Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Owners of the 'Freedom,' v. Simmonds and Hunt from the High Court of Admiralty, Ship 'Freedom;' delivered 11th February, 1871.

Present:

Sir James W. Colvile.
Sir Joseph Napier.
Lord Justice James.

IN this case a proceeding was instituted in the Court of Admiralty, under the 24 Vict. c. 10, s. 6, by which jurisdiction has been given to the Court over any claim by the owner or consignee, or assignee of any bill of lading, of any goods carried into any port of England or Wales in any ship, for damage done to the goods, or any part thereof, by the negligence or misconduct, or for the breach of any duty or breach of contract on the part of the master, owner, or crew. By this section a new remedy has been given to those who have a right of suit in any of the cases specified. By the 18 & 19 Vict. c. 111, the consignee of goods named in a bill of lading and the indorsee of a bill of lading, to whom the property in the goods mentioned shall have passed upon or by reason of such indorsement, shall have transferred to and vested in him all rights of suit and be subject to the same liabilities in respect of such goods, as if the contract in the bill of lading had been made with himself.

The transaction in the present case between the Plaintiffs and the shippers of the goods in respect of which the suit was instituted, was one of a class described in the elaborate opinion of Mr. Justice

Buller, delivered in the House of Lords, in which he shows that the nature of the dealing requires that the property in the goods specified in the bills of lading should be transferred to and vested in the Indorsee thereof. (6 East's Rep. p. 29, n.) The Plaintiffs were consignees for sale, but as part of the transaction, a Bill of Exchange was drawn by the consignors for nearly the full value of the goods; the bills of lading were indorsed by them and forwarded to the Plaintiffs, by whom the draft of the consignors was accepted and paid in due course.

The legal title to the property in the goods specified in the bills of lading was thus transferred to and vested in the Plaintiffs; the right of suing upon the contract in the bills of lading was transferred to them by force of the statute (18 & 19 Vict. c. 111).

It was suggested in the argument that the applicability of this enactment was doubtful, in consequence of some words reported to have fallen from one of the learned Barons in the Court of Exchequer, in the case of *Fox* v. *Knott* (6 H. & N. 305). But having regard to the facts of that case, and looking at the report in the 'Law Journal,' (vol. 30, Exch. 259), it would seem to have been intended to decide no more as to the construction of the 18 & 19 Vict. c. 111, than that it had no application to the case; and that to entitle the Indorsee of a bill of lading to have transferred to and vested in him a right of suit as thereby enacted, the circumstances under which the bill of lading shall have been indorsed must be such that the property in the goods shall have passed to the Indorsee by reason of the indorsement. The Plaintiff in that case was the charterer and, as such, the carrier. He had taken an assignment of the bill of lading upon the terms that freight should be paid. It was attempted on the part of the Defendant to use the statute as having extinguished the right of the shipowner to freight, if he took an assignment of the bill of lading, whereby (it was argued) he had lost his remedy against the shipper for the freight. The Court decided in favour of the Plaintiff.

Their Lordships are satisfied that it was intended by this Act that the right of suing upon the con-

tract under a bill of lading, should follow the property in the goods therein specified; that is to say, the legal title to the goods as against the Indorser. They entertain no doubt, that in the present case, the legal title was transferred to and vested in the Plaintiffs, and that the subordinate right under the contract was transferred to them by the statute.

The Plaintiffs have brought their suit for non-performance of the contract stated in the bills of lading. There were six parcels of goods, each consisting of 500 bags of linseed-cake; there was a separate bill of lading for each parcel. They are all in the same form, containing an acknowledgment of having received each parcel "in good order and well "conditioned, and an undertaking to deliver them "in like good order and condition at the port of "London, the dangers of the seas only excepted."

It was not disputed that the goods, for the damage to which the suit was brought, were not delivered in the order and condition in which they were shipped. But the question raised by the answer of the Defendants is, whether this default was caused either by "the dangers of the seas," or by "the natural qualities of the oil-cake"? The onus of proving either branch of this defence lay upon the Defendants.

The former is founded on the express stipulation in the contract; the latter, on the implication of law. It would be unreasonable to make the shipowners responsible for deterioration or damage caused by latent imperfection or defects in the oil-cake, which could not be supposed to have been known to them at the time of the shipment. It was properly observed by Mr. Justice Neilson, in delivering the Judgment of the Court in the American case, cited in the argument, "that the "acknowledgment in the bill of lading can only "mean that as far as they had an oppportunity of "judging, the goods were sent in a perfectly good "condition." The Defendants in this suit were not precluded from showing (if they could) that the damaged oil-cake was imperfectly manufactured or insufficiently prepared for the voyage; or that it had some intrinsic defect, at the time of shipment, which caused the damage. A notice was served upon the Defendants, on the part of the Plaintiffs,

before sending out a commission to America to take evidence on the subject. Having considered the evidence that was taken there, as well as that which was given in the Court of Admiralty, their Lordships are satisfied that the oil-cake was in good order and well-conditioned at the time of shipment. This disposes of one branch of the defence.

The learned Judge of the Court of Admiralty came to the conclusion upon the evidence, especially that of Dr. Letheby, that the damage complained of was mainly caused by the bones that formed part of the cargo. But at the same time he held that it was not necessary to found his Judgment upon this, inasmuch as the onus was on the Defendants to show, and that they had not shown, that this damage was caused by "dangers of the seas."

Their Lordships are not prepared to say what may have been the actual or the relative effect of the bones, considered as a distinct item in the combination of concurrent causes, which led to and resulted in the damage to the oil-cake. The cargo was made up (amongst other things) of beef and pork below, and a large number of bags of oil-cake, some below and some above; clover seed behind; bones in the forehold, loose and in bulk, about three feet from the oil-cake; a portion strewed about the bags of oil-cake, and some amongst tobacco. Every place was filled up so that no space was left in which any part of the cargo could be put. One of the witnesses for the Defendants was asked his opinion as to the stowage with reference to allowing the air to circulate. His answer was—"I did not fancy she "could have been stowed better. The ship was as "full as she could possibly be stowed." That is to say, she was well stowed in the sense of being well crammed and closely packed; but (as the result showed) so as to prevent the circulation of air. At a subsequent stage, when there was no ventilation, and no outlet was left for heat and damp to escape, the bones may have gradually contributed to taint the atmosphere. That in such circumstances the oil-cake would be liable to become mouldy, is stated by competent witnesses on both sides. It is difficult, if not impracticable, to come to any satisfactory conclusion as to the relative effect of each of the concurrent causes that by their combination brought about the proximate cause of

the damage. Causes minute in themselves may be intensified in combination with others.

The words in the bills of lading—"dangers of "the seas"—must, of course, be taken in the sense in which they are used in a Policy of Insurance. It is a settled rule of the law of Insurance, not to go into distinct causes, but to look exclusively to the immediate and proximate cause of the loss. In the present case, the remote causes are not only distinct from the proximate cause, but they are, for the most part, unconnected with dangers of the seas.

If a shipowner undertakes to convey such a cargo, under the ordinary contract set forth in the bills of lading, he takes upon himself the risk of consequences and contingencies other than those which are within the express exception, or that which is implied by law. The question here is not one of negligence, but of breach of contract, as explained in the Judgment delivered by Sir John Patteson in *Tronson* v. *Dent*, 8 Moore's P. C. C. 433.

The extent of sea damage done to some other parts of the cargo, so far as it was distinctly proved, was but limited, and the indirect effect of this damage is but a matter of conjecture. Some of the principal witnesses for the Defendants (including the Master) do not notice it at all, and some allude to it, without relying much upon it. As to the closing of the hatches, the Master assents to the suggestion made to him, that this may have had a share in causing the damage to the oil-cake, but he does not put it forward in the first instance. During the early part of the voyage (he says) he occasionally kept the hatches open, but during the last two-thirds of the voyage, the weather was so tempestuous, that he was under the necessity of closing them. He has not stated at what date this necessity arose, nor (except in this vague form) for what periods it continued. The log was not referred to; he did not make a protest after arrival at the port of London. The necessity must have ceased for some considerable period before the hatches were opened, on the third day after arrival, when there was such a rush of steam and heat as plainly indicated the absence of any means of escape for the confined and vitiated air during the time that the hatches were closed.

One of the witnesses for the Defendants says he thought it would have exploded the decks.

Their Lordships have referred to the surveys and reports that were given in evidence, and have considered all the evidence relating thereto.

They are of opinion that the conclusion proper to be drawn from the evidence is this, that from the nature and collocation of this cargo of animal, vegetable and (to some extent) putrescible matter, the sea damage done to a portion of the cargo, the packing and cramming of the ship so as to prevent any circulation of air, and the closing of the hatches, the atmosphere in the ship's hold became heated, damp, and vitiated, without means of escape, and that this atmosphere was the proximate cause of the damage to the oil-cake, which is the subject of this suit. This proximate cause cannot be brought within the legal import of the exception of dangers of the seas.

In the American case that was referred to, it is said that where the Defendants have brought their case within an exception in the contract, this shifts the onus upon the Plaintiffs to prove that the damage might have been provided against and prevented by reasonable care and skill on the part of the shipowners. But in order to make this applicable, the Defendants should first have given sufficient evidence to bring their case (*primâ facie* at least) within such an exception. Their Lordships think that they have failed to do so in the present case. The simple truth is, that they did not make provision sufficient to enable them to fulfil their contract. They ought to have known that there were portions of the cargo which if deprived of ventilation, without circulation of air, and without an outlet for heated, damp, or vitiated air to escape,—the result would be, in the natural course of things, that the oil-cake would be damaged. As they did not in fact provide sufficiently against such a natural, if not necessary, consequence, they imposed upon themselves the disability to fulfil the express contract into which they had entered under the bills of lading. In this view, it is not material to the Plaintiffs whether the Defendants are or are not chargeable with neglect, default, or improvidence. It is enough for the Plaintiffs to have established that the Defendants have not

performed their contract, and have not sustained either of the defences which they have pleaded as a legal excuse for non-performance. In this conclusion their Lordships agree with the learned Judge of the Court of Admiralty. There was another part of the case, but of minor importance, as to the expenses incurred in the sorting and weighing, etc., in consequence of the state in which the goods were delivered and the mode of delivery. Whatever these expenses were, they will be ascertained and allowed by the proper officer of the Admiralty, and it is not necessary to give any further direction. Their Lordships will, therefore, humbly advise Her Majesty that the Judgment appealed against should be affirmed, and that the Appeal be dismissed with costs.