became clear that some quite unreasonable course had been adopted. But when the proceedings at the trial, and the preceding correspondence, are examined, it appears that this was not the plaintiffs' contention at all. They did not, in fact, consider how they could make an equally commodious road without unnecessary expense. Their position was that they were in law entitled to raise the road to its old level, and to charge the defendants with the cost of so raising it. At the trial, as an afterthought, they also contended that the road would not, in fact, be so commodious to the public if it were made up on the lower level at the smaller cost. Jelf, J., states in terms that these were two contentions advanced, and this has not really been disputed. I regard the finding of Jelf, J., as conclusive on the question of fact. It has not been assailed, and if it were I need not repeat what has often been said of the advantages enjoyed by a Judge who has heard the witnesses. When a finding of fact rests upon the result of oral evidence it is in its weight hardly distinguishable from the verdict of a jury, except that a jury gives no reasons. The former practice of courts of equity arose from the fact that decisions often rested upon evidence on paper, of which an appellate court can judge as well as a court of first instance. The point of law which was advanced by the plaintiffs—viz., that they were entitled to raise the road to the old level cost what it might, and whether it was more commodious to the public or not—will not, in my opinion, bear investigation. Such a rule might lead to a ruinous and wholly unnecessary outlay. There is no authority for it, though there is authority to show that as between the owners of a public road and the adjacent lands the former may be entitled to restore the ancient level. Even those who have been wronged must act reasonably, however wide the latitude of discretion that is allowed to them within the bounds of reason. Accordingly, with the utmost respect to the Court of Appeal, I think that the judgment of Jelf, J., should be restored. The plaintiffs acted quite honestly, but under the mistaken belief that they were bound, or at least entitled, to maintain the ancient level at the defendants' expense. So thinking, they did not consider whether it was necessary to do so in the interests of the public, and did not exercise a discretion on that question, so far as appears from the evidence before us.

LORDS MACNAGHTEN and ATKINSON concurred.

Judgment appealed from reversed.

Counsel for Appellants—Sir R. Finlay, K.C.—Shearman K.C.—Disturnal. Agents—Bower, Cotton, & Bower, Solicitors, for Thursfield & Messiter, Wednesbury, Solicitors.

Counsel for Respondents—Macmorran, K.C. — Hugo Young, K.C. — M'Cardie. Agents—Sharpe, Pritchard & Company, Solicitors, for Thomas Jones, Town Clerk, Wednesbury.

HOUSE OF LORDS.

Friday, July 3, 1908.

(Before the Lord Chancellor (Loreburn), Lords Macnaghten, James of Hereford, and Dunedin.)

OWNERS OF S.S. "KNUTSFORD" *v.* E. TILLMANS & COMPANY.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Ship—Bill of Lading—Exceptions—Error in Judgment—Inaccessible on Account of Ice—Deemed by the Master Unsafe—Construction—Ejusdem generis.

In the construction of exceptions in a bill of lading, *held* (1) that "error of judgment in navigating the ship or otherwise" does not cover the master's erroneous view of the ship's contractual duties; (2) that "inaccessible on account of ice" means inaccessible without inordinate delay, not merely three days; (3) that "unsafe in consequence of war disturbance or any other cause" does not include danger by perils of the sea.

The plaintiffs (respondents) were the holders and indorsees of bills of lading in respect of goods carried on the s.s. "Knutsford" belonging to the appellants. They asked for damages for breach of contract in failure to carry the goods to Vladivostock. The bills of lading contained the following exceptions—"(2) . . . *error in judgment*, negligence, or default of . . . master . . . whether in navigating the ship or otherwise . . .; (4) should a port be *inaccessible on account of ice*, . . . or should entry and discharge at a port be *deemed by the master unsafe* in consequence of war, disturbance, or any other cause, it shall be competent for the masters to discharge goods intended for such port on the ice or at some other safe port or place at the risk and expense of the shippers, consignees, or owners of the goods. . . ." The appellants relied upon the portions italicised.

The master of the "Knutsford" tried for three days to enter Vladivostock, but at that time it was impossible because of ice. He considered it unsafe to persist in the attempt owing to the ice and severe weather. He therefore left and discharged the goods at Nagasaki. The day after leaving the approach to Vladivostock the ice dispersed and entry became easy.

Judgment in favour of the plaintiffs was pronounced by CHANNELL, J., and affirmed by the Court of Appeal (VAUGHAN WILLIAMS, FARWELL, and KENNEDY, L.JJ.).

The defendants appealed.

At the conclusion of the arguments—

LORD CHANCELLOR (LOREBURN)—I am clearly of opinion that this judgment ought to be affirmed. What took place was this. A vessel went from Middlesborough to Japan to deliver most of her cargo, and then she was to go forward to Vladivostock. When she arrived within forty miles of Vladi-

vostock she found that she could not get into the port by reason of ice. There was some danger to her propeller, it is said, from ice. There was also some fear—rather a vague fear—of submarine mines, and there was some danger, if the wind changed, from a lee shore. The vessel tried for three days in vain to get through the ice and then went back to Nagasaki, and, by order telegraphed from England, there discharged her cargo. The next day after her turning back the ice cleared off, the access was as safe as ever it was or ever will be, and other vessels entered there, while this vessel went back to Nagasaki, and it is asserted that she was entitled to do so. Is this conduct justifiable within the terms of the fourth clause of the bill of lading? Was the port of Vladivostock "inaccessible" on account of ice? At the moment and for two or three days undoubtedly it was; but the meaning of this bill of lading, in my opinion, is that the port must be inaccessible in a commercial sense, so that a ship cannot enter without inordinate delay. There is no ground whatever for saying that a delay of three days on a journey so long as the one from England to Japan could be regarded as inordinate delay. The next point taken was that by the bill of lading she may discharge at the nearest port "should the entry and discharge at a port be deemed by the master unsafe in consequence of war, disturbance, or any other cause." That also does not mean unsafe at the moment, but it means unsafe for a period which would involve inordinate delay. The master never decided that the port was unsafe in that sense, and never could have decided anything of the kind. Accordingly the shipowner is not entitled to the benefit of those words either. Then it was said that there was an error of judgment within the second clause of the bill of lading. I think that it is inapplicable. I do not see that the master ever exercised his judgment upon either of these points. What he did was this—he thought (no doubt admittedly acting in good faith) that he could go back, and he went back. He simply broke his contract; that is all that he did. The other point, namely, that one of the bills of lading was signed by Messrs Watts instead of by the captain, to my mind is destitute of validity in law, and even more destitute in merits. If the captain had been directed to sign it he was obliged to sign it. The point is a merely technical point that the proper signature was not there. As a matter of fact, I should be very sorry to lay down any rule that under such a contract the charterer or shipowner could always sign, but I am not satisfied that the captain did not know perfectly well of this signature and sanction it. I think that there is absolutely nothing in that point also. Accordingly I am of opinion that this appeal should be dismissed with costs.

LORD MACNAGHTEN—I agree with my noble and learned friend on the Woolsack on all the three points. One of them I think ought not to have been raised, and about that I will not say anything. With regard to the other two, after the very full and able arguments which we have had, I think that the judgments of Channell, J., and the Court of Appeal are quite right. I do not think that the port of Vladivostock was inaccessible within the meaning of the documents as a matter of fact, although the captain could not make his way there through the ice for three days. I do not think that he was justified in giving up the attempt after so short a trial considering that he had plenty of coal on board, and I do not think that, having regard to the fact that the whole of the freight having been paid in advance, he was justified in landing the goods at Nagasaki. While the goods were still on board he heard that the port of Vladivostock was accessible, and I think that he was bound to prosecute his voyage to the destination mentioned in the bills of lading. As regards the last point, I think that the rule of *ejusdem generis* applies as laid down in *Thames and Mersey Marine Insurance Company* v. *Hamilton*, 12 App. Cas. 484, and I prefer to take the settled rule on a point of that sort from a case which did deal with bills of lading and shipping documents rather than from cases that dealt with real property and settlements. On the whole I think that the appeal ought to be dismissed.

LORD JAMES OF HEREFORD—The main question in this case is entirely, I think, one of fact, and I concur in the judgment which has just been delivered by my noble and learned friend Lord Macnaghten on that point. It seems to me that the master when he gave up the attempt to enter Vladivostock and went to Japan and there delivered his cargo, was acting in the interests of the shipowners so as to get rid of the burden of that cargo, and not in the interests of the charterers. He did not wait the time which a person acting in the interests of the charterers would have waited near the mouth of the river to see whether the ice did or did not pass away. If he had done so for a short time, or a reasonable time, none of this litigation would have arisen. As I have said, for the reasons given by my noble and learned friend, I concur in the judgment proposed.

LORD DUNEDIN—The appellants were bound by at least three of the bills of lading to deliver this cargo at Vladivostock. Admittedly they did not do so, but delivered it at Nagasaki. They must therefore be liable in damages for the failure, unless they can show that they are excused in respect of any of the exceptions in the bills. Their principal defence was based on art. 4, the terms of which I need not again read to your Lordships. They plead the protection of both members of the clause. As to the first, Have they shown that *de facto* Vladivostock was inaccessible on account of ice? It is obvious that inaccessibility must be judged of reasonably. Here the practical inaccessibility lasted but three days, and though the captain may have been right, in view of the danger of his anchorage under the lee of Askold Island,

to give up the attempt to enter Vladivostock when he did, I see no reason why he should not have renewed his attempt when the weather conditions changed, as they did on the very next day. As to the second part of the clause, I have come, after consideration, to agree with the learned Judges of the Court of Appeal in thinking that "any other cause" must be limited there to causes *ejusdem generis* as war and disturbance, and cannot apply to ice, which is specially dealt with in the first portion of the clause. But even were that not so, I think that the same considerations as to the facts which prevent the appellants from sheltering themselves under the first portion apply here also. In other words, I should hold that the condition of unsafeness must at least endure until the delivery at the alternative port has been effected. The other clause appealed to was the general enumeration in clause (2), in which, *inter alia*, figures "error in judgment of the master, &c. . . . whether in navigating the ship or otherwise." I can only say that this seems to me to have no application. The non-delivery of the goods at Vladivostock was not due to an error in judgment of the captain. The proper application of the clause is sufficiently indicated by the words "in navigation or otherwise." It seems to me fantastic to extend it to the idea of a captain forming a wrong legal opinion on the meaning of a clause in the bill of lading and then proceeding to act upon it. The only point remaining is whether the appellants are bound in respect of the fourth bill of lading. The point is a narrow one, but I am content with the judgment of Channell, J., and I cannot think that your Lordships would regard with any favour a defence which, unless it were accompanied by an allegation that the charterers were not in a position to indemnify the owners, amounts to a mere multiplication of procedure, it being clear that the shipper could recover against the charterers either as upon a contract or in respect of warranty of authority. Nor do I think that any new and dangerous liability, as was urged, is being imposed on owners, because it must be clearly understood that the condition of the argument is that it is admitted that this was a bill of lading which the master could rightly have been called on to sign. Had the bill of lading contained stipulations of such an extraordinary character that the master might have refused to sign, then that defence would have been equally open upon the question of whether the signature of the charterers bound the owners.

Judgment appealed from affirmed.

Counsel for Plaintiffs and Respondents —J. A. Hamilton, K.C.—A. Adair Roche. Agents—Botterell & Roche, Solicitors.

Counsel for Defendants and Appellants— J. R. Atkin, K.C.—Lewis Noad. Agents— W. A. Crump & Son, Solicitors.

HOUSE OF LORDS.

Friday, July 3, 1908.

(Before the Lord Chancellor (Loreburn), Earl of Halsbury, Lords Ashbourne and Robertson.)

ANDERSEN *v.* MARTEN.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Marine Insurance—Time Policy—Exception of "Capture, Seizure, Detention, and the Consequences of Hostilities" — Total Loss after Capture before Condemnation.

A ship was insured against perils of the sea under a time policy for total loss only, and "warranted free from capture, seizure, detention, and the consequences of hostilities." She carried contraband of war and was seized by a belligerent cruiser. While under control of the captors she ran aground and became a total loss, partly in consequence of damage which she had sustained by perils of the sea before capture. After the ship's total loss she was condemned by the belligerent prize-court.

Held that upon the date of the capture there was a total loss by capture which the policy did not cover.

The owner of the s.s. "Romulus" sought to recover her loss from an underwriter, who was the respondent. He appealed from a judgment of the Court of Appeal (COZENS-HARDY, M.R., MOULTON and FARWELL, L.JJ.), affirming that of CHANNELL, J., in favour of the respondent. The circumstances appear sufficiently from the judgment of the Lord Chancellor pronounced after their Lordships had taken time for consideration.

LORD CHANCELLOR (LOREBURN)—In this case the owner of the steamship "Romulus" insured that vessel for twelve months, from the 12th January 1905, in a policy expressed to be on disbursements. At the trial it was agreed, no doubt with propriety, that the rights under this insurance were to be determined as though it had been on hull and machinery. The perils usual in a Lloyd's policy, including perils of the seas, men-of-war, takings at sea, arrests, restraints, and detainments, appear in the policy. But the risk insured was only against total loss. And there is the following clause:—"Warranted free from capture, seizure, and detention, and the consequences of hostilities, piracy, and barratry excepted." The "Romulus," a German vessel, sailed during the currency of this policy for Vladivostock, a naval port and basis of naval operations in the war between Russia and Japan then raging. She carried coal, which had been proclaimed contraband of war. In order to avoid Japanese cruisers, the "Romulus" took a circuitous course to the north, and was so injured by ice that the master made for Hakodate, a Japanese port, for refuge. On the 26th February 1905 she was stopped by a