this agreement the employer had paid the full amount which the workman could have recovered as compensation if he had insisted on his legal right. I agree with the Master of the Rolls that it would be most mischievous to the workman especially, but also to the employer, if we were to hold that it was incompetent for the employer voluntarily to make a payment to the workman without at the same time being held thereafter by implication to have agreed to continue that payment, because, of course, in order that there may be an agreement for redemption by payment of a lump sum, you must find weekly payments for the future in redemption of which the lump sum has been paid." I agree with the decisions upon this point to be found in the cases of *Rawlings* v. *Hodgson*, *Williams* v. *Minister of Munitions* (121 L.T.R. 341), and *Haydock* v. *Goodier*. When it is suggested that the proposed decision will not in effect interfere with a settlement between the employer and the workman for a lump sum because it could always be arranged on the basis of a commutation of a weekly payment, I would like to point out that not only does such a course necessitate litigation and a hearing, but it is apparent that such a settlement may very often involve other considerations than that of amount as the basis of the settlement agreed upon. I am therefore of opinion that this appeal fails on both points, and that (1) the agreement is a valid agreement, and (2) is not an agreement for the redemption of a weekly payment, and that the Registrar was bound under Schedule II (9) on being satisfied as to its genuineness to record it in a special register.

I am of course aware that having regard to the opinions expressed by your Lordships in the course of this debate the views which I have put forward are of no importance, but I have thought it right to give my reasons for dissenting from the motion put from the Woolsack at some length out of respect for your Lordships and for the learned Judges who have decided the cases already referred to, and which this House has decided to overrule.

Appeal allowed with costs.

Counsel for the Appellant—Morris, K.C. — Duncan. Agents — Kingsley Wood, Williams, & Company, Solicitors.

Counsel for the Respondent—Compston, K.C.—Shakespeare. Agents—Hair & Company, Solicitors.

Thursday, December 6.

(Before Lord Dunedin, Lord Atkinson, Lord Shaw, Lord Phillimore, and Lord Blanesburgh.)

"VITRUVIA" S.S. COMPANY, LIMITED *v.* ROPNER SHIPPING COMPANY, LIMITED.

(In the Court of Session, March 9, 1923 S.C. 574, 60 S.L.R. 379.)

Process — Record—Matter not on Record—Absence of Appropriate Averments and Pleas — Amendment — Ship — Collision — Damages — Detention for Repairs — Whether Detention Due to Collision.

Ship — Collision—Damages—Detention for Repairs — Whether Detention Due to Collision —Averments —Record—Amendment.

In an action of damages for detention for repairs alleged to be due to collision the defenders, while admitting responsibility for the collision, disputed their liability for the loss incurred by the vessel during the time she was laid up. Proof was led, in the course of which it appeared that during the time the vessel was under repair there was extant a defect in her propeller which the defenders alleged made the vessel unseaworthy. This question was argued both in the Outer and Inner House, though the appropriate averments and pleas *hinc inde* were not set forth on record. The pursuers having been awarded damages the defenders appealed to the House of Lords. *Held* that the procedure followed was not in accordance with the Rules of Pleading in Scotland, and cause *remitted* to the Court of Session with a direction to allow the parties to amend the record in terms of the minutes tendered at the bar, to allow a proof thereof, and to make findings of fact and to report the same to the House.

Davidson v. *Logan* (1908 S.C. 350, 45 S.L.R. 142), so far as regards the procedure therein followed, *disapproved*.

The case is reported *ante ut supra*.

The defenders, the Ropner Shipping Company, Limited, appealed to the House of Lords.

In the course of the hearing, their Lordships having intimated that the question now raised by the defenders, viz., as to whether the "Vitruvia" while under repair was unseaworthy irrespective altogether of anything for which the defenders were responsible, would not be considered without an appropriate amendment of the record, counsel for the defenders craved leave to amend answer 4 by adding the following statement:—"The 'Vitruvia' at the time when she arrived in the port of Glasgow on 12th August 1920 was in an unseaworthy condition. In any event her owners had decided that the vessel should not be sent to sea in her then condition. At that date a fault had developed in her propeller which required to be repaired before the

vessel could be put to sea. In order to allow of the fault being repaired or the nature of the defect discovered it was necessary that the 'Vitruvia' should be put into dry dock. A dry dock was ordered by or on behalf of the pursuers in order to ascertain the nature of the defect and to carry out the repair, but no dry dock was available or could be obtained until 2nd September 1920. By that date all the repairs rendered necessary by the collision had been carried out. For the purpose of these repairs a dry dock was not required." They also craved leave to add the following plea:—"The detention of the 'Vitruvia' between 12th August and 2nd September 1920, at which latter date she obtained a dry dock, having been due to her unseaworthiness, *et separatim* having been due to the determination of the pursuers to detain the vessel until the propeller had been repaired, the defenders are not liable in reparation to the pursuers during that period upon the footing of the vessel being a freight-earning subject."

In answer to the defenders' amendments the pursuers craved leave to add to condescendence 4 the additional averment:—"The statements made in defenders' amendment are denied subject to the following explanations:—Explained that the nut of the 'Vitruvia's' propeller required to be tightened one half-turn. This defect did not render the vessel unseaworthy. In any event the defect could have been repaired before the expiry of the twenty-two days occupied by the collision repairs. Had the defect been discovered before the vessel had been brought to Glasgow for the purpose of effecting the collision repairs the propeller could have been examined and repaired at Rouen or a Channel port. Further, had it not been necessary for the vessel to have remained in Glasgow for the collision repairs the pursuers could have had the propeller examined and repaired immediately it was discovered this was required by tipping the vessel while still afloat and without entering dry dock, or by obtaining a dry dock in Glasgow or elsewhere."

At delivering judgment—

LORD DUNEDIN—The case which is before your Lordships on appeal is in what I venture to call a most unfortunate condition owing to the disregard of those most salutary rules which for a long time have obtained in Scottish pleadings. It was only the other day in the case of *Black* v. *Williams* that I called attention to the fact—and Lord Shaw called attention to the same matter—that the case which was being argued before us, and which was argued in the Inner House, was a case in which there was neither record nor plea. In support of such procedure the case of *Davidson* v. *Logan* was quoted. I intimated at that time my dissent from what had been done in *Davidson* v. *Logan*. I fear I intimated it in much too mild terms, because this case presents really an object-lesson of the trouble that may follow from the disregard of those rules of pleading.

The present case is this—A collision occurred for which the defenders were admittedly responsible, and they necessarily have to pay for the repairs which were rendered necessary to the vessel injured by the collision. As to that there is no question. But when the action was raised for that sum it was found also that the proprietors of the injured vessel claimed damages for what, using a Latin phrase, may be called *lucrum cessans*, because their vessel had been out of action by the necessity of having these repairs made, and consequently had not during that time obtained remunerative employment. The parties went to proof upon various issues, and in the course of the proof it appeared that as a matter of fact during the twenty-two days in which the vessel had been laid up in Glasgow in order to be repaired there had been extant a serious defect of the screw which it could be alleged made the vessel unseaworthy. There was neither averment nor plea to that effect. None the less, when this fact emerged at the trial, without protest counsel were allowed to argue upon the whole matter before the Lord Ordinary, and the Lord Ordinary gave judgment upon the facts as presented to him, including this question of the unseaworthiness. The same thing happened when the case went to the Inner House. The case was taken upon that ground, and consequently when the case came up to your Lordships' House we found that we were discussing a question which it was absolutely vital to settle—a question as to which there was neither record nor plea.

Now I unhesitatingly say that the conduct of this case has been quite wrong. It may be that when the defence was lodged the defenders did not know the facts which raised the plea—I do not know whether they did or not, but I will assume for the moment that they did not—and that consequently the record did not contain the proper averment and plea. But what happened? As soon as it became evident by the argument of counsel before the Lord Ordinary that the defence was really being put upon a matter which was raised by neither averment nor plea, I think it would have been not only right but the duty of counsel on the other side to say to the Lord Ordinary, "This cannot be raised without an amendment of the record." That an amendment of the record would have been not only possible but necessary is made perfectly clear by section 29 of the Court of Session Act 1868 (31 and 32 Vict. cap. 100), with which everyone is familiar. Of course on what terms that amendment would have been made is another matter. That would have been in the hands of the Lord Ordinary. But supposing it had been made, then the counsel on the other side might have been in this position—He might have said—and quite rightly said—"Now the whole aspect of the case is altered. I want an opportunity to reconsider my position and see whether I will not make an averment which meets this averment, and if necessary ask for proof of that averment before judgment is given." None of those things were done, and the case comes up to

your Lordships' House, and we find that the point as now insisted on is a very formidable point. I say nothing at this present moment, because it would not be proper that I should, as to whether we should agree with the judgment the Inner House has given upon the pleadings as they stand. We might or we might not, but when the matter is further made clear by the discussion which has followed, then the counsel for the pursuers say, "Oh, well, but I will show that really the facts are not as they are disclosed in this proof. That is not a full and complete account of all that happened or that might have happened, and I want to show that so far from the vessel being necessarily unseaworthy during the twenty-two days it was not so, because there was a very slight repair which could have been made without going into dry dock at all, the unseaworthiness continuing for the twenty-two days being undoubtedly conditioned by the difficulty of getting into dry dock." All that may be very true, and without saying anything more — I do not say it necessarily leads to his winning the case—but it puts a perfectly different complexion upon the case from the case that is before us. Accordingly with your Lordships' assent I put to the defenders' counsel in this case that he could not raise the plea as he has now raised it without an appropriate amendment of the record and plea. He has tabled that amendment to the record and plea, and I move your Lordships that it be accepted. I say nothing of course about terms, because the terms on which the amendment will be accepted will have to be settled when the case is finally disposed of, but that the amendment and plea should be accepted I think is obviously clear.

Then counsel for the pursuers tables his further averment, and that further averment of his if made good, I will not say wins the case, but alters the whole complexion of it, and therefore I think he ought to be allowed proof upon it. I again say nothing about terms, but I move your Lordships first of all that the amendment by the defenders be allowed, and secondly, that the additional averment by the pursuers be received, and that the cause be remitted to the Court of Session in order that they may add the defenders' amendment to the record and may allow proof of this additional averment by the pursuers, and send the case back to us with the evidence and a finding upon the matter raised by that amendment.

LORD ATKINSON—I concur.

LORD SHAW—In the case of *Black* v. *Williams* the other day I ventured to express the opinion that doubts might arise as to the propriety or accuracy of the decision in *Davidson* v. *Logan*. In that case I spoke with considerable reserve, but I did express doubt whether it could stand alongside of the judgment then pronounced in this House.

I find myself forced to take a more definite attitude and now to say that I entirely agree with your Lordship that the procedure decision in *Davidson* v. *Logan* can no longer be considered correctly to represent the law of Scotland.

LORD PHILLIMORE—Your Lordships are under the guidance of two noble and learned Lords who are such authorities on Scottish procedure that I must, of course, concur with anything that they suggest. I confess that my withers would have been unwrung by the comments in this case. I have been brought up in a school in which a man who claims damages is expected to come into Court with every form of proof and ready to meet every form of objection. In cases in the King's Bench Division very little, except in rare cases and on broad lines, is said about damages by the defendant in his pleadings. He merely denies that there is that damage which is claimed. In cases in the Admiralty Division, and I rather think also when damages come to be assessed in Chancery (although I speak with a little hesitation about that), there is a detailed claim prepared by the claimant, and he is expected then to meet any point that may arise upon that claim and be prepared further to deal with it, without notice, unless in its discretion the tribunal which assesses the damage thinks it is a matter that should be adjourned for further consideration. But if the Scottish procedure is more minute in this matter it should be followed, and therefore I concur with the noble Lord who has moved this motion.

LORD BLANESBURGH—I concur.

Their Lordships ordered that the cause be, and the same is, hereby remitted back to the Court of Session in Scotland with a direction to allow the parties to amend the record in terms of the minutes tendered at the bar, and to allow a proof thereof, and to make findings of fact, and to report the same to the House.

Counsel for the Appellants — Moncrieff, K.C. — Carmont. Agents — Beveridge, Sutherland, & Smith, W.S., Leith—Botterell & Roche, London.

Counsel for the Respondents—MacRobert, K.C.—Jamieson. Agents—Webster, Will, & Company, W.S., Edinburgh—William A. Crump & Son, London.