Judgment of the Lords of the Judicial Committee of the Privy Council on the appeal of William A. Robertson v. *Peter Grant, from the Supreme Court of Halifax, Nova Scotia; delivered July 6th*, 1876.

PRESENT:

SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THIS appeal comes before their Lordships under somewhat peculiar circumstances. Two persons of the name of Benjamin and Frederick Short carried on business in partnership at Halifax. Their father, William Short, appears to have had some business connection with them, but the nature and the extent of that connection it is exceedingly difficult to arrive at. In 1865 a small ship called the "Athalaska" was built for Benjamin Short, or at all events nominally for Benjamin Short, and he was registered as her sole owner. Almost immediately upon this he mortgaged the vessel to his father. Subsequently that mortgage appears to have been got rid of, and he again became the sole owner. He seems to have sold or mortgaged it again, but he became the sole owner again at the time material to the present inquiry.

In 1867 Mr. Robertson, the Appellant, obtained a judgment against William Short, the father. He proceeded to execution of that judgment upon this vessel, which he contended, though nominally belonging to the son, to be really the property of the father. The sheriff was directed to seize the vessel in

execution. About the same time, Peter Grant, the Respondent in this suit, who was also a creditor of the Shorts, apparently a creditor of Benjamin Short, obtained a deed of sale of this vessel from Benjamin Short, and on the 2nd September, the day on which the deed of sale was executed, he claimed the vessel, and his so claiming it had the effect of preventing the sheriff selling, although the sheriff took possession and kept it for Robertson till the 18th November 1867, when Peter Grant instituted a replevin suit and gave a replevin bond, whereupon the vessel was given up to him. This replevin suit, for some reason which has not been explained, was not heard till nearly two years afterwards, namely, in June 1869. In the meantime Mr. Grant, together with Esson & Co., who were also creditors of the Shorts, and whose debt formed part of the consideration of the bill of sale, worked the vessel. She carried several cargoes, and was chartered by different merchants, and on one occasion, she being chartered to Ireland, the owners on their own account directed her to go across the Irish Channel to Ardrossan and get a cargo of coals, no doubt thinking it better that she should return with a cargo of coals than merely in ballast.

In June 1869 the cause at length came on for trial, and the trial occupied a considerable time before a Judge and jury. The termination of the trial is given at page 14 of the Record, in which this is stated by the Judge: "Mr. Palmer "proceeds to address me on the law, and it "being now two o'clock on Saturday, the "last day of the term, and little time being "left for the closing speeches of counsel "and the charge, which would perhaps result "in there being no verdict, I suggested that "counsel should come to an agreement on the

" terms of a rule remitting the whole matter " to the Court, to be signed by the counsel " and by Benjamin J. Short, who was present. " After a long negotiation a rule was agreed " on and signed accordingly." This is the " rule, dated 12th June 1869: "It is ordered " in this cause that the verdict is to be entered " for the Plaintiff, but such entry is to have " no effect, but the Court is to determine the " facts on the evidence and to draw the same " inference as a jury, and enter the verdict " for the Plaintiff or Defendant as they may " consider such evidence warrants, or order " a nonsuit, and upon such verdict to order " such judgment as the law will warrant, the " costs of this suit to abide the event. The " Court shall have power, in case they shall " determine that there are any equities on " either side that can be enforced in a Court " of Equity, to determine such equities and " order a sale of the ship, and an account of " the proceeds, disbursements, and earnings " thereof since the transfer to the Plaintiff, " and the proceeds paid into Court to be then " held, the same as the ship itself, and subject " to the distribution and order of the Court " among the parties interested, including the " Shorts, the Turnbulls, and Jones, the " equitable costs to be in the discretion of the " Court."

This rule appears to be divided into two branches, the first relating to the law, and the second to equitable considerations which might arise. Their Lordships collect that a separate judgment was given in the first instance upon the first branch of this rule, although that judgment does not appear anywhere in the Record. They collect this from what falls from the Chief Justice in the final judgment which he gave in the case, wherein he says

(at page 30 of the Record), "But the majority " of this Court held that a writ of replevin " did lie, and that the Plaintiff, under his " bill of sale and registry, was entitled to the " possession, which judgment was acquiesced " in." This judgment having been given, and apparently acquiesced in, the Court proceeded to take what they deemed an equitable view of the case, and that view is expressed in the following order, which was made on the 7th January 1871, which it is necessary to read *in extenso:* "On argument of the special " rule granted on the trial of this cause at " Digby, in June 1869, it is ordered that the " ship or vessel called the 'Athalaska,' the " subject-matter of this suit, be sold at public " auction in Halifax on her arrival, after public " notice of such sale for a period of eight days " in two at least of the newspapers there, and " by handbills, under the direction of the " master hereafter named, the title of the said " vessel to be conveyed to the purchaser by " the Plaintiff, as the registered owner thereof, " on such sale being completed; the proceeds " of such sale, after paying the expenses of " the said advertisment, to be paid by the said " master in the bank in the name of the " Accountant General of this Court, to abide " the order of this honourable Court or of " a judge thereof. It is also further ordered " that the net proceeds of the said vessel " and of her earnings since September 1867 " shall be distributed at an equal pound rate " among the five mercantile firms, creditors " in St. John, New Brunswick, and Halifax, " Nova Scotia, of William, Benjamin, and " Frederick Short, that is to say, Peter Grant, " T. R. Jones, Esson & Co., W. R. Robertson, " and Turnbull & Co. It is also further " ordered that the accounts of the ship's

" husband of said vessel, up to the time of " such sale, shall be referred to Henry Twining, " Esq., a master of this honourable Court, " allowing the sum of $315\frac{00}{100}$ dollars paid to " Messrs. Beard and Venning on account of " the said vessel, and all necessary and proper " outlays for repairs, wages, premiums of " insurance, and other charges properly paid, " laid out, and expended, or justly due and " owing in and about the said vessel and " her sailing, and charging the said Plaintiff " with all the earnings, profits, charter moneys, " and freights of the said vessel since the " month of September aforesaid to the time " of said accounting, and that the surplus, if " any, arising from the sale of the said ship, " after the payment of the said five mercantile " firms as aforesaid, be paid to the said " Benjamin Short, subject to the question of " costs on both branches of the said rule, " which is for the present reserved." What follows is not material.

This order is certainly of a somewhat peculiar character. It has little resemblance either in form or in substance to a judgment of the Court of Chancery. It does not expressly determine or declare any equitable rights. It is not drawn in the form of a decree, nor does any decree appear to have been drawn up from it. Their Lordships regard it as in the nature of an award directing what appeared to the Court, under all the circumstances, just and right to be done by the parties, but the reasons for which they came to the conclusion that what they have ordered was just and right, are left, in a great measure, to inference and conjecture.

Upon this order the matter went before the master, and the master made his report, which report may be shortly described in these terms. He first found the net proceeds of the sale of

the vessel, deducting the expenses of the sale from the gross proceeds. On inquiring next into the subject of the earnings, he arrived at a conclusion which was probably not contemplated by the Court, namely, that the disbursements had exceeded the earnings. He found a balance of loss, and that loss he deducted from the net proceeds of the sale, and he directed what remained after that deduction to be divided among the five creditors.

To that report various exceptions were made, and it is from the ruling of the Court with respect to these exceptions that the present appeal is preferred. It may be observed in passing that one of those exceptions with respect to a small sum of 37 dollars appears to have been allowed by the Court, and the order will be modified, of course, so far as that is concerned. It was contended, firstly, that the master was wrong in allowing to Mr. Peter Grant, as he unquestionably did, certain payments of considerable amount, as premiums on policies of insurance on the vessel. The argument was based on the expression which has been read,— " It is also further ordered that the accounts " of the ship's husband of said vessel, up " to the time of such sale, shall be referred " to Henry Twining, Esq." It was argued that a ship's husband has no power to bind the co-owners of a vessel by policies of insurance to which they were no parties, and to which they have not assented, and that proposition is undoubtedly correct, but it does not appear to their Lordships applicable to the present case. Grant was the owner of the vessel in conjunction with Esson & Co., who appear to have had an equitable interest. He acted as ship's husband for them at times, and they as ship's husband for him at times, and these insurances were effected,

as it appears to their Lordships, by Grant, not in his character of ship's husband, but as owner, and undoubtedly the relation of ship's husband never did, in fact, exist between Grant and the other creditors who were mentioned in this order. It appears to their Lordships that the view of the Chief Justice was right, that the effect of this order was to constitute Grant a trustee for the other creditors named from the date mentioned, and to give directions with respect to the taking of accounts; he is to be charged with certain items, and to be allowed—that is the expression—certain others. If one passes on to the rest of the clause, which does not appear to be governed by the expression "ship's husband" throughout, we find an express direction that the Plaintiff is to be charged on the one hand "with all the earnings, "profits, charter moneys, and freights of the "said vessel since the month of September "aforesaid," and then that he is to be allowed, *per contra*, "all necessary and proper outlays "for repairs, wages, premiums of insurance," &c., which are expressly mentioned. It appears to their Lordships that sufficient effect would not be given to these words by confining them, as has been suggested, to premiums of insurance upon freight. Their Lordships are of opinion, on the whole, that the Chief Justice was right in the view which he took of this provision in the charter.

The other questions raised were not the subject of any difference of opinion in the Court below, and it will be as well to refer to them in the order in which they were raised. Certain allowances are made to Mr. Grant for what is called interest and commission. Those are customary charges for a person who is in the management of the vessel to make, and they are spoken of as customary charges in one of the judgments in this case. On the whole, their Lordships see

no reason for disturbing the finding of the Court on this question.

Then it is further contended that the master ought not, as he has done, to have deducted—to have "allowed" is the term used in this order—to Mr. Grant a certain loss he has incurred on the cargo of coals taken in at Ardrossan. But it appears to their Lordships that the purchase of the coals was made for the benefit of the ship, for which no freight could be obtained, and that on the one side the master was right in charging the Plaintiff with the proceeds of those coals, and on the other hand he was also justified in allowing him the disbursements which were incurred in the obtaining of the cargo; and if, supposing that the balance had been gain, that should have been added to the whole amount divisible among the creditors, the balance being loss should, on the same principle, be deducted.

The next question, to some extent involved in the last, arises in this way: It is said that the master ought to have found the net proceeds of the sale of the vessel, and that that should have been distributed among the five creditors; that if he had found that there were any net earnings, that is to say, that the earnings had exceeded the disbursements, the excess of the earnings over the disbursements ought to have been added to the net proceeds of the sale, and divided also; but that if the disbursements exceeded the earnings he had no right to deduct the loss from the proceeds of the sale. If the question depended upon the first paragraph only of this order, that would seem to be a not unreasonable construction of it, for we find these words,—"It is ordered that the ship . . . . "be sold at public auction in Halifax on her "arrival, after public notice of such sale for a "period of eight days in two, at least, of the

" newspapers there, and by handbills, under the " direction of the master hereafter named, the " title of the said vessel to be conveyed to the " purchaser by the Plaintiff, as the registered " owner thereof, on such sale being completed; " the proceeds of such sale, after paying the " expenses of said advertisement and sale, to be " paid by the said master in the bank in the " name of the Accountant General of this Court, " to abide the order of this honourable Court;" not indeed that that is to be distributed, but it is to be paid into the bank to abide the order of the Court. But then follow these further words in the second paragraph:—" It is also further " ordered that the net proceeds of the said vessel " and of her earnings since September 1867 " shall be distributed at an equal pound rate " among the five mercantile firms," and so on. Then follow those provisions which have been read before.

The view which all the judges (whether there were two or three of them does not very distinctly appear) took of this provision is that which the master took; it is, in effect, as their Lordships understand it, that but one account was to be taken, and that on one side of that account were to be put the gross proceeds of the sale of the vessel and the gross proceeds of her earnings, and on the other side were to be put the expenses of the sale and all the disbursements properly incurred. In a case of this sort, in which, as their Lordships have before said, they appear to be dealing with an order which bears a good deal of resemblance to the award of an arbitrator, they are disposed to pay a great deal of attention to the view which was taken by the learned Judges below, who must have best understood what they themselves meant in making the order. If, indeed, the words of the order were incompatible with such a

construction, of course such a construction could not be adopted, but on the whole it appears to their Lordships that the wording of this order, which undoubtedly is somewhat ambiguous, is fairly reconcileable with the construction which the Judges themselves put upon it, and they are therefore of opinion that this ground of appeal ought not to prevail.

On the whole, their Lordships will humbly advise Her Majesty to affirm the judgment of the Court below, and to dismiss this Appeal.