

Thursday, March 11.

THE LORD ADVOCATE v. THE CLYDE STEAM  
NAVIGATION COMPANY.

(Before Lord Chancellor Cairns, Lords Hatherley,  
and O'Hagan.)

(*Ante*, vol. x. p. 265, 21st Feb. 1873, 11 Macph. 440.)

*Merchant Shipping Act, 1854, 17 and 18 Vict. cap.  
104, sec. 21, sub-sec. 4 and 5—Ship Measure-  
ment—Registered Tonnage—Permanent closed-in  
Space—Spar-deck.*

Certain alterations made on a steam vessel necessitated a new registration owing to increase of tonnage thereby. The ship carried an awning deck above the main or tonnage deck, and separated from the fore-castle by two gaps completely extending across the vessel, these gaps being only closed by moveable hatches, not fastened down and not water-tight. Held that the space between the awning deck and the main-deck did not fall to be reckoned in computing the increase of tonnage, as it was not (1) a "permanent closed-in space" in terms of sub-section 4 of the Act; and (2) that it was not a "third deck commonly called a spar-deck" within the meaning of sub-section 5.

In this case the question at issue had reference to the construction of the 21st clause of the Merchant Shipping Act, 1854. The respondents had a steamer called the "Bear," which had been surveyed and registered at Lloyd's A 1, of 331.97 tonnage. After trading for a time, some alteration was executed, and a re-measurement was made, when the Board of Trade discovered, as they supposed, that a mistake had occurred in the first measurement whereby the tonnage was understated by 189 tons. This arose from a third deck, or what was stated by the Board of Trade to be a third deck, being omitted from the measurement. The Court of Session held that the "Bear" had not a third deck, that the space in question was not a "permanent closed in space" in the sense of the Act, and dismissed the action.

The pursuer appealed.

In delivering judgment—

LORD CHANCELLOR—My Lords, the action out of which this appeal arises was instituted by the Lord Advocate of Scotland on behalf of the Board of Trade and the Board of Customs, against the Clyde Steam Navigation Company, in order to have it declared that the register tonnage of the respondents' steam-ship the "Bear" should be increased to 634 tons and a fraction, her present register tonnage being very much less.

The ground upon which this rectification of the register is asked for is, that the "Bear" has an upper or spar deck above the tonnage or main deck, and that the space between the tonnage-deck and this upper or spar deck ought to be increased in accordance with the rules contained in the "Merchant Shipping Act, 1854;" and it is not denied that if this space ought to be reckoned in the register would require to be rectified as desired. The 5th sub-division of the 21st section of the "Merchant Shipping Act, 1854," provides, that "if the ship has a third deck, commonly called a spar-deck, the tonnage of the space between it and the tonnage-deck should be ascertained as follows"—

then follow certain rules for measurement. The question then is, has the "Bear" a third deck, commonly called a spar-deck? The condescendence of the appellant affirms that she has.

No proof was allowed to the respondents in this case, although they desired to have a proof; but the case was, by an interlocutor of the 18th of May 1872, remitted to Mr Mumford, Lloyds' surveyor at Glasgow, to examine the "Bear," and to report as to the present state and position of the main-deck of the said vessel, and of the erections, structures, and coverings thereon, as far as the same relate to or bear upon the question as to the measurement of the registered tonnage of the said steam-ship, and, in particular, to compare the said steam-ship with the model, No. 11 of process, and to make such alterations on the model as he might think necessary to show the existing state of the ship in reference to the question of measurement.

Under this remit Mr Mumford made his report, dated the 2d July 1872; and the statements in that report, and the model referred to in it, are the only materials before your Lordships as regards the facts of the case. It appears from this report that the deck in question, "being separated by openings completely across the vessel, and those openings being provided with planks and hatches unsuitable to any weather-deck, which are not fastened down or rendered water-tight," is not considered by Mr Mumford to be a continuous deck. Further, that "the doors are not fitted so as to be water-tight against any pressure, and that the planks, top-sills of the doors, &c., covering the cuttings in the deck, are not made to fit so as to be efficacious in the sheltering the cargo beneath them." It is further stated that "a three-decked ship is usually loaded down, so that her main or middle-deck amidships is at or below her water-line, the usual custom being that her submerged side amidships, measured from the top of the upper-deck at the side to the water-line, should be 3 inches to every foot of her depth of hold. This also applies in a measure to the ventilating side ports in the steerage, and their protection in case of accident. The want of strength and efficiency of the gangway doors, and the position of the steerage side scuttles in the 'Bear,' would therefore prevent her from being loaded down as a three-decked ship with well secured ports may with safety be laden and sent to sea. If loaded regardless of these points the vessel would be unseaworthy."

My Lords, I think it clear that the kind of upper or spar deck mentioned in the Act of Parliament is a continuous deck from stem to stern, fastened down and water-tight, sealing up the cylinder formed between the two decks, and making it place for the stowage of cargo, like a hold.

In the case of the "Bear," judging by the evidence and the model, the upper-deck plays rather the part of a covering platform for the main tonnage-deck. This covering is fixed for a certain distance from the stem towards the funnel, and from the stern towards the funnel. But in this covering there are two gaps made quite across the vessel, one before and one behind the funnel, of the respective width of 13 ft. 6 in. and 8 ft. 6 in., and, as Mr Mumford observes, the deck is not practically a complete deck for all purposes of safety to the ship and cargo. It is in fact obvious that the "Bear," being a steamer used for coasting purposes, and chiefly for the conveyance of cattle, this which is called a deck is in reality a

covering run along the ship, above and parallel to the main-deck, for the purpose of affording shelter against weather, and at the same time affording a platform along which the crew can pass in navigating the ship. The cargo between this covering and the main-deck is not cargo stowed and sealed up in a hold, but is deck cargo, protected against the weather.

I am therefore of opinion that the "Bear" has not a third deck, commonly called a spar-deck, within the meaning of sub-division 5 of section 21, so that the tonnage of the space between it and the tonnage-deck should be ascertained under that sub-division.

It was then contended that the register tonnage should be increased under sub-division 4 of the same section.

It appears to me that the condescendence of the appellant and his pleas in law are confined to the case advanced under the 5th sub-division, to which I have already referred. But, even if this were not so, the argument under the 4th sub-division does not appear to me to be capable of being supported. The part of the deck underneath the moveable covering which I have described cannot in any sense be called a "permanent closed-in space on the upper-deck, available for cargo." It is the whole of the deck underneath the covering, and there is no enclosure or separation of one part of the deck cutting it off from the rest of the deck; nor is it a "space available for cargo" in the sense in which cargo is used for the purpose of measurement. The cargo underneath the covering would be deck cargo merely. Neither is it "space available for the berthing or accommodation of passengers or crew;" nor is it suggested that it has ever been used for that purpose.

On the whole, I am of opinion that this appeal fails, and I submit to your Lordships that it ought to be dismissed with costs.

**LORD HATHERLEY**—My Lords, I entirely concur in the decision to which your Lordships have been asked to come by my noble and learned friend on the woolsack, and it is not necessary for me to add one word to what has been said by him. The onus of proof, which in all ordinary cases rests upon the pursuer, rests one may say in a very peculiar manner in this particular instance upon the pursuer, because he seeks to alter a survey made upon a previous occasion by an official surveyor, which only requires to be revised in respect of certain alterations which had been made in the ship, of which the particular matter in question does not form part. Therefore, to decide upon the present occasion against the respondents would be in effect, as it seems to me, not only to disregard Mr Mumford's report, but to disregard the view entertained by the surveyor who originally surveyed the ship, and who certainly did not then think of including these erections as coming within either the 4th or the 5th sub-sections of the 21st clause of the Merchant Shipping Act.

**LORD O'HAGAN**—My Lords, I am of the same opinion. I have not been at all affected by the considerations of public policy and the possible results of our decision, one way or the other, which have been pressed upon us, mainly by the Attorney-General. Such considerations may sometimes, but very rarely, be regarded as throwing light on the terms of a statute when they are obscure, and

assisting towards an understanding of the intention of its framers. But here we have no difficult question of construction, there is no controversy as to facts, and we have nothing to do but to apply to those facts the plain words of the statute, and carry them into effect, whatever may be the consequences either to the revenue or to the mercantile community.

The report of Mr Mumford seems to me to conclude the case on both its branches. He is the sole witness; an expert named by the Court, and appealed to for his judgment for both parties. The Crown, at least, cannot object to his competency and correctness, for they have insisted that by his evidence alone the matter should be determined, and if it is to be relied on, the "Bear" is not a three-decked ship, according to the contention of the appellant. In her original certificate of registry she was described as a two-decked ship, and rightly so described, if Mr Mumford is warranted in saying that her awning-deck is not a continuous deck,—is not that which is commonly called a spar-deck,—and does not therefore constitute a third deck within the meaning of the statute. And he makes this still more clear when he states that the "Bear" cannot, without becoming unseaworthy, be loaded as a three-decked ship can and ought to be loaded. And if she cannot, it would seem that the measurement of her tonnage should, in fairness as well as in accordance with the terms of the statute, be proportioned to her carrying capacity, and that she should be dealt with as a two-decked vessel.

On the second point I should have been disposed to hold the Crown precluded from making it at all by the state of the pleadings, but it was considered by the learned Judges of the Courts below, and declared to be untenable. I concur in that opinion. I was struck by an observation of the Attorney General with reference to the danger of allowing shipowners to escape their proper liabilities by leaving portions of their vessels in an imperfect state, so as to keep them unreachd by the exact description of the statute, and yet to make them available for profit on occasion. I am not prepared to say that such a danger may not arise, and that such an evasion ought not, if possible, to be prevented. But in this case I do not find any proof of a purpose of that kind. The respondents deny it; and the sole witness, Mr Mumford, does not allege it. Upon his testimony, it seems impossible to hold that there is in the place to which the question has reference a space "permanently closed in," and suitable for the reception of "cargo or stores," or the berthing or accommodation of human beings. This is made clear by the report, which describes the place as in a condition wholly unfitting it for the reception of perishable goods, or the safe and reasonably comfortable lodgment of passengers or sailors. By that report the Crown has elected to stand, excluding all access to other evidence and means of information; and, according to its findings I think that the judgment of the Court of Session was perfectly correct, and ought to be affirmed.

The appeal was dismissed with costs.