the consequences of such negligence. But if it is to be ascribed to anything in the condition of the boiler before the sailing of the ship, the ship was not seaworthy, because owing to the state of her boiler she was not, to use the language of Lord Cairns in the case of *Steel v. The State Line Steamship Company*, ‘in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, might be fairly expected to encounter’ upon the voyage she was required to perform.

“The evidence as to the condition of the boiler before the departure from Seville is not altogether satisfactory. There is evidence that the tubes were leaking, and also that a dangerous crust or scale might have been deposited, which, if it existed when the ship came into harbour at Seville, was not removed before she sailed on the voyage in question. On the other hand, there is evidence that the leakage was not greater than might reasonably be expected, and

not sufficient to affect the soundness of the boiler, and that the ship had not been long enough at sea since the last occasion when the boiler was scaled to allow of a fresh accumulation of salt water crust. But there was another source of danger on which the pursuer lays greater stress. The boiler was filled with muddy water from the Guadalquivir, and this is said to have been done so long before the departure of the ship that the mud had time to settle in the bottom of the boiler, so that it could not be got rid of by blowing off the muddy water at sea, as might have been done if the mud had still been held in suspension, and re-filling the boiler with water from the sea. The evidence at the time when the boiler was filled is not satisfactory, but, according to the only witness who speaks to the time, it was done on Friday evening, and the ship did not sail till Sunday morning. If this evidence is correct the mud was in the boiler for thirty-six hours before the ship sailed, and the defenders, upon whom the burden lies, are not in a position to dispute the accuracy of a statement which they might have disproved, if it is erroneous, by the evidence of their engineer. The theory is that the mud having settled, so that it could not be cleared out at sea, was afterwards set in motion by the rolling of the ship; that it would naturally settle on the heated surface of the furnace crowns, and by preventing the transmission of heat would ultimately cause the crowns to collapse. The defenders make three separate points in answer to this hypothesis—First, that if there was mud in the boiler it must have been taken in during the voyage, because the ship took the ground in going down the river, a certain quantity of steam was lost in getting her off, and fresh water was taken in to supply the deficiency, while the propeller was working and necessarily stirring up the mud; secondly, that the boiler should have been cleared of the muddy water when the ship got to sea, and if this were not done, any mischief arising from the presence of mud must be ascribed to negligence during the voyage; and thirdly, that if the mud were set in motion, as the pursuer suggests, it would have settled on the crown of the centre furnace, which is lower than the other, and not upon the side furnaces which alone collapsed. It does not appear to me that these answers are satisfactory. The opinion of the experts examined for the defenders as to the probability of mud being taken in while the ship was aground is not given with sufficient reference to the facts in evidence. The contrary opinion is that the mud stirred by the propeller must have been carried away from the pumps by the tide which was running up the river, and this does not appear to me to be effectually displaced by the evidence for the defenders. But further, the quantity of water taken in on this occasion was very small in proportion to the contents of the boiler, and if it had contained any considerable proportion of mud this must probably have been detected at once by the presence of mud in the gauge-glass, whereas the gauge-glass was clear for the first two days, and only showed mud on the morning of the 8th of December. The objection that the boiler might have been cleared at sea does not meet the pursuer's case, if it is otherwise well founded, because this operation could not have been performed if the mud had

already had time to settle before the ship sailed. The third objection does not appear to me to be established, because while there is a conflict of skilled opinion on the subject the evidence of the defenders' witnesses comes to no more than this, that, other things being equal, the mud would have a tendency to settle upon the centre furnace crown rather than upon the others. But whether in the particular case it would adhere to one rather than another, or bring down one sooner than another of the crowns to which it did adhere, might depend to a material extent upon the antecedent condition of the various furnace crowns, as to which there is no satisfactory evidence.

“But it is a more material consideration that the pursuer is not required to establish the cause to which the accident must be ascribed. They have suggested a probable cause. But it is not enough for the defenders to show that the cause so suggested has not been sufficiently proved. The fact is that their boiler failed, and the inference is that when the ship sailed it was not in a fit condition for the voyage, unless they can prove by affirmative evidence that the failure is to be ascribed to some specific cause arising during the voyage. I think there is no evidence sufficient to displace the inference arising from the fact of the failure. The only cause suggested by the defenders is that the engineer by an error of judgment shut off the feed, and so allowed the water to evaporate without supplying the place of what was lost. The opinion of the experts examined for the defenders upon this point proceeds upon the assumption that the feed was entirely shut off for a period of four hours. But there is no evidence for this. The only evidence tending to prove it is that of the engineer William Thomson. His evidence is not in my opinion satisfactory. But he does not say, and there is nothing else in the evidence to prove, that the feed was shut off for the time that it is indispensable to support the defender's theory.

“On the whole, therefore, I am of opinion that they have not explained by any satisfactory evidence the failure of the boiler, which undoubtedly was the direct cause of the loss of the ship, and therefore that they have failed to prove that their ship was seaworthy when she sailed from Seville.

“I do not think it proved that she was unseaworthy in any other respect except from the condition of her boiler. But in the view I have taken it is unnecessary to examine the evidence upon other points in detail.”

The defenders reclaimed, and argued—The contract here was contained in the charter-party and the bill of lading taken together, and not in the bill of lading only—Scrutton on Charter-Parties, 33. “Errors or negligence of navigation” were therefore within the exceptions. The *onus* of proving that the vessel left Seville in an unseaworthy condition was in the pursuer. Assuming that the owners were, in the first place, bound to account for non-delivery of the cargo, the *onus* was shifted by the fact that the vessel had admittedly been wrecked, and therefore *prima facie* lost by a peril of the sea. It now lay with the charterers to prove that the loss was due to a cause for which the shipowner was responsible. In *Steel & Craig's* case the *onus* was assumed all through to be on the charterer—

*Moes Moliere & Tromp v. Leith & Amsterdam Shipping Company*, July 5, 1867, 5 Macph. 988; *Boyson v. Wilson*, March 6, 1816, 1 Starkie, 236; *Pockup v. Thames Insurance Company*, May 16, 1878, L.R., 3 Q.B. Div. 594; *Czech v. General Steam Navigation Company*, November 9, 1867, L.R., 3 C.P. 14; Bell's Com. i. (7th ed.) 597-663-664. On the evidence, the defender's theory of the cause of the accident, namely, that the water had been allowed to get too low in the boiler, was far more probable than the pursuer's. If it were held that the defender's theory was the true one, then the loss of the ship was due to an "error of navigation," because the lowness of the water in the boiler had been caused by the engineer's shutting off the feeds. Further, it was not proved that the mud which led to the accident by clogging the valves of the water-gauge, and so misleading the engineer as to the amount of water in the boiler, was taken in at Seville. On the contrary, it was much more likely to have been taken in when the vessel grounded on the bank on its way to the sea. If this were held to be so, the loss was due to a "peril of the sea." "Perils of the sea" were to be construed in the same way in charter-parties as in contracts of marine insurance. The "*Inchmaree*," July 14, 1887, 12 App. Cas. 484; the "*Xantho*," July 14, 1887, 12 App. Cas. 503; the "*Inehrhona*," July 14, 1887, 12 App. Cas. 518. Assuming that the pursuer's view of the accident was proved, namely, that the mud taken in at Seville subsequently caked on the crowns of the wing furnaces, and so caused them to get overheated and to collapse, the owners were still not liable, as the taking in of dangerously muddy water was "an error of navigation." These terms were the same as "improper navigation," and included any error on the part of master or crew, which resulted in the ship not completing her journey in safety. The words "during the voyage" in the charter-party could not prevent the exceptions applying to a period when the preparations for starting had commenced—*Urmichael v. Liverpool Indemnity Association*, May 19, 1887, L.R., 19 Q.B. Div. 242; *Good v. London Protecting Association*, June 23, 1871, L.R., 6 C.P. 563; the "*Warkworth*," June 28, 1884, L.R., 9 Prob. Div. 145; the "*Glenfruin*," March 31, 1885, L.R., 10 Prob. Div. 103. What was the "voyage" here, and where did it begin? The vessel was chartered to make an out-and-home voyage, and the voyage began at Swansea. It was clear that the shipowner was bound to furnish a seaworthy ship there, and it could scarcely be doubted that if the vessel had been wrecked in a storm on the way to Seville the owners would have been protected by the exception in the charter-party—*Scrutton on Charter-Parties*, 67; *Hudson v. Hill*, May 27, 1874, 43 L.J., C.P. 273; *Bruce v. Nicolopulo*, May 30, 1855, Hur. & Gord. Rep., 11 Exch. 129; *Nelson v. Dahl*, August 8, 1879, 12 Ch. Div. 568. But supposing the words "during the voyage" had the restrictive effect contended for by the pursuer, the danger from the presence of muddy water in the boiler could have been obviated by that water being blown out when the vessel got to sea. The method of doing so was familiar to engineers, and the failure to take this precaution was an "error of navigation." The facts relied on as constituting

unseaworthiness in *Steel & Craig's* case were of quite a different character from those here. There the source of danger could not have been easily removed, whereas in this case it could have been. This and the difference of the two contracts distinguished the two cases from one another. As to the alleged defect in the sails, the pursuer's averment was not proved, and the best of sails could not have saved the vessel in the actual circumstances of the case.

The pursuer and respondent argued—The defenders had failed to deliver the cargo, and so the *onus* lay primarily on them to account for their failure. Admitting that they had discharged that *onus* by showing that the vessel had been wrecked, and had thus *prima facie* been lost by "peril of the sea," the *onus* was again shifted when it was proved that the official cause of the loss was a breakdown of the steam power, and it remained with the defenders to prove that the breakdown was due to "an error or negligence of navigation." This they had failed to do—*Williams v. Dobbie*, June 29, 1884, 11 R. 982. The weight of the evidence supported the pursuer's theory of the cause of the accident, that it was due to the formation of a muddy cake on the furnace crowns. But whether the pursuer's or the defenders' theory was the true one, the loss of the vessel was due to the presence of mud in her boiler, and it was much more likely that that mud had been taken in at Seville, when the boiler was filled, than during the short time while the vessel was on the bank. It was further argued by the defenders that even if the mud which did the damage was taken on board at Seville, still that was an "error of navigation." But it was not an error "during the voyage." That had been already decided in the case of *The Seville Sulphur and Copper Company's* case, *ante*, vol. xxv., 437, 15 R. 616. As the charter-party was imported into the contract by reference in the bill of lading, these words were part of the contract, and the voyage must be that for which they were then preparing. In the case of *Bruce v. Nicolopulo* the vessel at the time she was seized was under the charterer's orders. And though several of the other cases on this point amounted to this, that where a shipowner had undertaken to go to a port for goods, and was prevented by an excepted cause, he would be excused, that did not solve the question whether the shipowner when he came to the port of lading, and granted bill of lading, was absolved from his obligation to provide a sea-worthy ship. None of the cases quoted by the pursuer at all touched the question whether the shipowner would be liable for accidents in the port of loading—*Worms v. Storey*, November 23, 1855, 11 Exch. H. & G.'s Rep. 427; *Cohn v. Davidson*, February 9, 1877, 2 Q.B. Div. 455; *Smith v. Darl & Son*, November 28, 1884, 14 Q.B. Div. 105. If the pursuer was right the vessel started on her voyage with a dangerous amount of mud in her boiler. That mud could not have been blown out when the vessel got to sea, as it had had time to harden before steam was got up, and when the rolling of the vessel showed mud the weather was too rough for the operation of "blowing out" the boiler. The vessel therefore left Seville in an unseaworthy condition. This case was *a fortiori* of *Steel & Craig*. Any difference in the two contracts was to the advantage of the pursuer's argument—

*Steel & Craig v. State Line Steamship Company*, July 20, 1877, 4 R. 657 (H. of L.) 103; *Kopitoff v. Wilson*, February 23, 1876, L.R. 1 Q.B. Div. 377; *Tattersall v. National Steamship Company*, March 11, 1884, L.R. 12 Q.B. Div. 297; *Arnold on Marine Insurance*, 660, *et seq.* Taking the defenders' theory of the cause of the breakdown to be the true one, the loss of the ship could not fairly be said to be due to an "error or negligence of navigation." All that could be required of the engineer was ordinary skill and care. If he was naturally deceived by the choking of the gauge-glass, and so led to cut off the feeds, with the result that the furnace crowns collapsed, that was not "error or negligence of navigation" in the sense of the contract. Further, if the vessel had been furnished with a supply of good sails she would have been able to keep off shore. The freighters were entitled to the chance that if the steam power failed the ship might be got off by sail—*Arnold on Marine Insurance* (6th ed.) 673.

At advising—

LORD ADAM—This is an action brought by the charterer of the steamship "Ethelwolf" against the owners for payment of the sum of £1536 in respect of their failure to deliver a cargo of oranges shipped by the charterer on board the steamship at Seville.

By charter-party entered into between them, of date 2nd September 1886, it was agreed that the said ship being tight, staunch, strong, well-manned, victualled, equipped, and in every way seaworthy and well fitted for the voyage, should, with all possible speed, sail and proceed to Seville, Spain, and that the master should take and receive on board the said ship from the agent of the charterer a cargo of fruit, say not less than 3000 H/chests oranges.

It was, further, thereby agreed that the master should sign bills of lading at any freight required by charterer, but without prejudice to the charter-party.

The charter-party further contained a clause in these terms—"Penalty for non-performance of this agreement, estimated amount of freight, the Act of God, the Queen's enemies, fire and all and every other dangers and accidents of the seas, rivers, and error or negligence of navigation of whatsoever nature and kind during the said voyage always excepted."

The vessel left Swansea on the 20th November, and arrived at Seville on the 27th November 1886. She then shipped 3200 boxes of oranges, for which on 4th December the master signed a bill of lading, which bore that the said oranges were to be delivered at the port of Antwerp—"Act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatsoever nature and kind soever excepted."

It will be observed that the bill of lading does not except "error or negligence of navigation of whatever nature or kind during the voyage" as the charter-party does, but it was not disputed by the charterer that he was bound by the clause of exception as contained in the charter-party.

The vessel sailed from Seville on her voyage to Antwerp on the morning of the 5th December. Seville is on the river Guadalquivir, about sixty miles from the sea. About an hour after leav-

ing Seville the vessel grounded on a bank in the river, where she remained about an hour, more or less. On getting off she proceeded on her voyage, and got to sea on the same evening. The weather was fine during the 6th and 7th, and all went well, but on the 8th it began to blow hard with a very high sea. About 4:30 on the afternoon of that day the crowns of the wing furnaces of the boiler came down. When this occurred the engineer, to prevent an explosion, drew the fires. The captain, finding the ship was being blown on a lee shore, ordered the fires to be re-lighted. The engineer, accordingly, about 6:30 re-filled the boiler with water from the sea and re-lighted the fires. The boiler, however, leaked to such an extent that sufficient steam pressure could not be maintained to prevent the vessel from being driven on shore, and she and her cargo were lost on the coast of Spain, near Vigo, on the afternoon of 10th December. There is no question that the vessel was wrecked in consequence of the failure of steam power, and that this failure is to be attributed to the coming down of the crowns of the furnaces, which necessitated the drawing of the fires.

The loss of the ship was undoubtedly caused "by the perils of the sea," and falls within the risks excepted in the charter-party. But the charterer maintained that the ship was unseaworthy when she left Seville, and that this unseaworthiness caused the loss of the ship. No doubt, if this be so, the owners will be liable. The owners, on the other hand, maintain that the ship was in every respect seaworthy, and that the injury to her boiler was caused by the error or negligence of the engineer, and that they are not liable in respect of the exception of error or negligence of navigation" contained in the charter-party. These therefore are the questions for decision in this case, and the first is the question of fact, whether the vessel was seaworthy when she sailed from Seville and commenced her voyage.

The charterer sets forth, in the 4th article of his condensation, several particulars in respect of which he alleges that the ship was unseaworthy, but the only one about which there is, I think, any room for serious controversy is thus expressed—"She was further unseaworthy in respect that prior to leaving Seville the boiler was filled with excessively muddy water. Such water is very injurious to boilers, and apt to derange the boiler connections, and to lead to injury to the furnace crowns."

The facts as to filling the boiler with water at Seville appear to be as follows—The boiler had been blown down (that is, emptied of water) after the ship arrived at Seville for the purpose of making some repairs. These having been finished, the crowns of the furnace were cleaned and the boiler washed out. Then about 10 o'clock on the night of Friday the 3rd December, or about thirty-six hours before the vessel sailed, the boiler was filled with water from the river. This time was chosen because it was then high tide, when the water of the river would probably be freest of mud.

The question is, whether the taking in of this water rendered the ship unseaworthy? There is no doubt, I think, that the presence of mud in the boiler of a steamer in large quantity may be

an element of danger. But I think it is proved that when water is taken in from a muddy river such as the Guadalquivir, it may be objectionable as tending to produce priming, and to clog the valves and their connections, but that it is not a source of danger to the boiler by forming a deposit on the furnace crowns or otherwise.

It is proved that there are no hydrants or other facilities at Seville by which steamers which have blown down their boilers can re-fill them except with water from the river. It is proved that it is the regular practice of such steamers to do so, and that no injury has resulted to them from doing so. There is no contradictory evidence as to this. It is also proved that it is the practice of steamers to do so in rivers of a like character to the Guadalquivir, such as the Seine and Garonne. If this be so, it would be difficult to hold that all such steamers are thereby rendered unseaworthy.

But it is said that in this case the muddy water was taken in so long before the vessel sailed, about thirty-six hours, that the earthy matter in suspension would be precipitated and so cause danger to the boiler. There is, however, no evidence that it was anything out of the usual course to fill the boiler so long before sailing, or that the earthy matter would not have been as completely precipitated in six as in thirty-six hours. There are no questions asked on the subject. It does not appear to have occurred to the pursuer, when the witnesses were being examined, that there was anything objectionable in the matter. I do not myself see that the mud constituted a greater element of danger, lying at the bottom of the boiler, than when in suspension in the water, and in fact the pursuer's case is, that the mud was stirred up from the bottom by the rolling of the ship, and in this way, and not till then, became a source of danger.

But the defenders have another answer on this part of the case. They say that if the presence of the mud in the boiler constituted such an element of danger as to produce unseaworthiness if not removed, yet it could and ought to have been removed as soon as the vessel got to sea by blowing it out of the boiler and taking in sea water. This, they say, is a method quite simple, and known to every engineer, and that if the vessel was lost by reason of the presence of the mud she was not lost because of unseaworthiness, but because of the error or negligence of the engineer in not blowing it out of the boiler. In my opinion the defenders are right in this contention, and that it is supported by the principles laid down in the House of Lords in the case of *Steel & Craig*, 4 R. 103. In that case, where a ship sailed with an open or insufficiently secured porthole, by which the water entered and damaged the cargo, it was suggested that whether the ship was or was not seaworthy depended on the position of the porthole; if it was easily accessible, and could be easily closed, the ship would be seaworthy; but if it was not so accessible, but would cost much time and trouble to get access to it in order to put it right, the ship might be unseaworthy. So here, if the steamer was in no danger from the mud in the boiler so long as she was in the Guadalquivir river—and it is not suggested that she was—and if the mud could have been easily removed on reaching the sea, then I think she

was in a seaworthy condition, and perfectly fit for her voyage when she left Seville, and that the danger, if any, from the state of the water arose from the engineer not having removed it.

Now, I think it is proved that the muddy water in the boiler could have been easily removed. One of the witnesses, Mackenzie, thus describes the operation—"It could easily," he says, "have been cleared out afterwards, when the vessel got out to sea—that could have been done by blowing or scumming the boiler. The bottom blow-off cock could have been turned on, and the water taken in from the sea alternately until the water in the boiler was found to be perfectly clear. That is the proper method, and is well known to engineers." Six or seven of the defenders' witnesses speak of this as being a common and simple method of getting rid of mud in boilers.

But the pursuer has examined three witnesses—Messrs Neish, Donaldson, and Darling—who say that it would not have been practicable in this case, because the mud had had time to settle in the bottom of the boiler. Neish says "that if the mud in the water had thirty-six hours to settle before steam had been got up, I don't think you could blow it off after steam had been got up. The mud would settle down in the bottom of the boiler, and get comparatively hard with the cold water, and get quite quiescent. There would be no inducement for it to be blown off, except just round about the orifice of the blow-off cock;" and Messrs Donaldson and Darling agree with him.

Mr Neish, however, says at another part of his evidence that the particles forming the mud would be in the condition of loose soft sludge, and if this was its condition, I do not see why it should not be easily blown off. I do not think it is proved that the mud would get into any such hardened condition as here described. The evidence shows that the mud was in such a condition that when the ship began to roll it mixed with the water, which had theretofore been clear. Roger, the assistant engineer, is asked—"Did anything unusual occur during your watch?"—(A) Yes, the water in the gauge-glass got very muddy about three in the morning" (that was the 8th). "(Q) What was wrong?"—(A) The wind had got abeam, and the rolling had turned up the mud. When I saw the mud I blew the gauge-glass down." He then says he did this several times, and reported it to the engineer at six o'clock, when he was relieved from his watch. He came back at eight, when he noticed that the water in the gauge-glass was very muddy, and he says that he kept blowing it down.

The pursuer's witness Donaldson is asked—"If an engineer could not get better water than muddy water, and had then to take it out, his duty would be to blow down the boiler, and thereby blow out the muddy water when he got to sea?"—(A) Yes, I should think it would be his duty to do so. I think he could not get the whole out in that way which had settled as a deposit. (Q) But if the vessel began to roll, so as to mix the mud with the water, he could blow it off then?"—(A) Yes, he could get rid of it then, when mixed with the water. I think that if mud was moving about in the boiler in such a way that it could reach the furnace-crowns, or show itself in the gauge-glass, it could have been blown off. (Q) Is it not a perfectly familiar operation to

engineers of ordinary skill to blow muddy water out?—(A) Yes.”

It appears to me therefore to be proved that there could have been no difficulty in this case in blowing out the mud, either when the ship first reached the sea, or, at any rate, later, when it was moving about in the boiler.

The two engineers of the ship, who ought to have known best, are of that opinion. Roger says so, and Thomson, the engineer, says—“I could have got the supplementary feed to work and put in sea water, and blown out the river water and the mud along with it. That, however, did not occur to me at the time;” and he says—“We could have blown off the mud after we started if we had tried. I did not do so because I did not know there was any mud in the boiler to the extent of being a source of danger.”

On this part of the case therefore I am of opinion that the ship was seaworthy when she sailed on her voyage from Seville.

The defenders maintained further, that if the ship was unseaworthy because of mud in the boiler, it was not the muddy water taken at Seville that rendered her so, but mud taken in when she was aground on the bank in the river, in which case they say the vessel was lost from dangers of navigation during the voyage.

It is not necessary in the view I have taken of the case to consider that matter at length, but my opinion is that the quantity then taken in can have made no appreciable difference on the amount of mud already in the boiler due to the water taken in at Seville, and can have made no difference in the result.

It is also right to state that it was maintained by the owners that on a sound construction of the charter-party and bill of lading the voyage must be held to have commenced at Swansea and not at Seville; that consequently, if the taking in of the muddy water at Seville rendered the vessel unseaworthy, that was caused by error or negligence of navigation during the voyage, for which under the charter-party they are not liable. In the view, however, which I take of the facts it is not necessary to determine that question either.

The next question to be considered is the cause of the collapse or falling down of the furnace crowns. The falling down of the furnace crowns is undoubtedly caused by the over-heating of the metal, and this again is attributable to one or other of two causes, either to the deposit thereon of a non-conducting crust, which prevents the transmission of heat from the metal to the water in the boiler, or to the water in the boiler having been allowed to fall below level of the crowns.

The facts bearing on this part of the case appear to be as follows—Nothing went wrong with the engines or boilers until about 11.30 on the morning of the 8th, when the gauge-glass instantly filled with water. This, no doubt, was caused by the gauge-valves, or its connections becoming clogged with mud. About 4.30 the crown of the port-furnace collapsed, and a few minutes afterwards that of the starboard furnace. Thereupon the engineer drew the fires and reported the fact to the captain. The captain, however, finding that he was drifting on a lee shore, shortly afterwards ordered steam to be

got up again. The boiler was re-filled from the sea and the fires re-lighted about 6.30. The consequence, however, of the cold water coming in contact with the still heated metal of the boiler, such an amount of leakage took place that steam of a sufficient pressure in the boiler could not be got up to enable the vessel to make head-way enough to keep her off the land, and hence the catastrophe.

I think the collapse of the crowns of the furnaces was caused by the water in the boiler having been allowed to fall below the level of their crowns. The engineer is of that opinion now, and he was of that opinion at the time. This is clear from Captain Cargill's evidence. He says—“I remember about 4.30 in the afternoon of the 8th having a conversation with the engineer. He told me that he would have to withdraw the fires. (Q) What reason did he give?—That the water had got so low in the boiler that he could not keep up the steam.” And further down he is asked—“Did you remonstrate or say anything to him?—(A) Yes, I said the ship is in a very dangerous position to do that. Could he not keep steam on till I got the ship perhaps 8 or 10 miles from the land? Did he draw the fires?—(A) He came back and said that he must draw them, there was nothing else for it. The ship might be blown up. He did draw them.” In cross-examination he is asked—“You have told us that the engineer reported to you that he had to draw the fires because the water was so short. That is so. I am sure that that is the report he made to me.”

Then the fact that the crowns of the two wing furnaces, which were higher than that of the centre furnace, and consequently would be first denuded of water, came down while the centre one remained intact, indicates that the reason was want of water. Again the boiler was re-filled with water from the sea before the fires were re-lighted. But this would not have been necessary and would not have been done had the boiler been fed with water in the usual way, as in that case the boiler would have been full. Then, again, the result which followed from filling with cold water the still heated boiler was exactly what was to be anticipated. The cold water coming in contact with the heated metal of the plates and tubes of the boiler, which were of different thicknesses was certain to cause unequal contraction of the metal and consequent leakage. The result was, that whereas the normal working pressure before the fires were drawn was from sixty to seventy pounds, a greater pressure than from twenty-five to thirty could not be afterwards obtained.

Nor is there any difficulty in accounting for the water having been allowed to fall so low in the boiler. The engineer is asked—“Did you ever shut off the main feed?” The answer is—“Sometimes I have done it. (Q) Did you do it on 8th December?—(A) I believe I did, but I do not remember. I thought there was too much water in the boiler from the indication of the steam packing and the engine priming. I cut off the main feed in that way, believing that that was the right thing to do.” It will be observed that by shutting off the main feed he shut off all water from the boiler, as it had also the effect of shutting off the supplementary feed. He is not asked if he



turned the main feed on again. But I do not doubt that he would have said so if he could, because he could not fail to know that if he did not do so the whole blame of the loss of the ship must rest on his shoulders. That he should have neglected to turn the feed on again is perhaps to be explained by his attention having been taken up by his endeavours to rectify the gauge-glass. But however that may be, if he turned off the main feed at the time that he says that he did, and did not turn it on again, then it is proved that the crowns of the furnace collapsed about the time they might have been expected to do so.

There is one circumstance which is said to be proved, and is strongly insisted on by the pursuer, as showing that the collapse of the furnace crowns could not have been caused by want of water. It is, that as the tubes of the boiler became successively denuded of water by its evaporation, the heat would cause them to leak, and permit the escape of steam, eventually producing so large a leakage of steam, and a corresponding diminution of pressure of steam in the boiler, that the engineer could not have failed to notice it.

It is said to be proved that there was no such leakage or decrease of pressure of steam noticed, and therefore that the tubes could not have been denuded of water. As it was steam leakage that would result, the steam would escape by the smoke-jack, and it would appear that its escape might not have been noticed by the engineer.

But I do not think that it is proved that no diminution of pressure was noticed before the fires were drawn. The evidence on the point is certainly not satisfactory, because apparently the parties had not realised the importance of it when the witnesses were being examined. Rogers, the assistant-engineer, no doubt says that they were able to keep up the normal pressure till the fires were drawn. But the engineer, who was the proper person to speak as to this, is not specially examined on the subject. It may be gathered, however, from his evidence that he had noticed a diminution of pressure of steam—"Thus," he says, "I formed the idea that the boiler was getting short of steam, and that there was too much water in it;" and a little lower down he says—"At four o'clock in the afternoon" (that is, about half-an-hour before the crowns collapsed) "I gave orders to have the fires cleaned so as to try to get more steam."

We have also the evidence of Captain Cargill, who says that when the engineer informed him it would be necessary to draw the fires he told him that the water had got too low in the boiler "that he could not keep up the steam;" and again, that he said "the water had got so low in the boiler that he would be obliged to draw the fires; he could not get steam." I think therefore that it is sufficiently proved that there was a deficiency of steam in the boiler before the fires were drawn. The proof is not so satisfactory as it might have been, but the fault lies with the pursuer, who ought to have cleared up the matter if he meant to make a point of it.

I do not think it necessary to say much as to the rival theory of the pursuer, that the falling of the crowns was caused by the deposit of mud thereon. It appears to me to be based on assump-

tions of fact which are not proved, and do not exist in this case.

As to the deposit of mud from muddy water in the boiler, I think the evidence shows that mud *per se* will not form a dangerous deposit on the furnace-crowns of a boiler. Mr Neish, the pursuer's leading witness, says "that mud by its nature will not form a deposit or crust on the furnace-crowns so as to injure them when the boiler is under steam."

It appears, however, that mud may possibly do so when it is mixed with oil or grease, and accordingly the pursuer assumes, for the purposes of his theory, an admixture of oil and mud in this case. But there is no proof, and nothing to lead to the inference that there was any such admixture in the boiler. I think therefore that there is no foundation for the pursuer's theory. But even assuming that there might have been such a dangerous admixture of oil and mud in the boiler as the pursuer assumes, I think the facts show that it had formed no dangerous deposit on the crowns of the furnaces. If such a deposit had been formed, one would have expected it to have been first formed on the crown of the centre or lowest furnace, and that it would have come down first. In the next place, the boiler would have been in its usual condition as to water, and would not have required to be filled with water from the sea, as the engineers say they filled it. Neither would there be anything to account for the great leakage which took place after the fires were re-lit, as there would have been no cold water to come in contact with the heated metal, and nothing to cause increased leakage; and finally, if a deposit on the crowns of the furnaces had been the cause of their collapse, it is difficult to see why, after the fires were re-lit, the crown of the centre furnace should not have collapsed, and the crowns of the wing furnaces come still further down, seeing that the *origo mali*, the deposit, was presumably still upon them.

On the whole matter, I am of opinion that the collapse of the crowns of the furnaces, and consequent deficiency of steam pressure and loss of the vessel, is clearly traceable to want of water in the boiler, and that this deficiency of water was caused by the negligence of the engineer in failing to turn on the main feed after he had turned it off; that consequently the loss of the vessel was caused by error or negligence of navigation during the voyage; that therefore the failure to deliver the cargo is covered by the exception to that effect in the charter-party, and that the defenders are entitled to absolvitor.

We were referred to the case of *The Seville Sulphur and Copper Company* against the present defenders, 15 R. 616, which was an action brought against them for the delivery of 350 tons of sulphur ore, which formed part of the cargo of the "Eihelwolf," and was lost with the vessel, and in which the Second Division arrived at a different conclusion to that at which I have arrived, but it is enough to say that the evidence we have had to consider is materially different from the evidence in that case.

LORD MURE—I have come to the same conclusion as Lord Adam on all the important points raised in this case, and I concur in the views that he has expressed as to the import of the

evidence. I find it therefore unnecessary to go into any detail on any of these points. The way it has presented itself to my mind is shortly this—The cause of the wreck was plainly the failure of the boiler to answer the purposes of the boiler of a steam vessel, and that boiler, I think, failed according to the evidence from one or other of two causes—either from the effects of the mud in the water, which was said to have been improperly taken in, mixing with certain substances, and settling down on the crowns of the furnace, and thereby producing a state of matters which led to the collapse of the furnace crowns; or secondly, if that was not the cause of the accident the boiler failed through the engineer shutting of the feed, and so causing so great a decrease of water in the boiler as to produce a state of matters which would also lead in the ordinary course to the collapse of the furnace crowns. From one or other of these causes the ship was wrecked, from a want of power to enable the engine to do what was required of it in the weather which prevailed at the time. Now, it appears to me upon the evidence that to whichever of these causes we attribute the accident, there was negligence in the navigation of the vessel which led to this collapse. It was the duty of the commander of the vessel, knowing that there had been muddy water taken in at Seville to get quit of that muddy water as they went down the river, and it is clear on the evidence that a well managed vessel leaving Seville in these circumstances would take that course. The other cause of the accident—the shutting off of the feed—as has been explained by Lord Adam, was done by the engineer through a mistake in regard to the working of the boiler at the time when he examined it. He took the wrong course, and therefore there was negligence in that respect. Now, to whichever of these causes we are to attribute the accident, there was negligence on the part of the crew leading to the loss of the vessel, and that negligence is covered by the words of the charter-party. On the question of the seaworthiness of the vessel on leaving Seville, I am quite unable to see that the fact of her taking in muddy water at Seville was of itself sufficient to render the vessel unseaworthy, because even assuming it to be proved that the water taken in from the river was extra muddy, I am not quite sure that that is proved, but even assuming it to be proved, I think it is plain on the evidence that any master who chooses to attend to the ship can take means to get that muddy water cleared out of the boiler before he gets to sea on the way down the river. No doubt there is contradictory evidence on that point, but the evidence led by the defender on that part of the case is to my mind conclusive that that muddy water would not have operated injuriously if there had been a proper exercise of discretion on the part of the commander on his way down the river. Therefore I think the vessel was not unseaworthy.

LORD SHAND—I had an opportunity of considering the opinion which my brother Lord Adam has delivered, and I entirely concur in that opinion, both in the substance of it and in the careful and detailed examination of the evidence which Lord Adam has made, subject to one observation, and only one, namely, that I attach

more importance than his Lordship has done to the stranding of the steamer on the bank in the river shortly after she left Seville. I do not mean to go into the evidence, but taking it as a whole I think there was on that occasion a considerable amount of mud drawn in from the river during the struggle that was made to get off the bank. The evidence shows, I think, that the steamer was on the bank for a material time, and there was a good deal of stirring up of the mud in the attempt to get off the bank, and accordingly I think there was then a considerable addition made to any mud there was previously in the boiler. If so, and if the loss of the vessel can be attributed to the presence of mud in the boiler, of course the defence of perils of the sea would cover the loss if caused by the presence of mud taken in after the vessel had left Seville, and in this view it is important to observe there is a mass of evidence that vessels did frequently take in the ordinary muddy water of the Guadalquivir at Seville without supervening mischief of any kind.

Then, generally, in regard to the case the pursuer's claim is made upon the footing that the cargo was lost and the ship lost because the taking in of the muddy water, producing unseaworthiness, really caused the accident, by having been the direct cause of the falling down of the crowns of the boiler, and consequent failure of the motive power. Now the Court must be satisfied upon this point, not only that the vessel was unseaworthy, but that the unseaworthiness caused the loss of the cargo. The case is not one like that of insurance where it is quite sufficient, in order to void a policy to prove that there was unseaworthiness, even though the unseaworthiness was not proved to be the cause of the loss. In the case of insurance, it is a condition-precident that the vessel shall be seaworthy, and if that condition be not fulfilled the contract of insurance cannot be enforced. In this case, however, there must not only be unseaworthiness, but it must appear on the evidence that the unseaworthiness caused the loss. Now, we had a good deal of discussion upon the question of *onus* in the case, and I desire to say a few words upon that point. It appears to me in the first place, that the shipowners having been entrusted with the carriage of the goods, and being unable to deliver them, have an *onus* upon them to show that they are to be relieved of the obligation to deliver, and I think that *onus* is discharged primarily by showing that the vessel was driven on a lee shore and wrecked. While that was being done, however, it came out in the evidence that the cause of the vessel being so wrecked and driven on shore was the failure of motive power. The pursuer maintains that it is clear that the *onus* is thereby thrown upon the defenders in the action to account for this, that it is to be presumed that the failure of the motive power arose from the unseaworthiness in respect of the boiler being defective, or in a condition dangerous to the ship when she left Seville. The defenders say no; that there is a clause in the charter-party saving them from the effects of the negligence of those who were working the ship, and that this was just as likely to happen from the negligence of those working the machinery as from the alleged defective state of the machinery itself three or four days before, when

she left Seville, and before she encountered the severe weather that she did. Upon that matter it appears to me that there is no presumption of law arising in the circumstances one way or the other which can be referred to as determining the question of *onus*. It is purely a question of presumption of fact one way or the other, and that is for the judge or jury dealing with the circumstances of each case. The case of *Cohen v. Davidson*, referred to in the course of the discussion, was one in which, I think, the presumption of fact was absolutely clear. A vessel or lighter drawn into the harbour, in all respects apparently seaworthy, took in her cargo, and everything appeared right when she left the pier, but within two hours of her getting to sea a very heavy leakage occurred, and that leakage went on and became so bad that the vessel ultimately sank. The only inference that could be drawn from the circumstances there was, that the vessel had received damage while the cargo was being put on board, and that a hole had been there driven in the bottom, and consequently it was there held that she was unseaworthy at the time of sailing. That was simply, however, because of the special circumstances that occurred. In this case it is perhaps difficult to determine exactly how the presumption stands after this vessel had been three or four days out, and her machinery had gone wrong. If one could conceive a case in which there was no evidence to be got on the subject, and no light to be had on the matter at all, I rather think the pursuer would be right, that one would rather infer unseaworthiness at starting than negligence causing the accident. But we have no case presenting these features, for in this case we have a body of evidence with two conflicting theories, and I am quite clear that the Court must on that evidence simply come to the conclusion on these theories, and say which of them is right. We have a great deal of evidence on both sides, and I do not consider the question of *onus* to be of the slightest consequence. We have simply the two theories, and the evidence in support of these is not so nicely balanced that you cannot say which of the two alleged causes of the failure of the vessel's motive power is the more probable. On the contrary, there is evidence which, I think, enables the Court to come to a conclusion as to the true cause.

Now, so taking the case on this question of *onus*, which I think is simply a question as to the presumption arising from fact, I entirely agree in the view which Lord Adam has expressed as to the true cause of this accident. And even supposing it had been proved that the vessel had taken in so much mud from the muddy water, taken in at Seville, as might possibly cause danger to the boiler (which, however, is not proved in my opinion), yet I am of opinion with his Lordship that the pursuer has failed to make out that this was really the cause of the accident. It appears to me that the theory on which the pursuer proceeds is ingenious, but much too speculative, and having fully considered the proof on the subject, the theory which seems to me to proceed on too many assumptions of fact, does not recommend itself to my mind. I do not think that there are facts proved in the evidence on which that theory can be satisfactorily established, and I think there are facts proved which

conflict with it. When the vessel left Seville, according to Neish and other witnesses, who took the view that mud had ultimately settled down on the crowns of the boiler and caused them to collapse, everyone seems to be agreed that the muddy water having been thirty-six hours in the boiler, the mud must have fallen as a deposit—I shall not call it a cake, because it was a loose deposit—on the bottom of the boiler. There is no suggestion that there was anything on the furnace crowns then. Now, what is necessary in order to make out Mr Neish's theory? In the first place, the mud which was at the bottom has to be stirred up, and I agree with the witnesses in thinking that it necessarily must have been stirred up. The putting on of fires and the heating of the boiler would immediately cause a certain amount of boiling and stirring up of the mud, and as she went to sea the motion of the vessel would increase that, and after the third day, when the wind and the sea began to rise it would be increased more and more. In that state of matters it appears to me that the mud which was at the bottom must have got all through the boiler. But to make out the pursuer's theory it is required to bring that mud down and deposit it on the two upper furnace-crowns which first gave way, and to deposit it there so that it became a cake adhering to the metal in such a way that the fire was no longer able to act on the water around the two upper furnace-crowns. That is the theory I think. It appears to me that if there would be a settling of mud there—I doubt whether there was opportunity from the motion of the vessel for the settling of the mud at all—it would go to the bottom of the boiler again, and that at least the lowest furnace crown would be the one most readily covered, and would be the first to show symptoms of weakness and to come down, whereas it was the two upper ones that came down. And besides, to carry out the theory you require (1) a certain admixture of oil so as to make the mud adhesive, while the presence of the oil requisite is not proved, and (2) the existence of a current or currents in the boiler of this peculiar nature that they would carry the mud over the low under crown and land it on the top of the two higher side crowns. Looking at all the evidence on the subject, I can only say that this theory does not commend itself to my mind. I think the accident was much more likely to have occurred, and I believe it did occur, according to the evidence, because Thomson, the engineer, to some extent lost his head in the difficulty in which he was placed. When he went to the glass which indicated the presence of mud in the boiler, and the water very high up, and at a time when he says he thought there was priming also, the first thing he would naturally do was to shut off the feeds. The result of this would of course be to let the water get gradually low, and I think the real evidence in the case tends to show that this was what happened. And the first account accordingly which Thomson gave to the captain, when the occurrence was looking serious, was that the boiler was short of water. If the true view of the evidence be that the engineer cut off the water and omitted in proper time to turn it on again, as I think he is brought to confess, that accounts entirely for what happened. The water fell in the boiler, the two upper furnace-

crowns became exposed to great heat, there was no water to cover them, the action of the fire at once told, and the necessary result was that the two furnace-crowns came down. Then there are the other matters which Lord Adam so fully went into on the evidence. I could not give a better *résumé* of the evidence on that point than he has done. And so I am of opinion that at the outset of the case there is a failure on the pursuer's part to prove that the cause of the accident was unseaworthiness of the vessel.

But even if that were the cause I am still of opinion that the pursuer cannot succeed, because I do not think it has been proved that the vessel was unseaworthy. The case of *Steel & Craig v. The State Line Shipping Company* shows that if a vessel goes to sea with some defect which, though it would be a cause of danger if left unremedied, may yet be readily cured, as by shutting a porthole, or by any operation that will obviate the danger before it arises, even when the vessel is at sea, that cannot be regarded as unseaworthiness. The owners of the vessel stipulated that any error of navigation during the voyage should relieve them from responsibility. Now, I think the evidence in this case brings out a point which was not before the other Division of the Court in the former case, namely, that if there is such a quantity of mud in the water in the boiler as to lead to any apprehension of danger the engineer has it in his power at once to cure that by blowing off the muddy water, and taking in a supply of sea water. I am not prepared to say that when the vessel left Seville there was sufficient mud to cause danger, but if there was a dangerous quantity of mud so taken in everyone is agreed that the engineer had nothing to do but blow it off. The mud must be shaken up before it could produce the accident—that is part of the pursuer's case—and as soon as it was shaken up in the water, then was the time to blow it off. It is said by the pursuer's witnesses that the mud was all lying at the bottom, and that blowing it off would only take off the part of the mud at and around the orifice by which the water was driven out, but the theory of the pursuer's case is that it would be all shaken up before being deposited again on the crowns. There were two days of fine weather, and only by the third day there was a heavy sea, so there was ample opportunity to have the muddy water blown off, and to take in sea water, and Thomson says if it had occurred to him he would have taken that course. Therefore I am of opinion that in this view it was not from unseaworthiness, but from an omission on the part of the engineer, that the loss occurred. Taking it in either way, my opinion is that the loss was caused either by Thomson having cut off the water and omitted to turn on the feed again, or that it was caused by his failure to blow off the muddy water. In either case the loss was caused by the negligence of one of the servants of the defenders, and on these grounds I concur in the opinion of Lord Adam.

The pursuers maintained another point in argument, viz., that they were not bound under the special terms of the charter-party to have a seaworthy ship starting from Seville, but the best consideration I have been able to give to that question leads me to the opinion that this argument is unsound. It is quite true that the vessel

began her voyage at Swansea, and the provision of the charter-party undoubtedly is, that the vessel being then staunch and strong and seaworthy, and fitted for the voyage, should sail for Seville and there take on board her cargo, and then the exceptions of perils of the sea and errors in navigation occur relating to the voyage as a whole. I do not doubt in the least that if the vessel, being seaworthy when she left Swansea, had been lost or delayed on her way to Seville by a cause within the clause of exceptions no claim of damage could have been made against the owners of the vessel for non-arrival or non-arrival in time. The exceptions would apply to any part of the voyage contemplated. But, on the other hand, I am of opinion that though we have here a voyage in one sense out and home, we have also a cargo voyage. The charterers required to have a vessel out into which they could load their cargo, and it appears to me—and there is pretty clear authority for saying—that in every case where there is a provision for taking cargo on board, even on such a charter-party as we have here, it is an implied term of that contract that the ship at the time she leaves with her cargo shall be seaworthy. There are two leading cases on that point which were referred to, one of them in 1876 and the other in 1877, in the Queen's Bench Division of the High Court of England. The first of these was the case of *Kopitoff*, where a bill of lading having been granted for goods, although there was no stipulation on the subject, the Court held that if a person undertakes carriage of goods on board his ship there is implied in the contract that he shall present a seaworthy ship to carry the cargo. That was the case of *Kopitoff* in 1 Q.B. Div. Rep. The other was the case of *Cohen* in 2 Q.B. Div. Rep., and there the case of *Kopitoff* came up again for consideration, but with this difference, that in the case of *Cohen* which I have already referred to on another point, there was a charter-party which provided that the vessel should leave a certain place where she was, go into harbour, take on board her cargo, and then sail with it. It seemed to be proved that the vessel was perfectly sound when she left the place at which she had been lying when the charter-party was entered into, that she was perfectly seaworthy when she presented herself to take on board the cargo, but an accident occurred by grazing on the harbour bottom before she left the harbour, and it was maintained that if the vessel was seaworthy when the charter was signed, and when she started to sail for the harbour, the owner was not bound to have her seaworthy when she started with her cargo on board, but the Court in that case laid down the same principle as in the case of the bill of lading, viz., that when the charterer came to put the cargo on board the vessel, then is the time when it is important for him that the ship shall be seaworthy, and unless that undertaking is positively excluded it must be held to be implied in the contract. I do not propose to read the opinions, but the judgment came very clearly to this, that as in a bill of lading, so in every charter-party, there is an implied undertaking that the vessel at the time of sailing with her cargo shall be seaworthy. And that is very well explained in the unanimous opinion of the Court, that to hold otherwise might defeat the power that a shipper of goods has to make his

insurance effectual. He cannot insure his goods except on the footing of giving an implied warranty of seaworthiness, and so the law holds in the contract of carriage that seaworthiness is plainly implied as an obligation on the shipowner. I am therefore of opinion that that plea maintained on the part of the defenders would not have availed them. But on the facts of the case otherwise, as I have stated, I am of opinion that the defenders ought to succeed, and that the judgment of the Lord Ordinary should be recalled.

LORD PRESIDENT—I concur entirely in the opinion of Lord Adam, and have nothing to add.

The Court recalled the interlocutor of the Lord Ordinary, sustained the defences, and assolized the defenders from the conclusions of the action.

Counsel for the Pursuer—Asher, Q.C.—Salvesen. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for the Defenders—Balfour, Q.C.—Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Friday, December 21.

## FIRST DIVISION.

KLENCK v. EAST INDIA COMPANY FOR MINING AND EXPLORATION, LIMITED.

Limited Company—Memorandum and Articles of Association—Issue of Shares at a Discount—Companies Act 1862, secs. 7, 8, 12, 25, Table A (27)—Companies Act 1867, sec. 25.

It is *ultra vires* of a company incorporated with limited liability under the Companies Acts 1862 to 1880 to issue its shares at a discount (whether the memorandum of association bears to confer such a power or not), because such a company has no power to reduce the capital specified in the memorandum of association.

The articles and memorandum of association of a limited company, incorporated under the Companies Acts 1862 to 1883, bore to confer power on the company to issue shares at a discount. The company issued such shares in conformity with certain special resolutions and a contract registered with the registrar. A shareholder, who was a party to these special resolutions and contract, presented a petition to the Court to have the register of the company rectified by deletion of his name as holder of 300 shares issued at a discount, on the ground that the issue of these shares was *ultra vires* of the company, and that consequently their allotment to him and the entry of his name on the register were also *ultra vires* and illegal. The Court granted the petition.

Opinion (per Lord Shand) that in certain cases the shares of railway and other companies which have adopted the Companies Clauses Acts may be issued at a discount.

The East India Company for Exploration and Mining, Limited, was incorporated under the

Companies Acts 1862 to 1880 in 1881. The capital of the company was £100,000 in 100,000 shares of £1 each, of which 99,000 were taken up.

The memorandum of association contained the following clause:—"The objects for which the company is established are—From time to time to make the shares of capital original, increased, or reduced, or any part thereof ordinary or preferred, or guaranteed or deferred shares, and to convert the same into shares of different nominal amount, . . . and to issue all or any of such shares at par, or at a discount, or at a premium, or as paid up or partly paid up."

By the articles it was provided, *inter alia*—" (8) The company may from time to time by special resolution increase the capital by the creation of new shares." . . .

" (9) Such increased capital may be issued as ordinary shares, or preferred or guaranteed or deferred shares, or partly by one of these modes and partly by another or others, and may be issued at par, or at a discount, or at a premium." . . .

By special resolution passed on 6th January 1886, confirmed on February 5, 1886, and registered on 16th May 1886, it was resolved that the capital of the company should be increased from £100,000, divided into 100,000 shares, to £300,000, divided into 300,000 shares of £1 each.

By special resolution, passed on 13th June, confirmed on 30th June, and registered 8th July 1887, it was resolved, *inter alia*—" (1) That the directors be, and they are hereby authorised to issue 150,000 shares of £1 each, *quoad* 123,270 shares at a discount of not more than 12s. 6d. per share."

In pursuance of this resolution the company offered 123,270 shares at a discount of 12s. 6d. per share, and John Matthew Klenck applied to the directors for 300 shares, and at the same time remitted £15, being 1s. per share thereon. On 26th August 1887 he received notice that these shares had been allotted to him, and that he was entered in the company's books as holder of these shares.

On 31st May 1888 Mr Klenck presented a petition craving the Court "to ordain that the register of said company be rectified by deleting therefrom the entry of the petitioner's name as holder of the 300 shares of the capital stock of the said company (part of the shares issued in July 1887) standing in his name in the said register; and to direct that due notice of such rectification be given to the Registrar of Joint-Stock Companies in Scotland; and further, to interdict and prohibit the said company from making or enforcing any call or calls upon the petitioner in respect of the said shares, or from charging him for any alleged price in respect thereof, or from in any way holding or treating him as a shareholder of the said company in respect of the said 300 shares; and further, to discern and ordain the said company to make payment to the petitioner of the sum of £15, paid by him in respect of said shares, with interest thereon at the rate of 5 per centum per annum, from the 25th day of July 1887; and to find the said company liable in the expenses incurred in this application."

The petitioner averred that his application for the shares had been made on his part and accepted by the company on the condition that on