Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mary Elizabeth Allen and John Henry Allen, her husband, v. *the Quebec Warehouse Company, from the Court of Queen's Bench, Lower Canada; delivered November* 18*th*, 1886.

Present:

LORD FITZGERALD.
LORD HERSCHELL.
SIR BARNES PEACOCK.

THIS is an appeal by Mary Elizabeth Allen and John Henry Allen, her husband, Plaintiffs in an action brought by them against the Quebec Warehouse Company, to recover damages for an injury sustained by a ship belonging to the female Plaintiff in the month of November 1880. The action was brought in the Superior Court of the Province of Quebec, and the Judge of first instance dismissed the action. The Plaintiffs then appealed to the Court of Queen's Bench of the province and that Court affirmed the judgement of the Court of first instance. The present Respondents, who were the Defendants in that action, themselves brought an action against the present Appellants to recover damages for the injury which their quay and appliances had sustained owing to the same disaster, which action was likewise dismissed in both Courts. There is no appeal so far as regards the decision in that action, and their Lordships have only to deal with the first action, viz., the action of Mrs. Allen and her husband against the Quebec Warehouse Company.

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It appears that about the 3rd of November 1880 Mrs. Allen entered into a contract with the Respondents for a mooring berth for a vessel called the "Bridgewater" at the Respondents' wharf and booms; and that contract being entered into, the "Bridgewater" was placed in position and moored, and remained so moored until the 21st day of that month, when, during stormy weather (the nature of which will be referred to hereafter), the vessel broke adrift, the post or a portion of the post to which the vessel was moored was drawn out from the quay, and, owing to this, the vessel sustained very considerable injury. An action was brought to make the Defendants liable for that injury, the foundation of the action being that the disaster arose from the fact that the post was rotten and not fit for the purpose for which it had been used and was intended to be used. Both the Courts below have taken a view unfavourable to the Appellants upon the facts, and no question of law appears to their Lordships really to be in dispute, or to have been dealt with in any way erroneously by the learned Judges in the Courts below. It does not appear to their Lordships to be necessary to consider whether the contract which was made in the present case was a lease or hiring within the terms of the Civil Code of Lower Canada to which their attention has been called, nor to say whether, strictly speaking, there was a warranty such as has been contended for, because their Lordships think there can be no doubt what the character of the contract made between the parties substantially was. Whether it be called a warranty or not, there can be no doubt that inasmuch as the Respondents gave the Appellants for valuable consideration the use of their mooring appliances to moor the Appellants' vessel, it was an essential part of that contract that the mooring appliances, taking them altogether, were fit and proper for

ordinary use by prudent persons, and were not in such a condition that if properly used the vessel which moored to them would suffer from reliance being placed upon them. On the other hand the Company who gave to the Appellants the use of these mooring appliances had equally a right to expect that the mooring appliances as a whole would be used in the manner in which a prudent and reasonably skilful person would use such appliances; and their Lordships can see no reason to think that any erroneous view in regard to the true relation of the parties was taken by either of the Courts below. No doubt the obligation may be expressed in different ways, and it may be to some extent a question of words, whether it is spoken of as an essential part of the contract, or as a warranty or in any other particular way; but looking at the substance of the matter, their Lordships see no reason to suppose that the Courts below have dealt with it erroneously.

The case put by the Appellants in their factum is thus stated at page 98: "It is obvious, "from the nature of Respondents' business, "that under their contract with the first Ap- "pellant they warranted that their wharf, "booms, and block, and the mooring posts "upon them were in good order and condition, "and sufficient for the purposes for which they "were intended. Their obligation went un- "doubtedly to this extent, and for any failure "in this respect on their part occasioning loss, "they would be liable, assuming that there was "no contributory negligence by the other party. "On the other hand it was incumbent upon the "people of the ship to moor her skilfully and "properly, in reliance, however, upon the sound- "ness of the gear provided by the wharfinger." That is the statement of their view of the law by the Appellants, and that view seems to have

been the one dealt with by the Courts below in considering the facts of the case.

Their Lordships having arrived at the conclusion that there has been no error in point of law, the sole question that remains for determination is whether the judgement of the Court below ought to be reversed on the ground that the Judges have taken an erroneous view of the facts. Now, it has always been the view taken by this Committee in advising Her Majesty, when the question for determination has been whether the concurrent judgement of the Judges who have been unanimous below should be supported or reversed, that unless it be shown with absolute clearness that some blunder or error is apparent in the way in which the learned Judges below have dealt with the facts, this Committee would not advise Her Majesty that the judgement should be reversed. That principle has been laid down in many cases. On this point the observations of Lord Kingsdown reported in 11, Moore's Indian Appeals, p. 207 may be quoted. "It is not," he says, "the habit of their Lordships, "unless in very extraordinary cases, to advise "the reversal of a decision of the Courts of "India" (and the principle is equally applicable to other Courts) "merely on the effect of evidence "or the credit due to witnesses. The Judges "there have usually better means of determining "questions of this description than we can have, "and when they have all concurred in opinion "it must be shown very clearly that they were "in error in order to induce us to alter their "judgement." And Lord Cairns uses these words in delivering the opinion of their Lordships in a subsequent case, 11, Moore's Indian Appeals, p. 338. "Now, the learned Judges in the Courts "below, the two Judges in the primary Court, and "the three Judges in the Court of Appeal, have all "arrived, without hesitation, at the conclusion

" that the debt of 43,674 rupees was not a *bona* " *fide* debt due from Obhoy Churn, and it would " be far from consistent with the rules which " their Lordships have always laid down in " dealing with cases of this kind for them to " reverse a decision upon a question of fact " thus unanimously arrived at by five Judges " unless the very clearest proof were adduced " to their Lordships that that decision was " erroneous. It is true that only the two " primary Judges had before them the witnesses " or the witness who were or was examined, " but the three Judges of the Court of Appeal, " conversant with testimony of the kind which " has to be dealt with in this case, were of " opinion that the two Judges of the Court " below had arrived at a just conclusion upon " the evidence that was adduced." Their Lordships entirely adhere to the views thus expressed, and therefore they do not consider that the question they have to determine is, what conclusion they would have arrived at if the matter had for the first time come before them, but whether it has been established that the judgements of the Courts below were clearly wrong. Now, taking the obligation to be that to which attention has already been called, the question raised by the case is, whether the learned Judges were wrong in holding that the Appellant's claim was not well founded, inasmuch as the disaster which occurred was not solely due to the imperfections of the post which was said to be imperfect, but was due, in part at all events, to other causes for which the Appellants were themselves to blame. No doubt with regard to the condition of the post there was a great deal of evidence tending to show that it was more or less unsound; and there was evidence of weight tending to show that the unsoundness was considerable, though

that evidence was certainly not of the definite character which their Lordships would have desired. It is to be observed that the Court below had the opportunity (whether it was exercised or not their Lordships are not aware) of looking at the piece of the post itself, so as to be able by their own eyes to test to some extent the evidence given by the witnesses, which was of a very contradictory character. That is an advantage which they had which their Lordships on the present occasion do not possess. But taking it to be established that the post was more or less infirm, that does not dispose, as the Appellants have contended it does, of the whole case. If it rested upon that alone, no doubt a very strong case was established on the part of the Appellants; but the question then arises whether in the circumstances which existed prior to the disaster the Appellants were entitled to trust solely to the particular post to which their vessel was attached, and to say that the vessel was properly moored, and that they were using the appliances, of which they had obtained the use, in a proper manner, by mooring the bow of the ship to that post and to that post alone. Upon this point again there was contradictory testimony. There was some evidence that, being moored as they were to the one post alone, they were properly moored, but there was evidence of a weighty character to the contrary; and what their Lordships would desire specially to point to is this, that the question is not whether it was proper at any time or under any circumstances to moor to the one post alone. It may well be that under certain circumstances and at certain times the post was sufficient for the purpose, and indeed it proved itself to be so, for it held this very ship in position for many days. But then arose circumstances of a different character, viz., a gale, called by the master a

violent gale, by the mate a strong gale, or a fresh gale,—it matters not what designation be given to it—and undoubtedly with the gale there was also in the same direction a strong tide, both forcing the ship the same way. Under these circumstances was it a prudent and proper use of the appliances put at the Appellants' service under the contract to continue moored to one post only? There is strong evidence that it was not. The evidence on the point is contradictory, but their Lordships are not prepared to say that the Courts below were wrong in holding that the true conclusion was that, under the circumstances which existed shortly before the disaster, those who had the use of the mooring appliances were not using them in a reasonably skilful and prudent manner. If that conclusion be the right one, and if it has not been shown (and their Lordships think it has not been shown) that if the mooring appliances had been used in a proper and skilful manner, the accident would nevertheless have happened by reason of the rottenness of the post, their Lordships' view is that the judgements of the Courts below cannot be disturbed, and their Lordships will therefore advise Her Majesty that the judgement appealed from be affirmed and the Appeal dismissed with costs.