

been established, and this would certainly be the first case in which it would be established against the representatives of a prior heir for acts done by him in dealing with the estate, and I confess if it were sustained I do not see to what length that principle might not go. I am therefore of opinion with your Lordship on the general grounds stated, that this claim cannot be entertained.

We had a good deal of argument upon another point pleaded by the pursuer, who maintained that even if they were not entitled to succeed under this doctrine of implied obligation to restore the house, that because of the Marquis of Breadalbane's actings, in having entered into contracts with builders, and having materials on the ground and otherwise, there was some vested right in the pursuer to have these acts continued. That argument was founded upon cases as between heir and executor, in which class of cases the question arose between parties who had a legal right to the succession of the estate with reference to the particular position in which the testator had left his estate. I am of opinion—and I presume in saying so I express the opinion of all your Lordships—that these cases have no application to the present, and that there was nothing in the actings of Lord Breadalbane which could give these pursuers the right as beneficiaries or *quasi* beneficiaries to insist on this building being completed if there be no legal obligation to do so. I have noticed that point in case it should be observed that the argument had not received full notice, but I rather believe your Lordships' reason for not commenting upon it was that you did not think that that was an argument that could be maintained.

The Court adhered.

Counsel for the Pursuer (Reclaimer)—Kinnear—Lorimer. Agents—Davidson & Syme, W.S.

Counsel for the Defenders (Respondents)—Balfour—Graham Murray. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Friday, March 16.

FIRST DIVISION.

[Sheriff of Lanarkshire.

STEEL & CRAIG v. THE STATE LINE STEAM-SHIP COMPANY.

Ship—Contract of Affreightment—Liability—Exception—Negligence.

Terms of a bill of lading which were held sufficient to free shipowners of their liability at common law for damage done to goods through the negligence of the seamen employed by them.

Opinion, that conditions of such a nature must be distinctly expressed, and that the clauses of the bill of lading must be construed *contra preferentem*, although not to be subjected to a critical verbal interpretation.

This was an action brought against the State Line Steam-ship Company by Steel & Craig, grain merchants in Glasgow, for a sum of £4000, being the amount of the damage done to

a cargo of wheat shipped by the pursuers on board of one of the defenders' ships for transit from New York to Glasgow. The sum concluded for was afterwards by minute restricted to £2793, 4s. 6d. The bill of lading, after narrating the quantity shipped, &c., ran thus—"Not accountable for leakage, breakage, sweating, rust, rain, spray, decay, or damage by vermin, slightness or insufficiency of packages, stowage, or contact with or smell or evaporation from any other goods, inaccuracies, obliterations, or absence of marks, numbers, address, or description of goods shipped, injury to wrappers, however caused. Not responsible for the bursting of bags, or consequences arising therefrom, or for any of the following perils, whether arising from the negligence, default, or error in judgment of the pilot, master, mariners, engineers, or persons in the service of the ship, or for whose acts the shipowner is liable or otherwise—namely, risk of craft or hulk, or transshipment, explosion, heat, or fire at sea, in craft or hulk, or on shore, boilers, steam or machinery, or from the consequences of any damage or injury thereto, howsoever such damage or injury may be caused, collision, straining or other peril of the seas, rivers, navigation or land transit, of whatever nature or kind soever and howsoever caused, excepted." Issues were adjusted, and the case was sent for trial by jury, but by agreement of parties a special verdict was returned. In so far as material, that verdict is quoted in the Lord President's opinion. The damage was found to have been caused by the negligence of some of the mariners employed by the defenders; and, on the motion of the pursuers to enter-up the verdict for them, the question came to be—Whether the terms of the bill of lading did or did not include damage so caused among the things for which the shipowners declared themselves not responsible.

The pursuers argued—The clause of the bill of lading must be read in three, or at least in two, distinct sentences—the first beginning with the words "not accountable" and going down to "wrappers, however caused;" the second, from "not responsible," to "may be caused;" and the third, from "collision" to "excepted." If there are only two branches, the second will begin at "collision." By this reading, the words "peril of the seas" will not be affected by the clause as to the negligence of the shipowners' servants. Now, if that be so, this accident is not excepted; for it cannot be said that it was caused by a "peril of the sea"—that always presumes some extraordinary violence of the elements, which certainly did not occur here. In a contract of insurance "peril of the sea" might have a much wider meaning, but it is quite settled that in contracts of affreightment and of insurance the term is used in different senses. Unless there is express discharge of liability for the negligence of servants, it cannot be presumed to be discharged.

Authorities—Story on Bailments, p. 512; Parsons on Contracts, ii. p. 307; Addison on Contracts, p. 730; *Lloyd v. The General Iron Screw Collier Coy.*, L.J. 33 Excheq. 269; *Moes, Moliere & Co. v. Tromp*, July 5, 1867, 5 Macph. 988; *Stevenson v. Henderson*, Nov. 25, 1873, 1 Rettie 215, H. of L. June 1, 1875, 2 Rettie 71; *Grill v. General Iron Screw Collier Coy.*, L.R. 1 Com. Pl. 600, and 3 Com. Pl. 476; *Ohrloff v. Briscall*, 1

L.R. Priv. Council, 231; *Lyon v. Mells*, 5 East. 428; *Nugent v. Smith*, L.R. 1 C.P. Div. 423.

The defenders argued—The question is, Do parties wish to stand on their common-law rights and liabilities, or to contract themselves out of these and put themselves in a peculiar position? Now, if this bill of lading be construed, not with a strict critical interpretation like a deed drawn and revised by lawyers, but with regard to the position and intention of parties, it is plain that the shipowner intended to free himself from liability for everything except a seaworthy ship. This is not certainly a peril of the sea in the ordinary sense, but by the contract it is made one.

Authorities—Abbott 339; *Davidson*, 4 L.R. Com. Pl. 117; *Redman v. Wilson*, 14 Meeson and Welsby 476; *Dixon v. Sudler*, 8 Meeson and Welsby 895, and 5 Meeson and Welsby 405; *Duero*, 2 L.R., Adm. and Eccles. 393; *P. & O. Steam-ship Coy. v. Shand*, 3 Moore, P.C. Reps., N.S. 272; *Carr*, 21 L.J. Excheq. 261; *Austin*, L.J. 21 Com. Pl. 168; *M'Cawley v. Furness Railway Coy.*, L.R. 8 Q.B. 57.

At advising—

LORD PRESIDENT—By bill of lading, dated at New York on 31st August 1875, the defenders undertook to carry 15,000 bushels of wheat from New York by the ship "Virginia," to be delivered to the pursuers of this action in Glasgow. The special verdict finds "that the defenders did carry the said wheat to the port of Glasgow in the said steam-ship, and did there deliver the same to the pursuers;" but also finds "that the said wheat when so delivered was not in the like good order and condition in which it was when shipped at New York, but was damaged by sea-water;" and further, goes on to find "that, through the negligence of some of the crew, one of the orlop-deck ports of the said steam-ship was insufficiently fastened, and that in consequence the said sea-water was thereby admitted to the hold after the ship had been five days at sea: Find that, as the ship was loaded, the said port was situated about a foot above the water-line, and that if properly fastened by means of the screws thereto attached, the said port would have been water-tight throughout the voyage." Now, if we had been dealing with an ordinary contract of affreightment—that is, with a bill of lading in the form to which we used to be accustomed—the effect of this special verdict would not be doubtful, because it is by the negligence of the mariners that the damage was caused. For such negligence there is not the slightest doubt that the shipowners are at common law liable, independently of express stipulations in the contract of affreightment. But this case has been brought before us in consequence of the very peculiar terms of the bill of lading. The bill of lading stipulates in the usual form that the goods are to be delivered at the port of destination in the like good order and condition in which they were received at the port of loading. Then there follows a very long and special clause enumerating various perils and risks of damage for which the shipowners are not to be liable, and indeed it is conceded by the shipowners that the object of this clause was to save them from all liability for failure to deliver the cargo in the like good order and condition in which they received it, except for the unseaworthiness of the vessel.

VOL. XIV.

If they supplied a vessel that was tight, staunch, and strong, well manned and equipped for the carriage of goods, they say they are then free from all liability. Now, that is not an illegal contract. The shipowners and the shippers may, if they like, stipulate that they shall not in effect be liable for the obligations which such a contract involves at common law; but it is indispensable that the conditions must be distinctly and clearly expressed—they must be interpreted *contra preferentem*. But there is another consideration, viz., that the bill of lading must not be subjected to a critical verbal interpretation. Such documents are not expressed with grammatical accuracy or logical precision, and therefore we must not construe them critically.

The question then comes to be—Whether the shipowners have stipulated effectually that they shall not be liable for damage done to the cargo by sea-water through the negligence of the mariners. That question involves an examination of the bill of lading. The first part of the clause is not material. A new sentence begins at the words "not responsible," and it is here, if anywhere, that the exemption from this special risk must be found. It runs thus—"Not responsible for the bursting of bags, or consequences arising therefrom, or for any of the following perils." Then occur some words which are plainly in parenthesis, and which I shall at present omit. Then the bill of lading goes on—"namely, risk of craft or hulk, or transshipment, explosion, heat, or fire at sea, in craft or hulk, or on shore, boilers, steam or machinery, or from the consequences of any damage or injury thereto, howsoever such damage or injury may be caused, collision, straining, or other peril of the seas, rivers, navigation or land transit, of whatever nature or kind soever, and howsoever caused, excepted." The contention of the defenders is that the particular risk in that enumeration under which the present case falls is "peril of the seas;" but this special verdict would under ordinary circumstances completely negative that contention, for it is thereby found that what injured the cargo was not a peril of the sea. No doubt it was such damage as is received at sea, and could hardly occur elsewhere; but the efficient cause was the negligence of the seamen, and therefore it is only by going back to the parenthesis and reading it in with what I have read that the owners can in the circumstances get the benefit of this clause. The words in parenthesis are—"Whether arising from the negligence, default, or error in judgment of the pilot, master, mariners, engineers, or persons in the service of the ship, or for whose acts the shipowner is liable, or otherwise." The defenders accordingly contend that they are exempt from every peril of the sea caused by the negligence of the mariners. It is difficult, I confess, to say that that is not the fair interpretation of this clause. A peril of the sea caused by the master or mariners ceases in ordinary legal principle to be a peril because it is so caused, but this clause stipulates, as it seems to me, that although so caused, it is still to be held to be a peril of the sea, and therefore it seems to me that even when you construe the clause *contra preferentem*, this is one of the risks that was provided against. It was contended by the pursuer, and indeed it was the main point of his argu-

NO. XXVIII.

ment, that the clause I have read was to be read as two, not as one, thus—"Not responsible for the bursting of bags, or consequences arising therefrom, or for any of the following perils—whether arising from the negligence, default, or error in judgment of the pilot, master, mariners, engineers, or persons in the service of the ship, or for whose acts the shipowner is liable or otherwise—namely, risk of craft or hulk, or transshipment, explosion, heat, or fire at sea, in craft or hulk, or on shore, boilers, steam or machinery, or from the consequences of any damage or injury thereto, howsoever such damage or injury may be caused. Collision, straining, or other peril of the seas, rivers, navigation or land transit, of whatever nature or kind soever, and howsoever caused, excepted." If that is the true reading, these "perils of the sea" would fall to be read in the ordinary meaning of the term, and that risk could not be qualified by the words occurring in the former part of the clause. That was a very ingenious suggestion, and was very ably argued to us. Its greatest support was the occurrence of the word "excepted" at the end of the clause. If the clause is one and not two, that expression is pleonastic, for it expresses no more than the opening words "not responsible." But I think its presence can be otherwise accounted for. There is no doubt that in the bills of lading to which we used to be accustomed, the excepted risks used to be enumerated, and the clause ended with the word "excepted." While they have introduced this long string of exceptions, beginning with the words "not responsible," into the bill of lading, its framers have left the word "excepted," which is no longer necessary, standing. But its presence does not, I think, enable us to read the clause in the sense contended for by the pursuers. I therefore have come to be of opinion that the defenders must have the benefit of this clause, and the verdict must be entered for them. I cannot say that I have come to this conclusion without regret, for I am sure that the limitation of shipowners' liability in this way is likely to lead to much negligence and disastrous consequences. But if parties will contract in such terms, I can do nothing to prevent them.

LORD DEAS, although with much difficulty and reluctance, concurred, on the ground that the interpretation suggested by the pursuers for this clause leads to the extravagant result that exceptions from the responsibility of the shipowners were themselves excepted.

LORD MURE and LORD SHAND concurred, the latter observing that even upon the pursuers' own reading of the bill of lading, they were not entitled to succeed. His Lordship at the close of his opinion said—But even if the clause is to be read as the pursuer contended—that is, is to be broken up into three branches, and each part disconnected from the other—I am of opinion that in respect of the words "howsoever caused" the shipowner is exempted from liability, for he has thereby stipulated that he is free from liability for perils of the sea however they may be caused. These words must have some force, and the pursuers' argument gives them none. The shipowner is already freed from responsibility for ordinary

perils of the sea, and these words must, I think, cover the only peril not already covered, viz., peril caused by the negligence of the seamen or master. The force of these words is not now for the first time before a court, for in the 21st vol. of the *Law Journal* (Common Pleas), p. 179, I see they received the interpretation I think they should receive here, in the case of *Austin*. I observe, too, that in the case of *Philips v. Clark*, *Law Journal* (Common Pleas), 26, p. 168, which was a case where leakage and breakage caused by the defenders' servants was the cause of the damage, Mr Justice Crowder observes—"It is said that the captain's intention was to free himself from all responsibility. In order to do that he ought to have expressed in clear terms that he was not to be liable for leakage or breakage arising from whatever cause." These are substantially the same words as are used here. And in the case of *Lloyd* the present Mr Justice Brett in the course of argument makes the observation that the words "however caused" are "a well-known form often adjudged upon." On the whole, I think that though this may have been an imprudent contract, it can receive no other interpretation than that which your Lordships propose to give it.

Verdict entered for defenders.

Counsel for Pursuers—Balfour—Mackintosh.
Agent—John Henry, S.S.C.

Counsel for Defenders—Asher—Jameson.
Agents—Webster & Will, S.S.C.

Wednesday, March 14.

[Bill Chamber.

SECOND DIVISION.

BAIRD v. KERR.

Interdict—Property—Sea-shore—Sea-ware.

B., who held lands bounded by the sea, under titles which gave him the sole and exclusive right to sea-ware *ex adverso* of the lands, applied for interdict against K., who, he alleged, had paid the inhabitants of a neighbouring village to gather the sea-ware and remove it to a short distance from the beach, whence K. carted it to his farm. K. answered that he bought the sea-ware in open market from the villagers, who claimed right to gather it. Interdict refused.

This was a suspension and interdict at the instance of William Baird, Esq. of Elie, Fife, against Hugh Baird, farmer, Abercrombie, St Monance, praying the Court "to interdict, prohibit, and discharge the respondent from collecting, removing, or carting away, by himself or others acting with his authority or on his behalf, sea-ware from the sea-shore or beach *ex adverso* of the complainer's lands and estates of Elie, Ardross, St Monance, and Pittenweem, in the county of Fife, or any of them, and also from carting or taking away sea-ware which has been in the knowledge of the respondent, or the persons acting on his behalf, gathered by others from the said sea-shore or beach, and removed to a short