[HOUSE OF LORDS.]

H. L. (Sc.) 1888 Dec. 18.

ROBERT MACKILL AND OTHERS . . . APPELLANTS;

AND

WRIGHT BROTHERS & COMPANY . . RESPONDENTS.

Ship—Charterparty—Marginal Note—Guarantee as to Ship's Capacity—Stowage of Machinery and Coal.

By a charterparty made between the respondents and the appellants it was agreed that the appellants' vessel should proceed to Glasgow and there "load all such goods and merchandise as the charterers should tender alongside for shipment not exceeding what she could reasonably stow and carry, &c." It was provided that the freight should be a lump sum of £2200, and the charterparty contained this guarantee: "Owners guarantee that the vessel shall carry not less than 2000 tons dead weight," and this provision: "Should the vessel not carry the guaranteed dead weight as above any expenses incurred from this cause to be borne by the owners, and a pro ratâ reduction per ton to be made from the first payment of freight." The cargo intended to be carried was a general cargo consisting in part of railway locomotive machinery, and a note was by consent of the parties written upon the margin of the charterparty specifying the "largest pieces" of machinery which were to be included in the cargo by number, weight, and measurement. The charterers tendered a cargo not in excess of 2000 tons dead weight, consisting of railway machinery, including locomotives and tenders, two parcels of coals, and general goods. The large pieces of machinery were much more numerous than specified in the marginal note. The vessel sailed with only 1691 tons dead weight. It was not disputed that she contained a carrying capacity up to the guarantee; and it was admitted that 2000 tons dead weight of the cargo tendered could not have been carried on the vessel unless the coal had been packed with the machinery, which was not done. The charterers claimed a deduction in the freight:—

Held (reversing the decision of the Court of Session), that the marginal note amounted to a representation, and the cargo being such a cargo as was not contemplated, and the fact being that the vessel carried less than the guaranteed dead weight because the charterers tendered large machinery in excess of their representation, they were not entitled to the benefit of the stipulation for reduction of the freight, and the whole lump freight was payable:—

Held, also (affirming the opinion of the Court of Session), that the stowage of coal among machinery without the consent of the shippers of the machinery and of the coal was not proper stowage, and that it was the duty of the respondents and not the duty of the appellants to obtain such consent.

APPEAL from the Second Division of the Court of Session (1), Scotland.

(1) 14 Court Sess. Cas. 4th Series, 863.

By charterparty, dated the 28th of May, 1886, entered into on behalf of the appellants, Robert Mackill, and others, Glasgow, owners of the steamship *Lauderdale*, on the one part, and the respondents, Wright Brothers & Co., of London, as charterers, on the other part, it was agreed that the ship, then on a voyage, should proceed to Glasgow, and there "load all such goods and merchandise as the said charterers or their agents shall tender alongside for shipment, not exceeding what she can reasonably stow and carry over and above her tackle, &c." The whole vessel was to be at the disposal, except room for eighty tons extra bunker coal, of the charterers for the conveyance of goods. By the charterparty the "owners guarantee that the vessel shall carry not less than 2000 tons dead weight of cargo." The vessel when loaded was to proceed viâ Suez Canal to Kurrachee. It was provided that the freight should be a lump sum of £2200; and "should the vessel not carry the guaranteed dead weight as above any expense incurred from this cause to be borne by the owners and a pro ratâ reduction per ton to be made from the first payment of freight." The charterers were to have the option of ordering the vessel from Kurrachee to Bombay, or vice versâ, with part cargo, in which case the freight should be £2400.

On the side of the charterparty was written the following unsigned note: "Including machinery, the largest pieces measure about say:

10	pieces	25.10	×	9.6	×	4.5	and weighs about	12	tons	12	cwt each.
10	„	20.10	×	8.1	×	5.1	„ „	10	„	6	„ „
5	„	36. 0	×	3.1	×	1.0	„ „	6	„	3	„ „."

The charterers tendered a cargo of 2000 tons dead weight, which consisted of, inter alia, railway machinery, including locomotives (in pieces), tenders, engine turntables, and two parcels of coal of 100 tons and 370 tons respectively.

The vessel arrived at Glasgow, and having unloaded her inward cargo proceeded to the General Terminus Quay, where on the 10th of June, 1886, she loaded in the bottom of 3 and 4 holds the two parcels of coal, and subsequently, from different quays, took in the machinery and general cargo. On the loading of the vessel being completed it was found that only 1691 tons dead weight of cargo had been shipped.

H. L. (Sc.) 1888 MACKILL v. WRIGHT BROTHERS & Co.

It was not disputed that the vessel contained carrying capacity for more than 2000 tons dead weight, or that that amount of cargo was supplied, but the appellants maintained that the short shipment was due to causes for which the respondents were responsible, and that the full freight was payable. The respondents contended that in any event the lump sum should suffer a deduction corresponding to the short shipment. In these circumstances the appellants raised this action for the balance unpaid amounting to about £451; of this sum the respondents admitted about £106 to be due. The only question was whether the respondents were entitled to a deduction for the freight.

In the proof adduced the respondents alleged and the appellants denied that it was 'proper stowage to stow coal among machinery, but this House held that to do so without the consent of the respective owners was not proper stowage. The other evidence given in the Court of Session is dealt with in the Law Peers' opinions. It substantially proved that the quantity of bulky machinery and awkward stowage tendered was much larger than specified in the marginal note: that some of the tender-frames were from 15 to 16 ft. long by 9 ft. broad and 6 ft. high, and were very slightly built, and that it was impossible not to have a waste of stowage with such a cargo, tendered as it was. The appellants denied that they understood the coal was to be packed among the machinery, and relied on two letters as shewing the intention of the respondents that the coal should go separately. One letter was dated 7th of June, 1886, from the respondents to Messrs. Niven & Co.: "As the coals we bought through you are for the bottom of the ship you had better arrange with Mr. Mackill to put them on board as soon as possible"; and the other letter was Messrs. Niven's reply, dated the 7th of June: "*Lauderdale.*—We have seen owners about the coals, and they are having them shipped on Wednesday, first." On the other hand, the respondents alleged that they intended the coal to go in the bottom of the ship in and around the machinery; but they admitted they sent no order to that effect to the stevedore. When the ship was partially loaded some discussion took place as to taking out some of the coal and placing it among the machinery, but the respondents did not

offer to bear this expense. It also appeared that the respondents, who were the owners of the parcel of coal of 370 tons, had sold those coals before they were shipped. Neither party asked the owners of the coal to allow it to be placed among the machinery. It was admitted that the eighty tons of extra bunker coal was placed on the top of railway machinery the day on which the vessel sailed. The stevedore was appointed by the respondents and paid by the appellants.

The Second Division of the Court of Session (1), on the 5th of July, 1887, adhering to the Lord Ordinary's (2) interlocutor (Lord-Rutherfurd Clark dissenting), gave judgment in favour of the respondents. The reasons of the Lord Justice Clerk and Lord Young are dealt with in the Law Peers' opinions; Lord Rutherfurd-Clark considered that a deduction could only be allowed either in the case of the shipowners not furnishing a ship of the requisite carrying capacity, or not loading a cargo which with proper stowage could be loaded up to 2000 tons; that no breach of the obligation in either respect had been committed by the shipowners, for they furnished a ship of the carrying capacity of 2000 tons and loaded all the cargo it was possible to load consistent with proper stowage, but that the charterer had not furnished a cargo which with proper stowage could be loaded to the extent of 2000 tons; the only condition on which that amount could have been loaded was that the machinery and coals should be stowed together; that that would have been improper stowage unless with the consent of the owners of the machinery and the owners of the coal, and that this consent ought to have been obtained by the charterers and furnished to the shipowners before either the machinery or coals were loaded.

On appeal.

1888. Nov. 13, 15. *Finlay*, Q.C., and *Leck*, for the appellants:—

The guarantee that the vessel will carry not less than 2000 tons is necessarily dependent upon a cargo being tendered which can be properly stowed, and the respondents tendered a cargo which could not be properly loaded. The machinery was materially

(1) 14 Court Sess. Cas. 4th Series, 863. (2) Lord Trayner.

H. L. (Sc.) 1888 MACKILL v. WRIGHT BROTHERS & CO.

different from what was stipulated for in the marginal note. The Lord Ordinary held that it was for the shipowners to obtain permission to stow the coal amongst the machinery. The fact seems to be clear that coal is broken when stowed among machinery, and that shipowners will not stow coal in this manner without the consent of the shippers. It was therefore the duty of the respondents before either coals or machinery were loaded to furnish the appellants with proper evidence of the necessary consent, and this they failed to do. Secondly, the appellants' contention is that the coals were loaded in the bottom of the ship in accordance with the intention of the respondents: see letters of the 7th of June, 1886; and it appears to have been an afterthought that the coals should be placed among the machinery. The fact that a full cargo was not carried was therefore the fault of the respondents, and no deduction for the freight ought to be allowed.

J. Gorell Barnes, Q.C., and *W. S. Robson*, for the respondents:—

The appellants are liable. The respondents were no doubt bound to tender a cargo which could be loaded on board the ship: but of the nature of that ship they knew nothing, and there was nothing in the charterparty binding them to supply any particular cargo. What they did was to send a list of the cargo which they reasonably considered could be carried. The appellants knew their ship, and the list of the goods enabled them to calculate if the whole cargo could go; if it could not, then they ought to have told the respondents so at once, and they would have sent other cargo. They neither did this nor consulted with the respondents as to how the cargo was to be stowed. They have therefore failed to comply with the terms of the charterparty, and cannot justly say "we have lost the freight through the charterers." It is not the duty of the charterer to obtain the consent of the owners of the coal and of the machinery to stow them together; but in fact the respondents gave their consent to this being done. The marginal note is not a list of the whole of the large pieces, but the measurement of the largest pieces, and the respondents have complied with it, and have sent no pieces larger than those named.

Finlay, Q.C., in reply:—

The shipowner cannot form an estimate of the space to be occupied before such a cargo as this is placed on the vessel. The marginal note is at least a representation; but assuming it not in existence, the charterer is bound to tender a cargo which can be properly stowed. In *Pust* v. *Dowie* (1) Blackburn, J., said: It has been "contended that there is a warranty that the ship is capable of taking 1000 tons (the capacity there guaranteed) of goods in any proportion of weight and measurement which the freighter chooses to furnish. But that cannot be, for it would put the shipowner at the mercy of the freighter. When a ship is loaded, three things are to be considered: the ship is to be full, it is to be loaded so that it may sink to a proper depth, viz., that of the water-line, and so that the centre of gravity may be in the proper place in order that the ship may not roll or labour or be top-heavy. These objects can only be secured by certain proportions of heavy and light goods being loaded on board. And therefore the parties must be taken to have intended that the capacity of the ship should be to take 1000 tons weight and measurement in reasonable proportions;" and his Lordship continued: "When a shipowner says, 'My ship will carry 1000 tons weight and measurement,' I think that means that the ship is of a capacity to hold 1000 tons of weight and measurement goods, furnished in fair proportions of the ordinary and usual goods of the port of loading." Mellor, J., said: "The ship being of the capacity warranted, it is the default" of the freighter "that, having the option of loading the ship as he chooses, he has not made the ship fully available." The stipulation here is, that the ship is capable of carrying not less than 2000 tons dead weight, and the respondents cannot successfully contend that it has not carried such weight.

LORD HALSBURY, L.C.:—

My Lords, the question in this case arises on a charterparty dated the 28th of May, 1886.

The owners of the screw steamer *Lauderdale* (the appellants)

(1) 5 B. & S. at p. 31.

H. L. (Sc.) 1888 MACKILL v. WRIGHT BROTHERS & Co. Lord Halsbury, L.C.

and the charterers (the respondents) agreed upon the face of that document that the *Lauderdale*, then on a voyage, should proceed to Glasgow and there load all such goods and merchandise as the charterers or their agents should tender alongside for shipment. The whole of the vessel was to be at the disposal of the charterers except room for eighty tons extra bunker coal.

By the charterparty the owners guaranteed that the vessel should carry not less than 2000 tons dead weight of cargo. It was also further provided that a regular stevedore and clerks, as customary, to be appointed by the charterers, should be employed by the owners to stow and take account of the goods received on board.

The freight was to be a lump sum of £2200; and it was provided that should the vessel not carry the guaranteed dead weight as above, any expense incurred from this cause to be borne by the owners, and a pro ratâ reduction per ton to be made from the first payment of freight.

I have omitted to notice for the moment the marginal note upon the charterparty with which I propose to deal separately.

The vessel reached Glasgow on the 5th of June, 1886. The cargo included machinery consisting of locomotives and tenders, and two parcels of coal of 100 tons and 370 tons respectively. On the loading of the vessel being completed it was found that only 1691 tons of cargo had been shipped.

The respondents maintain that the appellants are responsible for the short shipment, and claim a deduction proportionate to the amount by which the cargo fell short of 2000 tons.

My Lords, I have very great difficulty in reconciling the somewhat divergent views of the learned judges below with the conclusion at which they have nevertheless arrived.

The Lord Ordinary in terms finds the owners' guarantee is subject to the implied condition that the charterers shall tender for shipment 2000 tons of cargo of such a description as could to that weight be stowed in the vessel.

His Lordship proceeds to decide against the shipowners apparently upon the ground that the coal should have been stowed as was customary among the machinery in holds 1 and 2, the size and character of the machinery making it inevitable that large

spaces would be left unoccupied in the holds where it was stowed.

His Lordship finds as a fact proved that it is quite customary to stow coals among heavy pieces of machinery—provided that the owners or shippers of both coals and machinery consent to this being done. But he further holds that without such consent it is not customary, and would be improper stowage, for the consequences of which the owners would be liable not only at common law, but also under the stipulations of the charter-party in question.

The Lord Ordinary's judgment assumes that—given the machinery which in fact the charterers tendered and the quantity of coal—it would be impossible properly to stow cargo up to the guaranteed amount; this, together with the implied limit which the learned judge places on the guarantee, would lead to a conclusion the opposite to that at which the learned judge arrived. But the argument which appears to have decided the learned judge's view is that the appellants were bound to obtain the consent of the owner of the machinery and of the coals, and as it is admitted they did not obtain it, he holds them liable.

My Lords, this seems to be a wholly novel principle, and one to which I cannot assent. The charterers are to tender the cargo, and if, as the Lord Ordinary says, the owners' guarantee is subject to the implied condition that the charterers should tender for shipment 2000 tons of cargo of such a description as could to that weight be stowed, it is obvious to ask from what part of this contract am I to infer an obligation upon the part of the shipowners to procure the consents of different owners to that which it is admitted but for such consent would be improper stowage.

My Lords, I am unable to agree, as I have said, with the judgment of the Lord Ordinary, but it is consistent with itself, and if the principle insisted on, namely, the obligation to procure the consents existed on the part of the owners, I should agree in the conclusion.

I am not so certain that I am able to follow the reasoning of the Lord Justice Clerk or Lord Young. I find the Lord Justice Clerk, describing the cargo, and giving his exposition of the true

H. L. (Sc.) 1888 MACKILL v. WRIGHT BROTHERS & Co. Lord Halsbury, L.C.

construction of the guarantee to be that it was a guarantee applying to the capacity and not to the actual fact, points out that the stevedore acting on his own responsibility put the machinery into one part of the hold of the vessel and the coals into the other. Unquestionably by so doing, he says, a good deal of space was occupied by the machinery which ought to have been occupied by ordinary cargo. His Lordship adds: "It appears that the coals might have been packed with the machinery, so as to fill up the interstices of space, but that it does not appear that there was any duty on the stevedore to do it." His Lordship thinks that there was no sufficient evidence that the stevedore did not do anything but what was reasonable and right in the stowage, and that such a stowage might be injurious both to the machinery and to the coal. I cannot reconcile this series of propositions.

I can only understand the learned judge's judgment on the view that the guarantee on its true construction is an absolute guarantee to carry 2000 tons of cargo of whatever kind the cargo may be, and that, inasmuch as in fact the cargo fell short of that amount the owners are responsible, such a construction gives no effect to the words "dead weight."

Lord Young, on the other hand, holds that if the cargo presented can only properly be stowed to the weight of 1600 odd tons, that does not shew the vessel is not of a guaranteed dead-weight carrying capacity, because, whatever the dead-weight carrying capacity of a ship may be, it is quite plain that it would not carry any cargo up to that weight. The area of a ship will not carry anything just up to that.

To this view I entirely assent. The guarantee is the dead-weight carrying capacity, and no one acquainted with ships or mercantile usage could suppose that such a guarantee would involve the obligation to carry any sort of cargo whatsoever up to the guaranteed amount. The guarantee is as to dead weight. But I so far agree with Lord Young that if it could be truly asserted that both parties were acquainted with the nature of the cargo that was to be carried, it would be unreasonable in construing a mercantile contract of this character not to suppose that both parties used the general language with reference to

the particular subject-matter as to which they were contracting, but I fail to see that the learned judge is justified in holding that this was an ordinary cargo "exactly such as was expected," namely, coals and machinery. I am not quite certain in what sense I am to understand the adverb "exactly," or in a later part of his judgment the words "the very cargo." It seems to me that a serious question would have arisen without the aid of the marginal note, which I have reserved for special treatment: whether the disproportionate excess of bulk over dead weight would not have been so unreasonable as it would not, according to the ordinary mercantile understanding of such a contract, have been a reasonable cargo. But the marginal note upon the charterparty, whether part of the contract or not, seems to me to free the question from all doubt. It certainly was information afforded to the shipowners for the purposes of the contract, and I think I may invert the terms of the judgment of Lord Young: the cargo tendered was not "the very cargo," nor "exactly" such as was expected. The bulk so far exceeded the proportion of dead weight as indicated by the marginal note in question that the cargo tendered was not all the cargo expected of and represented to be in the declared contemplation, and I think the reasoning of the learned judge should have led to an opposite conclusion.

My Lords, I only notice for the sake of dismissing a suggestion made in argument before your Lordships, but of which I cannot find any trace in the courts below, that there was some breach of duty by the shipowners in not informing the charterers as soon as it was ascertained that the ship could not carry to the guaranteed amount with the cargo then being loaded.

I doubt very much whether till the loading was completed, or nearly completed, the shipowners could in fact conjecture how far the loaded cargo would fall short, if at all, of the guaranteed amount, but if they could, it appears to me that those who are responsible for tendering the cargo should have themselves ascertained from time to time what would be the ultimate effect upon the carrying capacity of the vessel of the goods that they were entitled to tender and which it is manifest the shipowners would have no right to refuse. Such a claim is an entire novelty

H. L. (Sc.) 1888 MACKILL v. WRIGHT BROTHERS & CO. Lord Halsbury, L.C.

for which no authority whatever was advanced, and would certainly be imposing upon the shipowner a new liability recognised by neither lawyers nor merchants up to the present time. I agree entirely with the judgment of Lord Rutherfurd-Clark.

My Lords, under these circumstances I move your Lordships that the interlocutor appealed from be reversed.

LORD WATSON:—

My Lords, by the contract of affreightment upon which this action is laid the appellants guaranteed that their steamship, the *Lauderdale*, would, over and above eighty tons of extra bunker coal, "carry not less than 2000 tons dead weight of cargo." With reference to that warranty it was stipulated that, "should the vessel not carry the guaranteed weight as above, any expense incurred from this cause to be borne by the owners, and a pro ratâ reduction per ton to be made from the first payment of freight." The latter clause simply imports that, should the charterers furnish a suitable cargo, within the meaning of the guarantee, and the vessel prove incapable, with proper stowage, of fulfilling it, her owners must allow a deduction from the slump freight, proportioned to the tonnage of cargo short-shipped, together with the costs occasioned by their breach of contract.

The construction of the guarantee is attended with more difficulty. The appellants undertake, in common form, to load "all such goods and merchandise as the charterers or their agents shall tender alongside, not exceeding what the vessel can reasonably stow or carry." To hold that the terms in which that obligation is conceived are necessarily conclusive in determining the kind of cargo which comes within the scope of the guarantee, would, in my opinion, neither be consistent with mercantile usage, nor with the principles of the law merchant. Business men are in the habit of making shipping contracts in these general terms for the purposes of a particular adventure; and wherever it appears that the precise nature of the cargo which the charterers had it in their contemplation to ship was mutually understood, and was in the view of both parties at the time when they contracted, it becomes matter of reasonable inference that

such an obligation as is involved in the guarantee given by the appellants was meant to apply only to cargo of that description. Of course no such inference can be admitted when it is inconsistent with the express or implied conditions of the charterparty. But in cases like the present it is competent to investigate the whole facts and circumstances attendant upon the execution of the charterparty, with the view of ascertaining what particular kind of goods, if any, it was then in the contemplation of both parties should be shipped and carried, that being the cargo with reference to which it must be presumed, in the absence of express or implied stipulation to the contrary, that the guarantee was given and accepted.

There is really no conflict of evidence with respect to the mutual understanding of the parties to this appeal, before and at the time when they contracted, regarding the character of the cargo which it was then intended that they should respectively provide and carry. It was to be a general cargo, consisting in part of railway locomotive machinery, some portions of which occupy an extent of stowage room out of all proportion to their dead weight. During the same meeting at which the charterparty was signed (whether before or after signature does not clearly appear) a note, unauthenticated by their subscription or otherwise, was by consent of both parties written upon its margin, specifying the "largest pieces" of machinery which were to be included in the cargo by number, weight, and measurement. These, as described in the note, were to consist of twenty-three pieces in all, of which twenty appear to have required about 375 tons stowage space, calculated at 40 cubic feet per ton, with an aggregate dead weight of 209 tons. For the purposes of this case, it is not necessary to consider whether the note in question ought to be regarded as pars contractus, or as an unsigned jotting, because in either view it leads, practically, to the same legal result. Assuming it to be a mere memorandum, it nevertheless amounts to a distinct representation by the charterers that the appellants would not be required, under their guarantee, to carry more than twenty-three pieces of machinery of the size and character which it describes. That being the case, if the fact that the *Lauderdale* did actually stow and carry only 1690 tons

H. L. (Sc.) 1888 MACKILL v. WRIGHT BROTHERS & Co. Lord Watson.

dead weight of cargo was attributable to the respondents having sent forward large machinery in excess of their representation, their claim to a rateable deduction from freight is as effectually barred as if the representation had been embodied in the contract and made an express condition of the guarantee.

It appears from the evidence of the witnesses for the appellants that, over and above the twenty-three pieces specified in the marginal note, there were forwarded for shipment by the respondents, and carried by the *Lauderdale*, no less than sixty pieces of large machinery, of the same description, consisting of ten tenders and ten tender frames, weighing about four tons apiece, the other forty pieces each weighing from two to four tons. That extra machinery was an awkward species of cargo, and if stowed by itself was calculated to interfere seriously with the dead-weight carrying capacity of the ship. When so stowed, the tenders alone must, according to the estimates given by different witnesses, have occupied from 186 to 240 tons of measurement space, in excess of their dead weight. No attempt was made by the respondents to impugn that testimony, either on cross-examination or in their own evidence.

The respondents, in their statement of facts, allege that, in the list of machinery which they furnished to the appellants for their guidance in loading the vessel, there were included two parcels of 100 and 370 tons of coal respectively, which they intended to be "stowed in odd places beside and among the machinery and locomotives, so as to fill up the spaces between the large pieces, and utilise the ship's space to the best advantage." That was admittedly not done; but they say that it ought to have been done, in accordance with mercantile usage; and an examination of their record and evidence has satisfied me that they offer no other substantial excuse for having shipped large machinery in excess of their representation. Mr. William Wright, one of the partners of the respondents' firm, who went to the ship and found that the coals and machinery had been kept separate, says, "I was very much surprised at that, because I expected to see the coals stowed amongst the machinery. That was our intention when we ordered the coals;" and he adds that it is "invariably done." That was obviously the

intention and belief of the witness and of his firm; and, at the trial of the cause before the Lord Ordinary, they adduced no less than eight witnesses with the view of proving that the packing of coals amongst machinery is proper stowage. Unfortunately for the respondents, the testimony of their own witnesses disproves their contention. It merely comes to this, that when coals are stowed along with machinery not much harm is done to the latter, but the damage to the coals may be considerable; that coals are frequently stowed in that manner by special arrangement between the parties interested in ship and cargo; and that in such cases it is usual for the shipowner to allow a deduction from the freight of the coals, varying from 2*s.* to 3*s.* per ton, in order to cover damages. It is in vain to represent a practice of that kind, depending upon special agreement, as constituting a proper mercantile custom; and upon this point I agree with the learned judges in both courts below, who were all of opinion that loading coals amongst machinery is improper stowage.

By the charterparty the appellants are made responsible to all concerned for improper stowage; but it was suggested in the argument for the respondents, and it appears to have been strongly urged in the Court of Session, that it was the duty of the appellants to obtain permission from the respective owners of the machinery and coals to stow them together. The suggestion appears to me to be utterly unreasonable. I am of opinion, with Lord Rutherfurd-Clark, that the respondents, if they desired the stowage to be in accordance with their own views, were bound to obtain the requisite permissions from all interested, and to furnish these to the appellants before the proper time arrived for loading the machinery and coals. That they admittedly declined to do, and therefore the cargo must be held to have been properly stowed within the meaning of the contract of affreightment.

There is only one other argument addressed to us on behalf of the respondents which I think it necessary to notice. It was said that whenever it became known to those engaged in loading the ship that she could not, owing to the character of the goods sent forward, carry 2000 tons dead weight, they were bound to

H. L. (Sc.) 1888 MACKILL v. WRIGHT BROTHERS & Co. Lord Watson.

make an intimation to that effect, so as to give the respondents an opportunity of substituting other goods for the extra machinery. But the respondents were fully aware of the terms of their contract, and of the representation which they had made in regard to the larger machinery. In my apprehension, it was for them to consider what amount or description of cargo they would furnish. So long as the goods which they chose to send alongside were capable of being properly stowed and carried, without danger to the ship or her navigation, the appellants could not reject them on the ground that they were not of the precise description contemplated in the guarantee. The appellants might be thereby released, either in whole or in part, from their undertaking to carry 2000 tons dead weight; but they would not have been justified in refusing to carry any safe and otherwise suitable cargo which the charterers might find it possible or convenient to ship.

I have accordingly come to the conclusion that the so-called failure of the appellants to fulfil their guarantee was due, not to any act of theirs, but to the act of the respondents; and that the judgments appealed from must therefore be reversed.

LORD MACNAGHTEN:—

My Lords, the question turns upon the true construction of a charterparty in some respects peculiar. It is a charter for the hire of a vessel for a lump sum from Glasgow to Kurrachee. It has a note in the margin as to the description of part of the proposed cargo, and it contains this guarantee, "Owners guarantee that the vessel shall carry not less than 2000 tons dead weight of cargo." In effect, the charterers say to the owners, "We want a vessel to carry to Kurrachee a general cargo, including parcels of machinery; we give you the dimensions and number of the largest pieces; will your vessel carry 2000 tons dead weight?" The owners say "It will." That is, I think, something more than a mere guarantee of carrying capacity. It is a guarantee of the vessel's carrying capacity with reference to the contemplated voyage and the description of the cargo proposed to be shipped, so far as that description was made known to the owners.

It is not disputed that the *Lauderdale* possessed a carrying capacity of more than 2000 tons dead weight.

It is admitted that the *Lauderdale* did not, in fact, carry 2000 tons.

It is admitted that a cargo up to but not in excess of that weight, and consisting partly of machinery and partly of coal and other goods, was tendered by the charterers.

It is not disputed that the cargo so tendered could not have been carried on the *Lauderdale*, unless the coal had been packed with the machinery.

Though not admitted by the charterers, it is, I think, clear upon the evidence, and proved even by the testimony of the charterers' witnesses, that it is not proper stowage to pack machinery and coal together. The coal is invariably crushed and injured. The machinery generally suffers too, especially if the coal be damp or the machinery of delicate construction.

Further, it seems to me that the fair result of the evidence is, that in regard to the machinery which was tendered for shipment and shipped, the cargo was not such a cargo as was contemplated by the charterparty. It contained more large pieces; it was more bulky in comparison to its weight, and it was more awkward for stowage than the terms of the charterparty would naturally have led the owners to expect.

These being the material facts of the case, the clause in the charterparty on which the question turns remains to be considered. The charterparty has this provision:—"Should the vessel not carry the guaranteed dead weight, as above, any expense incurred from this cause to be borne by the owners, and a pro ratâ deduction per ton to be made from the first payment of freight."

What is the meaning of this provision? What is the event contemplated? Is it the case of the vessel (1) not actually carrying 2000 tons dead weight from any cause whatever; or (2) not carrying that weight from any cause not attributable to the charterers?

I think it would be unreasonable to read the provision as allowing abatement in the freight in every case of short weight. Such a construction would place the shipowners at the mercy of

H. L. (Sc.) 1888 MACKILL v. WRIGHT BROTHERS & Co. Lord Macnaghten.

the charterers. They might fill the whole space at their disposal, and yet the cargo might be much under the contemplated weight, and so the shipowners would lose their full freight without any fault on their part.

I think that the provision was intended to have effect in the event of the vessel not carrying the specified weight, assuming the cargo tendered to be such a cargo as was contemplated by the charterparty, that is, an ordinary general cargo with a fair and reasonable proportion of machinery corresponding as to the largest pieces with the numbers, dimensions, and weights specified in the margin of the charterparty. In other words (to put it most favourably for the charterers), the provision was to come into effect in the event of the vessel not carrying 2000 tons dead weight from any cause not attributable to the charterers.

I think that the loss of cargo space and the short weight of the cargo carried on the *Lauderdale* were attributable to the charterers. It was their doing; I do not say it was their fault. They have committed no breach of the charterparty. They were not bound to load a full and complete cargo, and no blame, therefore, in the proper sense of the word attaches to them. But I do not think that they could take advantage of the stipulation for reduction of freight unless they tendered a cargo of the contemplated description and not in excess of the specified weight. They did tender a cargo of proper weight, but it was not of the contemplated description, and the result was that that cargo could only be stowed on board if stowed improperly. The charterers were at liberty to load the vessel with such goods as they pleased not inconsistent with the intention of the charterparty. They did not take the trouble to avail themselves of the whole space at their disposal. Why should the shipowners be fined for that?

I think that the charterers were altogether wrong in contending that the shipowners ought to have obtained the consent of the owners of the machinery and the consent of the owners of the coal to a method of stowage which would have been improper without the consent of both. I am unable to understand how any obligation of that sort could fall on the shipowners.

It was said that the shipowners placed some coal of their own,

for which space was reserved by the charterparty, among the machinery. But that does not prove that it was a proper thing to do. The observation seems to be matter of recrimination rather than argument.

It was urged by the learned counsel for the respondents that the charterers knew nothing about the vessel except what was told them in the charterparty. After the charter was signed they gave the shipowners in ample time a list of the goods they proposed to ship, specifying weight and dimensions. With this list before him the stevedore, it was said, had as good means of judging whether the whole 2000 tons could be shipped as if the goods had been arranged on the quay alongside. It was contended that the shipowners and the stevedore ought to have prepared a scheme for loading the vessel, and that when it was found that the whole quantity of cargo could not be shipped, the shipowners ought to have communicated with the charterers and given them an opportunity of altering or re-arranging the cargo. Now, that might have been a reasonable course for the owners to have taken; I say nothing to the contrary. But advice unsought is not always welcome, and I am not sure that if any such advice had been given to the charterers they would not have told the shipowners that it was their business to take the cargo and stow it the best way they could. Of course, the shipowners knew more about their vessel than the charterers. But the charterers ought to have known more about the cargo they proposed to ship. There is no evidence tending to shew that the vessel was of peculiar construction or different in any respect from what a charterer with the charterparty before him would have been led to expect. I cannot help adding that if the charterers really felt so much in the dark and so helpless as they are now represented to be, it would have been more natural for them to have consulted the shipowners and the stevedore than to have waited for advice, without giving any intimation that advice was expected or that advice would be well received.

Neither the appellants nor the respondents were, I think, conspicuously reasonable. But the respondents were the more unreasonable of the two, and, what is more to the purpose, I think

H. L. (Sc.) 1888 MACKILL v. WRIGHT BROTHERS & Co.

they took a wrong view of the construction of the charterparty, and of their own position.

I therefore agree that the appeal ought to be allowed.

Interlocutors appealed from reversed with costs, and cause remitted to Court of Session with directions to give the appellants decree for the sum claimed by them, together with their expenses in the Court of Session.

Lords' Journals, 18th December, 1888.

Agents for the appellants: *Lowless & Co., for Webster, Will, & Ritchie, S.S.C., Edinburgh.*

Agents for the respondents: *Stibbard, Gibson & Co. for Boyd, Jameson, & Kelly, W.S., Leith.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1889 *April* 8.

HOOD AND ANOTHER . . . . . APPELLANTS;

AND

MURRAY AND OTHERS . . . . . RESPONDENTS.

Succession—Nearest of Kin—Vesting—Post-nuptial Contract—Proceeds of Sale of Heritage by Minor moveable or heritable—Moveable Succession (Scotland) Act (18 & 19 *Vict. c.* 23).

By post-nuptial contract, dated 1840, husband and wife conveyed their whole property (then consisting of moveables) each to the other in the event of his or her surviving, in liferent, and to their children in fee. The deed declared that the spouses reserved power severally to dispose of their respective estate by testament to take effect at the expiration of the liferent, "in the event of there being no children alive at the death of the predecessor, or dying in the lifetime of the survivor" of the spouses. A second declaration provided that in the same events and failing any such testament, then the whole estate "belonging or which may belong to the said husband shall fall to and become the property of his own nearest-of-kin;" a similar declaration provided as to the wife's property.

The husband purchased heritable estate in 1848, and died in 1858, without making any testamentary provision, survived by his widow and one child. This child died in 1863 of full age survived by an only son who was born in 1862. In 1877 the surviving spouse sold the heritable estate for £7500, executing a conveyance to the purchasers with the consent and