HOUSE OF LORDS.

Monday, November 21.

(Before the Lord Chancellor (Herschell), and Lords Watson, Halsbury, Morris, and Field.)

GILROY, SONS, & COMPANY *v.* W. R. PRICE & COMPANY.

(*Ante*, vol. xxviii. 427, and 18 R. 569.)

Ship — Affreightment — Bill of Lading — Shipowner's Exemption of Liability for Default of Crew in Navigation of Ship — Uncased Pipe and Resulting Damage to Cargo—Seaworthiness—Judicature (Scotland) Act 1825 (6 *Geo. IV. cap.* 120), *sec.* 40.

A bill of lading exempted the shipowner from liability for "any act, neglect, or default whatsoever of pilots, master, or crew in the navigation of the ship in the ordinary course of the voyage." A cargo shipped thereunder was damaged by the absence of casing on the pipe of a water-closet, which was broken by the pressure of the cargo in rough weather. The master and crew had before the commencement of the voyage removed the casing, and considered it unnecessary to replace it, trusting to other means for the protection of the pipe. According to usual practice in jute-carrying vessels, such a pipe is cased before the cargo is loaded and the ship starts on her voyage. After the vessel was loaded the pipe in question was not visible or accessible without the removal of part of the cargo.

In an action at the instance of the onerous indorsee of the bill of lading against the owners—*held* (*rev.* the decision of the Second Division) that without casing on the pipe, the vessel was not in a condition to carry her cargo with reasonable safety, and as this defect ought to have been remedied before the voyage began, it was a breach of the implied warranty of seaworthiness on the part of the shipowner, who was accordingly not protected by the terms of the bill of lading.

This case is reported *ante*, February 27, 1891, 28 S.L.R. 427, and 18 R. 569.

This was an action by the appellants for damages for injury caused to a cargo of jute by sea-water entering by means of an uncased pipe, which was broken by the pressure of the cargo. The Second Division of the Court of Session assoilzied the defenders, holding that the pipe should have been provided with casing, that a failure to provide it was a "default of the master or crew in the navigation of the ship in the ordinary course of the voyage," the shipowner's liability for which was excluded by the bill of lading.

The appeal was remitted back by the House of Lords on March 29th 1892 to the Court of Session with certain questions of fact, to which the following answers were returned—"(1) That in the case of vessels carrying jute, it is according to the usual practice that a pipe such as that in question is cased before the cargo is loaded and the ship starts on her voyage; (2) that after the 'Tilkhurst' was loaded, the pipe in question was not visible or accessible without the removal of part of the cargo; and (3) that in order to get at the pipe for the purpose of casing, it would have been necessary to remove part of the cargo (which was in bales and could have been removed), but that the evidence in the cause does not show what amount of the cargo required to be removed for that purpose."

The Court of Session had previously found "that the pipe was not cased as it should have been to prevent the pressure of the cargo on the pipe."

At delivering judgment—

LORD CHANCELLOR—My Lords, the pursuers in this action are the owners or part owners of a cargo of jute carried on board the ship "Tilkhurst," and they seek to recover against the owners of that vessel, who are the defenders, by reason of the damage to a part of the cargo owing to sea-water entering the vessel and coming in contact with the jute. The jute was shipped under bills of lading which contained this exception—"Any act, neglect, or default whatsoever of pilots, master, or crew in the navigation of the ship in the ordinary course of the voyage, and all and every the dangers and accidents of the seas and rivers, and of navigation of whatever nature or kind excepted."

My Lords, the effect of an exception of that kind in a bill of lading came under the consideration of your Lordships' House in the case of *Steel* v. *The State Line Steamship Company*, L.R., 3 App. Cas. 72, and your Lordships were of opinion that under such a contract there was an implied undertaking by the shipowner that the ship was at the time of its departure reasonably fit for accomplishing the service which the shipowner engaged to perform, and that if the ship was not so reasonably fit, the exception which I have just read in the bill of lading was no defence of the shipowner.

Now, my Lords, in the present case the House has to deal with special findings of fact, and no doubt cannot enter upon the question whether, so far as the facts were found, they were rightly found or not. The facts found in the interlocutor are—"That the said cargo was damaged in the course of said voyage by sea-water, which obtained access to said cargo by means of a hole in the side of the ship, to which was attached or connected the discharge-pipe of the forward water-closet on the port side." We have therefore the cargo damaged by sea-water coming into the ship through a hole in the pipe which permitted its access, and "that said pipe was broken" (that is the next finding) by pressure of the cargo thereon." It was therefore a pipe

with which the cargo was in contact, and which was not of sufficient strength to resist the pressure of the cargo, so that if the pressure of the cargo came, owing to the ordinary movement of the ship in the sea during the voyage, into close contact with the pipe, the pipe was unable to withstand that pressure, and it would necessarily break, and the water would necessarily come in. The interlocutor further finds—"That said pipe was not cased as it should have been to prevent the pressure of cargo on said pipe; that the want of casing as aforesaid led to the breaking of said pipe, and consequent damage of the cargo."

My Lords, when the case first came before your Lordships' House doubts were suggested whether that fourth finding which I have just read was intended to indicate that as matter of fact it would have been in ordinary course to case the pipe, or merely that the event proved that the pipe needed casing, and that in that sense it ought to have been done; and it was urged before your Lordships that there was nothing in those findings which I have just read inconsistent with the fact that the casing was a matter ordinarily added, or some substitute for it provided in the course of the voyage, and that the precaution of either so casing the pipe or so fending off the cargo as that it should not press upon the pipe might, for aught that appeared, be one ordinarily taken in the course of the voyage. In view of those arguments the House directed that the case should be remitted to the Court of Session for further findings, and it is now found—"That in the case of vessels carrying jute it is according to usual practice that a pipe such as that in question is cased before the cargo is loaded and the ship starts on her voyage. That after the "Tilkhurst" was loaded the pipe in question was not visible or accessible without the removal of part of the cargo." It is true that it is found that the pipe might have been got at by the removal of a part of the cargo, though how much there was no evidence before the Court enabling them to say.

Now, my Lords, I apprehend that those findings amount to a finding of unseaworthiness at the time when this vessel started on her voyage. Seaworthiness is thus defined by Lord Cairns in the case to which I have already called attention—"That the ship should be in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, may be fairly expected to encounter in crossing the Atlantic," or in performing whatever is the voyage to be performed. Now, my Lords, how is it possible to say that in that sense this vessel is seaworthy? Laden in that way, and being a ship such as she was, she had a pipe uncased in such a position and of such a character that if the ship rolled the water must be let in. That is a short statement of the facts; and really to say that a vessel of which that, under the circumstances, is a proper description is seaworthy would be, as it seems to me, to reduce the definition of seaworthiness to an absurdity. Therefore, my Lords, it appears to me that the findings amount to a finding that the vessel was not seaworthy.

But it is said that it is found that this was a "neglect or default" in the course of the voyage, and it is found that it might be remedied in the course of the voyage. In my judgment if it is found that the vessel was unseaworthy when she started, that is absolutely immaterial. The exception is only an exception which relieves the shipowner in the case of the vessel first starting on her voyage seaworthy. I can understand cases in which a defect which constitutes unseaworthiness at the time of the disaster may have existed at the time when the vessel started, and yet it may have been a case not, properly speaking, of initial unseaworthiness but of neglect or default in the prosecution of the voyage. If, for example, some porthole be left open, or there be some means of access for the water, which in the ordinary course of the prosecution of the voyage, if the master and crew were not negligent, would be put right, and which it is usual to leave open when starting, there is no doubt that although it existed at the time when the voyage commenced it would probably be said not to be a case of unseaworthiness but of "neglect or default" on the part of the master or crew. But this is not a case of that kind at all, because when you look at all the findings you see that it is obviously a matter not ordinarily remedied in the course of the voyage, but one constituting initial unseaworthiness, and not at all of the character to which I have alluded.

My Lords, I do not think that there is anything inconsistent with this view in the fifth finding. It may be that the intention was in the fifth finding to find the case within the exception. If it found it within the exception in spite of unseaworthiness, then that was a decision running entirely counter to the decision of this House in *Steel* v. *The State Line Steamship Company*, to which I have already alluded. If it was not such a finding, then it does not exonerate the defenders from the liability which rests, upon them by reason of the other findings which amount to this, that the cargo was damaged owing to the vessel having been unseaworthy at the time when she started on her voyage.

For these reasons I submit that the interlocutor appealed from ought to be reversed, and judgment entered for the pursuers to the amount stated in the joint minute.

LORD WATSON—My Lords, it does not appear to me that your Lordships are, by the terms of sec. 40 of the Act of 1825, precluded from entertaining and deciding the questions raised upon the 5th finding, which according to the terms of the interlocutor professes to be one of fact. In my opinion that is not its true character. If not a pure finding in law, it appears to me to be a mixed finding of fact and law, and embodies the application of legal principles to the actual facts otherwise found. I rather think it was meant by the Court to be a finding to the effect that these facts did not constitute

unseaworthiness in the sense of law, but merely amounted to such neglect of the master or crew as fell within the excepted risk. If the finding was merely intended to affirm neglect of the master or crew, that would not be necessarily inconsistent with or exclude the inference that the vessel was unseaworthy.

The facts found by the interlocutor appealed from, and on remit, sufficiently establish that the "Tilkhurst" was not in a condition to carry her cargo with reasonable safety unless and until the pipe which eventually led to the damage, was properly cased. That defect must be regarded as a breach of the shipowner's implied warranty of seaworthiness if it ought to have been remedied before the voyage began. On the other hand, if the want of casing was such a defect as is usually and may conveniently and properly be set right in the course of the voyage, the failure to case was a negligent omission on the part of the master or crew, from the consequences of which it appears to me that the owners of the vessel would be protected by the terms of the bill of lading. It may in some cases be a very nice question whether the defect comes within the first or second of these categories.

In *Steel* v. *The State Line Steamship Company* the covering of one of the ship's port-holes was left unfastened, and on her encountering stormy weather sea-water was admitted by the port-hole and injured the cargo. The port-hole fittings in that case were structurally complete, which was not the case with the pipe in question. In remitting the cause for a new trial, the Lord Chancellor (Cairns) thus expressed the test which he thought should be applied for ascertaining whether the injury to the cargo was one due to unseaworthiness, or to negligence in the course of navigation. His Lordship said—"It might have been that there was no want of fastening the port-hole when the ship sailed; that the port-hole may have been unfastened afterwards for any particular purpose, and then left insufficiently fastened, and that all this occurred in the course of the voyage through the negligence of one of the sailors, and if so, probably that would be a matter which would be covered by the exceptions in the bill of lading as a case of negligence occurring during the transit of the goods." The case put there of course has no analogy to the facts of the present case. But the next illustration which the noble and learned Lord puts in favour of the shipowner is in these terms—"Or it may be that if the port-hole was unfastened at the time of the sailing of the ship, the port-hole may have been so situated, and the access to the port-hole such as that at any moment, in prospect of any change of weather, the port-hole could have been immediately fastened, and that the ship at the time of her departure was perfectly free from any charge of not being adequate for the performance of the voyage which she had undertaken." The noble and learned Lord then proceeds to indicate the considerations which would raise in such a case the liability of the shipowners under their implied warranty, namely, "that the state of things, with reference to this port-hole at the time the ship sailed was such that the state of the port-hole constituted a degree of unseaworthiness which could not at any moment without considerable trouble, have been got rid off."

Applying these principles to the actual facts as found by the Second Division, I am unable to discover any ground for exempting the respondents from responsibility. The defect in the fittings of the "Tilkhurst," which was the occasion of injury to her cargo, existed before she left Chittagong. That circumstance might not be sufficient to show that she was unseaworthy so long as it could be reasonably suggested or inferred that the pipe could have been cased immediately, at any moment, without considerable trouble. But any such suggestion or inference is excluded by the express findings, that according to the usual practice of jute-carrying vessels the pipe ought to have been cased before the vessel sailed, and that during the voyage the pipe was neither visible nor accessible without removal of part of the cargo.

I therefore concur in the judgment which has been moved by the Lord Chancellor. I think that the judgment of the Second Division must be reversed, and that the appellants must have decree for the amount of damages settled by the joint-minute.

LORD HALSBURY—My Lords, I am of the same opinion. I hesitate very much to give any opinion upon the extent and degree to which a vessel having a structural defect at the time of the commencement of a voyage could be prevented from being unseaworthy by something which might be contemplated to be done in the course of the voyage. It is not necessary, I think, to give any opinion upon that subject, because in any view of the law it appears to me that this case is outside any such possible contention. This vessel was structurally defective. The vessel was loaded, and it was not intended by anyone that this particular portion of the vessel should be visited or interfered with, or attended to in any way until the completion of the voyage. In the course of that voyage, without any unusual peril of the sea, the damage was occasioned to the cargo in this vessel by reason of that structural defect which existed at the commencement of the voyage.

My Lords, I say that I hesitate—I should rather say I decline—to enter into the question of what degree of defect may exist consistently with the performance of the obligation by the shipowners to have the ship in a seaworthy condition. I can understand some things which if permitted to continue would render the ship unseaworthy. Take the case of a hatchway remaining off, or anything of that sort—in the ordinary contemplation of every business man or sailor, that would be something

which would be attended to in the course of the voyage, but if not attended to it would make the ship unseaworthy. I can imagine some things of that sort which if permitted to continue would make the ship unseaworthy, and bring the case within the exception contemplated by the contract between the parties. But for my own part I do not know any case, and I hesitate or rather decline to give any opinion upon the subject, where a vessel having an existing structural defect, which it is not either usual or easy to remedy during the progress of the voyage, would be prevented from being unseaworthy, because it is a negligence or an omission which those on board might have remedied in the course of the voyage. It is enough to my mind to say that it appears to me sufficiently from the facts as found that this structural defect in the vessel did exist, rendering the vessel manifestly unfit for the due and safe carrying of the cargo which she undertook to carry.

Under these circumstances I concur in the judgment which has been moved.

LORD MORRIS—My Lords, in this case it is found that a ship starts with a pipe uncased, though the usual practice is to case the pipe before the loading and starting of the ship. It is further found that the non-casing led to the pipe breaking, and consequently to the damage. It is further found that the non-casing was a default or neglect of the master or crew of the ship, and that the said default or neglect was committed by the master or crew in the ordinary course of the voyage. The bill of lading exempts from liability for any act, neglect, or default of the master or crew in the navigation of the ship in the ordinary course of the voyage. That exemption protects the defenders from the neglect or default of the master or crew in not casing the pipe during the voyage. I fail to see how it can exempt the defenders from liability for starting the vessel with a substantial structural defect in not casing the pipe. I see no inconsistency in the existence of two distinct faults, viz., first, the default in starting with a non-cased pipe, secondly, neglect in not repairing and remedying that defect during the voyage. The bill of lading protects against the second neglect—it gives no exemption from liability for the first.

I concur in the judgment moved.

LORD FIELD—My Lords, I am of the same opinion.

Their Lordships reversed the judgment appealed from, with a direction that the pursuers are entitled to judgment for the amount stated in the joint-minute; the respondents to pay the costs in this House and in the Court below.

Counsel for the Appellants — Graham Murray, Q.C. — Walton, Q.C. Agents—Waltons, Johnson, Bubb, & Watton, for J. & J. Ross, W.S.

Counsel for the Respondents—Bigham, Q.C.—Henry Aitken. Agents—William A. Crump & Son, for Forrester & Davidson, W.S.

Friday, December 16.

(Before the Lord Chancellor (Herschell), and Lords Watson, Ashbourne, and Field.)

CALEDONIAN INSURANCE COMPANY *v.* GILMOUR.

(*Ante*, July 18, 1891, vol. xxviii. 899, and 18 R. 1219.)

Arbitration—Insurance Policy—Arbiters not Named—Arbitration Clause Excluding Action on Policy Pending Arbitration.

A policy of insurance was granted, "subject to the conditions on the back hereof, which are to be taken as part of this policy." These provided that when the company did not claim to avoid its liability on the ground of fraud or unfulfilment of the conditions of the policy, any difference arising as to the amount payable in respect of any alleged loss or damage by fire should be referred to the arbitration either of one person chosen by both parties, or by two persons—one appointed by the insured and the other by the company. The conditions further declared that "the party insured shall not be entitled to commence or maintain any action at law or suit in equity on this policy till the amount due to the insured shall have been awarded as hereinbefore provided, and then only for the sum so awarded, and the obtaining of such award shall be a condition-precedent to the commencement of any action or suit upon the policy."

A difference arose between the parties to the policy as to the amount of damage done by a fire to the property insured, and the insured raised this action in order to have the damage ascertained. The insurers defended, on the ground that until the pursuer obtained an award settling its amount the terms of the policy excluded action, but the Court of Session rejected this defence, on the ground that a reference to unnamed arbiters to value subjects, as to the identity or original condition of which there is no dispute, formed the only exception from the rule of Scots law, that a general agreement to refer future differences to arbiters who are not named is not binding on either of the parties.

Held (*rev.* the judgment of the Court of Session) that the ascertainment of the amount of damage by arbitration was made a condition-precedent to the obligation to pay, and that a court of law could not enforce the obligation until so ascertained.

This case is reported *ante*, July 18, 1891, vol. xxviii. 899, and 18 R. 1219.

At delivering judgment—

LORD CHANCELLOR—My Lords, the simple question raised in this case is, whether the