of deciding to stay this action would be that the bill of lading holder or the shipowner (in this case it would be the shipowner, but it might just as well occur where a bill of lading holder is concerned) who does not wish for an arbitration is ousted from the jurisdiction of the courts and compelled to decide all questions by means of arbitration. Now I think, broadly speaking, that very clear language should be introduced into any contract which is to have that effect, and I am by no means prepared to say that this contract, when studied with care, was ever intended to exclude or carries out any intention of excluding the jurisdiction of the courts in cases between the shipowner and the bill of lading holder. It seems to me that the clause of arbitration ought properly to be confined, as drawn, to disputes arising between the shipowner and the charterer, and therefore I concur in the motion which the Lord Chancellor has made that this appeal should be dismissed.

LORD ROBSON — The question here is whether the appellants, who are consignees of the goods, can compel the shipowners to submit to arbitration on a claim for demurrage instead of bringing an action. For this purpose they must show that the bill of lading, which constitutes the contract between the shipowners and themselves, contains a clear stipulation to that effect. There is an arbitration clause in the charter-party applicable to "any dispute or claim arising out of the conditions of this charter-party," and providing that it "shall be adjusted at the port where it occurs, and settled by arbitration." The appellants contend that this clause is incorporated in the bill of lading by reference. There are two references in the bill of lading which purport to incorporate all or some of the terms of the charter-party. With regard to the clause in the body of the document which expresses the obligation of the shipowner to deliver the goods to the consignee, "he or they paying freight with other conditions as per charter," very little need be said. These words have been the subject of a series of decisions which establish that such a reference does not incorporate every clause or term of the charter-party, but only those terms which are *ejusdem generis* as that for the payment of freight. There is, however, written in the margin of this bill of lading a clause which deals with the incorporation of the provisions of the charter-party in somewhat wider terms. It says—"Deck load at shipper's risk, and all other terms and conditions and exceptions of the charter-party are to be as per charter-party, including negligence clause." In these words we have no specific reference to the payment of freight so as to import a limitation on their generality, but I do not think that they differ in effect from the clause in the body of the bill of lading so far as the question in the present case is concerned. Both clauses are subject to the rule that the terms of the charter-party when incorporated or written into the bill of lading shall not be insensible or inapplicable to the document in which they are inserted, and it is not absolutely clear that, when thus tested, this arbitration clause is applicable to a dispute between persons other than the parties to the charter. It relates expressly only to disputes "arising out of the conditions of this charter-party," and would stand in the bill of lading with that limitation. In one sense it is perhaps difficult to imagine any dispute relating to the chartered voyage which might not be said to arise out of the conditions of the charter, but we are dealing here with obligations founded primarily on the bill of lading, which is a different contract, and is made between different parties, though it relates in part to the same subject-matter. The limitation of the clause to the conditions of this charter-party is therefore, to say the least, embarrassing and ambiguous when it comes to be made part of the bill of lading. It requires, indeed, some modification to make it even read intelligibly in its new connection. It is to be remembered that the bill of lading is a negotiable instrument, and if the obligations of those who are parties to such a contract are to be enlarged beyond the matters which ordinarily concern them, or if it is sought to deprive either party of his ordinary legal remedies, the contract cannot be too explicit and precise. It is difficult to hold that words which require modification to be read as part of the bill of lading, and then purport to deal only with disputes arising under a document made between different persons, are quite sufficiently explicit for the appellant's purpose. On the whole, therefore, I think that their contention fails.

Appeal dismissed.

Counsel for Appellants — Leslie Scott, K.C. — Holman Gregory, K.C. Agents — Botterell & Roche, Solicitors.

Counsel for Respondents — Bailhache, K.C.—Albert Parsons. Agents—Downing, Handcock, Middleton, & Lewis, Solicitors.

HOUSE OF LORDS.

Monday, June 26, 1911.

(Before the Lord Chancellor (Loreburn), the Earl of Halsbury, Lords Ashbourne, Atkinson, Shaw, and Mersey.)

MOSS STEAMSHIP COMPANY, LIMITED *v.* WHINNEY.

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

Company — Debenture Holders — Receiver and Manager—Shipment of Goods by Receiver—Bill of Lading—Clause of Lien for Previous Arrears of Freight.

A brewery company had habitually shipped beer by the appellants' steamships under bills of lading which provided for a lien to the shipowners for unsatisfied freight due either from

shipper or consignee in respect of other shipments. The brewery's debenture holders brought an action against it, and W. was appointed receiver and manager of the brewery company. W. sent an order to the appellants to ship some beer consigned to the company, c/o the company's agents at Malta, signing the order in name of the brewery company "by W., Receiver and Manager." The shipowners having carried the beer under a bill of lading in their usual form claimed a lien over it for arrears of freight due in respect of previous shipments by the company before W. was appointed receiver.

Held (*diss.* Lords Shaw and Mersey) that the company and W. the receiver were distinct; that the receiver was both shipper and consigner, and by the form of his order had given notice of this fact to the appellants, and that accordingly the appellants were not entitled to a lien under the bill of lading for arrears of freight.

The receiver and manager of a company under a debenture action shipped goods under the circumstances stated *supra in rubric* and in the judgment of the Lord Chancellor. The shipowners claimed a lien for arrears of freight due by the company, and the amount was paid under protest by the receiver, who raised this action for repayment.

Judgment in favour of the receiver was pronounced by the Court of Appeal (VAUGHAN WILLIAMS and BUCKLEY, L.JJ., *diss.* FLETCHER MOULTON, L.J.).

The shipowners appealed.

Their Lordships gave considered judgment as follows:—

LORD CHANCELLOR (LOREBURN)—In this case Fletcher Moulton, L.J., and Hamilton, J., were of one opinion while Vaughan Williams and Buckley, L.JJ., held a different view. Your Lordships have, I am sure, felt the difficulty presented by such a conflict of judicial authority. This is eminently one of those cases in which it is most important to appreciate the true business character of the transaction, and to examine the communications between the parties in that light. Messrs Ind, Coope, & Company had for some time shipped beer on the vessels of the Moss Steamship Company, and taken bills of lading which provided that the shipowner should have a lien on the goods, not only for the stipulated freight but also for any unsatisfied freight due on other shipments either from shipper or consignee to the shipowner. That was the course of business between them up to January 1909. On the 5th January an order was made in a debenture holder's action that Mr Whinney should be receiver and manager of Ind, Coope, & Company. Nothing special is to be found in that order. Its effect in law was that the company still remained a living person, but was disabled from conducting its business, the entire conduct of which passed into the hands of Mr Whinney. Mr Whinney did not close down the business, but continued it, and among other things he resolved to send some of Ind, Coope, & Company's beer to Malta to the company's representatives there. Accordingly on the 13th January he sent an order to the Moss Steamship Company directing them to ship the beer to Ind, Coope, & Company, care of Turnbull jun. and Somerville of Malta, and he signed as follows:—"Ind, Coope, & Company, Limited, by Arthur F. Whinney, receiver and manager." Upon this Messrs James Moss & Company, as agents, shipped the beer and made out the bill of lading in the terms theretofore in use, which, as I have said, gave to the shippers a contractual lien, not merely for the freight of £56 payable for this particular beer, but also for any unsatisfied freight due either from shipper or consignee. Now there was at that time due from Ind, Coope, & Company to the shipowner the sum of £171 for unsatisfied freight, and the dispute which your Lordships have to decide is this—Can Mr Whinney claim delivery of this beer on payment of the stipulated freight of £56 or must he also pay the additional £171 unsatisfied freight due upon earlier contracts from Ind, Coope, & Company in accordance with the lien clause in the bill of lading? Obviously, if the lien holds good for this sum of £171 the effect of what Mr Whinney has done is this—He has given security to the unsecured creditors of Ind, Coope, & Company which placed them in front of the debenture holders after the latter had got a receiver appointed in order to realise their floating security over the undertaking of Ind, Coope, & Company. Questions have been raised as to the power of a receiver and manager to hypothecate assets of the company for the payment of unsecured creditors. It is said that such a proceeding would be *ultra vires*, or at all events an excess of authority, of which a trader who knew the position could not avail himself. I do not think that such a question arises in the present case, for the reason stated by Mr Bailhache. This is an action between the shipowners on the one side and Mr Whinney on the other. If Mr Whinney has contracted so to hypothecate these goods—I say if he has done so—he cannot himself compel the shipowners to deliver them without first satisfying the charge which he has created. As between the litigating parties there is a charge. It may be that Mr Whinney had no power to create it, but if so then it is for the company to claim the goods and to raise the question of his authority. Of course a decision upon the ground so taken by Mr Bailhache would really settle nothing as to the true rights of the shipowners.

In my opinion there is another ground upon which this case ought to be decided in favour of the respondent. The shipowners can claim a lien for the sum of £171 unsatisfied freight only if this unsatisfied freight was due by the shippers or consignees of this particular shipment of beer. Who were the shippers and consignees respectively? We must look at

the order of the 13th January and the bill of lading together. The order is signed Ind, Coope, & Company by Mr Whinney, receiver and manager. Unless qualified by other circumstances, absent here, this means that Mr Whinney ordered the shipment and contracts for it on his personal credit, looking, of course, for indemnity to the assets of the company, of which he is receiver and manager. He is the shipper in the name, it is true, of Ind, Coope, & Company. The shipowners know, from the terms of the order, or ought to know, that Ind, Coope, & Company are no longer conducting the business, but that Mr Whinney is conducting it and making contracts for it. So again, when in the bill of lading Ind, Coope, & Company are named as consignees, the shipowners know that they are so only in name, the real consignee being the same as the real shipper, namely, Mr Whinney the receiver and manager. I agree with Fletcher Moulton, L.J., that the company was still alive and its business was being still carried on by Mr Whinney, but he was not carrying it on as the company's agent. He superseded the company, and the transactions upon which he entered in carrying on the old business were his transactions upon which he was personally liable. He was really a trustee, and the shipowners dealt with the trustee. No doubt there may be cases in which a receiver and manager is in all senses the agent of the company, and a question may then arise as to the extent of his authority. But here he was not such agent, and this was sufficiently conveyed to the shipowners by the notice that he was receiver and manager. Had they doubted or desired further information they could have asked for it before contracting to carry the goods. They would have found that the person contracting with them was Mr Whinney. Accordingly, I move your Lordships that the order appealed from be sustained.

EARL OF HALSBURY—I think, for more reasons than one, that it is desirable to state the circumstances under which this case comes for adjudication, chiefly because the very sensible arrangement made by the parties to have the real question in dispute disposed of before the courts might be defeated if questions of pleading or forms of action should interfere with the determination of the real question, as I think that it has interfered with the arguments. Another reason is, that I think that if the appellants' argument should succeed it would be a very serious blow to a system at present prevailing, by which an enormous quantity of business is being carried on. A great many joint stock companies obtain their capital, or a considerable part of it, by the issue of debentures, and one form of securing debenture-holders in their rights is a well-known form of application to the Court of Chancery, which practically removes the conduct and guidance of the undertaking from the directors appointed by the company, and places it in the hands of a manager and receiver, who thereupon absolutely supersedes the company itself, which becomes incapable of making any contract on its own behalf or exercising any control over any part of its property or assets.

Now in this case a joint stock company, Ind, Coope, & Company, Limited, a brewery carrying on an extensive business, part of which consisted in exporting beer, &c., to Malta, became embarrassed in its affairs; the debenture-holders became alarmed, and such an application as I have described was made to the Court of Chancery on the 5th January 1909, and on that day an order was made appointing Mr Whinney, the respondent, receiver and manager. On the 13th January an order was given by Mr Whinney for the beer which is the subject of this action, but the order was signed by "Arthur F. Whinney, Receiver and Manager," and on the 16th shipping documents were sent from Moss & Company with a note that one bill of lading had been sent to the consignee by the ship "Rameses," the exact date when she started on her voyage is not given. Two bills of lading were issued, one stamped, the other an unstamped copy sent to Ind, Coope, & Company, Limited, Burton-on-Trent. No one has suggested that Mr Whinney ever saw the bill of lading himself; indeed, Hamilton, J., finds that that form of bill of lading was probably not read by anybody. The letter of the 16th January, which inclosed it, bore the statement—"One bill of lading sent to consignee. Please check the inclosed bill of lading, and if found incorrect, return to us immediately, as otherwise we can take no responsibility." That is a warning and request that the bill of lading should be checked. I am satisfied that it has no reference whatever to the terms of the bill of lading, and it only meant matters to be filled in pursuant to the instructions of the 13th January, but that included the description of the consignee and the address of the consignee, and I assume that to that extent the bill of lading was duly checked, and certainly no exception was taken. No doubt Mr Whinney did not read the bill of lading; it is not proved that he did not, but I think that I should be shutting my eyes to the ordinary course of business if I believed that he did. This is certainly what I should infer, and when the witness at the trial is challenged with this notice of the 16th he says that of course it had reference to the number of the casks. Now if actual knowledge of this particular stipulation in this particular bill of lading is negatived, as I think it is here, I am unable to take the view, with all respect to this very learned and experienced judge, and my respect for any judgment of his is very great indeed, that there was any evidence of such a contract as would enable Messrs Moss & Co. to exercise a lien. Such a phrase as "the usual bill of lading" is entirely misleading unless it is explained with respect to what the word "usual" is to be applied. No doubt there are some

things which are so common in commerce as, even when not specially called to the attention of the contracting parties, to be assumed by every business man to be included in a common and well-known form of contract, but no one I should have thought could contend that when a company has been so altered in its management that a receiver has been appointed who is the only person who can contract, its former course of business is to be considered as making the very first consignment made after the appointment of the receiver to be subject to the forms which were in use when the company and not the receiver were conducting the business.

It would be quite intelligible that such a clause as we are here discussing should be included in dealings with the company itself, and the practice would be used justly as proof against those who had been in the habit of using it for ten years. But once a receiver and manager is appointed things are changed, and every man of business would know, or ought to know, that the only person with whom he could contract safely would be the manager appointed by the Court of Chancery. Now to say of such a person that the stipulation in question would form a likely clause would be ridiculous. If it were to be inserted at all, it certainly would require that it should be expressly pointed out to the receiver and manager, who, as every business man would know, is placed in his position of receiver and manager to protect the rights of the debenture-holders. One would suppose from some of the arguments that one was dealing here with some quite inexperienced persons, who had never heard of a debenture action before, whereas, as I have already pointed out, we are dealing with thoroughly experienced business men, and I observed that when Mr Waller was challenged at the trial as to whether he had not heard of a manager and receiver being appointed, his only answer is that he had not been officially informed. As the late Lush, L.J., pointed out, a bill of lading refers primarily to legal relations between the parties as applicable to the particular consignment to which it relates. The question what would be the consequence if Mr Whinney had known and understood the contract, which he was supposed to have done, but which I find as a fact he did not, does not arise in this case. I agree with the Lord Chancellor that it is unnecessary to discuss it, and I think that this appeal should be dismissed.

Lord Atkinson — The action out of which this appeal has arisen was not an action to recover damages for breach of a warranty given by Arthur F. Whinney of his authority to make a contract, still less an action to recover damages for a false representation made by him of his authority to make any contract. It was a proceeding instituted by him to try the validity, as between himself and the appellants of a lien given to them, and already enforced by them, on certain goods of which he had possession, the property of Ind, Coope, & Company, shipped on the appellants' ship the "Rameses," and carried by her to Malta. The lien was given in respect of a simple contract debt owed by Ind, Coope, & Company for freights theretofore earned, and in the circumstances of this case must, I think, be taken *prima facie* to have had the effect of giving to an unsecured creditor of that company priority over its secured creditors. Arthur F. Whinney was, by order of the Court of Chancery, dated the 5th January 1909, made in an action instituted by the debenture holders of this company, appointed receiver and manager over "all the undertaking and property whatsoever and wheresoever of the company," the company being directed to deliver over to him, amongst other things, "all the stock-in-trade and effects of" their business, and the possession of the said properties so far as was necessary for the purposes of such receivership and managership; and it was further ordered that Whinney should forthwith, out of any assets coming to his hands, pay the debts of the company, which had "priority over the claims of the debenture stockholders, under the Preferential Payments in Bankruptcy Amendment Act 1897 and be allowed all such payments on his account." It is not pretended that the debt due for back freights, for which the lien was given, was one of these latter, or that any order had been obtained from the court authorising the giving of the lien, and I do not think that it can be contended successfully that under this order Whinney had any power to give a lien valid at law against everybody on assets of the company coming to his hands, part of its stock-in-trade, which would have the effect of giving the priority above mentioned. This appointment of a receiver and manager over the assets and business of a company does not dissolve or annihilate the company, any more than the taking possession by the mortgagee of the fee of land let to tenants annihilates the mortgagor. Both continue to exist, but it does entirely supersede the company in the conduct of its business, deprives it of all power to enter into contracts in relation to that business, or to sell, pledge, or otherwise dispose of the property put into the possession or under the control of the receiver and manager. Its powers in these respects are entirely in abeyance. Of all these facts the appellants had notice before this lien was sought to be created. That notice was conveyed to them by the description given by Whinney of himself in his letter to them of the 13th January 1909. He describes himself as receiver and manager of Ind, Coope, & Company. That is sufficient—*Burt and Others* v. *Bull*, [1895] 1 Q.B. 276. Now, as I understood, the appellants contend that, despite this notice, Whinney could enter into a contract with the appellants, valid and binding as between themselves, that the company should do that which at law it is disabled from doing, and that he himself, Whinney,

could also do something which at law he is also disabled from doing, namely, that the company should intermeddle with their own goods, that they should become the consignees, if not the shippers, of these goods, and should exercise dominion over and deal with them in the character of consignees, and that he, Whinney, could, in defiance of the order of the court, give a valid lien over the goods of the company, part of its stock-in-trade, of which he got possession and control as such receiver and manager, in respect of a simple contract debt, in the manner and with the result above mentioned; and further, that the lien so given could be enforced, and the receiver be estopped, as it were, in a suit such as this, from relying upon its invalidity. It is admitted on both sides that the bill of lading in this case is only evidence of the contract entered into between the shipowner and the shipper, not the complete contract in itself. It is further admitted that it must be construed together with the respondent's letter of the 13th January 1909. It is not denied that the bill of lading is similar in form to those invariably or generally used by the appellants in their business as shipowners, but there is no evidence which I can discover either that its terms were specifically brought to the knowledge of Whinney, or that he was under any necessity or pressure to ship this beer by the "Rameses," or by any other of the appellant's ships, or indeed to ship it at all. It is not, therefore, in my opinion, open to the appellants to contend that there was some object to be gained by shipping the goods by this ship or by the appellants' line so important in character that it would have been but reasonable and proper for him, in the efficient and zealous conduct of the business entrusted to him, to accept deliberately the terms contained in the bill of lading rather than not effect this object. The debt for which the contested lien was given was, by the terms of the bill of lading, a debt due either by the shipper or "consignee." The contention of Sir Alfred Cripps, on behalf of the respondent, on this point was that Whinney was both shipper ahd consignee of the goods, and that he owed nothing for back freights. That of Mr Bailhache, on behalf of the appellants, was, as I understood it, that at all events between the contracting parties the company which did owe back freights is the consignee and must be so treated; and the judgment of Moulton, L.J., is apparently to the effect that the company must for the purposes of this case be treated both as shipper and consignee, and that Whinney was only in the position of a general manager of the company appointed by the company itself. This latter point has not, as I gather, been relied upon on behalf of the appellants in argument before your Lordships. The decision of the question turns upon the construction of the letter of the 13th January 1909, since it is admitted that the bill of lading must be read in conjunction with it. In my opinion Sir A. Cripps is right. I think it obvious that the company were not the shippers. The very words "receiver and manager" convey, according to the above-mentioned authority, that Whinney was not an agent of the company, but that he was managing their affairs under the order of the court, and that all their powers were in abeyance. It would seem to me plain, therefore, that the Ind, Coope, & Company, designated as consignee, must be the same company as that first mentioned in this letter—that is, the disabled and superseded company whose powers were dormant; so that the letter must be read as if, after the words Ind, Coope, & Company, Limited, where the same occur for the second time, the words "over whose business the above-mentioned A. F. Whinney has been appointed receiver and manager by the Court of Chancery" had been written into it. Read with that interpolation this letter in my view amounts in effect to a direction to consign the beer to Whinney, receiver and manager, care of Turnbull junior and Somerville, Strada Reale, Malta. And if the same interpolation be made in the bill of lading, as I think it must be, then Whinney is himself under the contract the consignee, and as he owes nothing for back freights there is no lien.

As regards the second point, the money sued for was paid under protest to obtain the delivery of the goods, and the question must be determined as if this was a proceeding instituted by the appellants to enforce this lien. The question for decision then would resolve itself into this—Would Whinney be estopped in such an action as against the appellants from asserting that he had no power to create the lien, and that it was invalid in law? It is to be observed that no evidence whatever was given to show that the appellants refused to ship their goods, or would not have shipped them, except upon the terms of getting this lien. It may well be that the way in which Whinney did this business was the ordinary way in which such business was done by the superseded firm. That, however, in my view, is not enough. He was not the agent of the company, but the officer of the court. His powers were those of such an officer, not those of the company or of an agent or manager appointed by them who might possibly be held by implication to have conferred upon him power to conduct the business in the mode and on the lines upon which it had been theretofore conducted by them. His position would appear to me therefore to resemble somewhat that of the directors of a company, who, as I understand the authorities, are not estopped at law from relying on the fact that a contract which they made or act which they did was *ultra vires* and invalid (whether it was an act which could be ratified by the shareholders or not), as against a person who knew, or should be taken to have known, what their powers were, and therefore knew, or should be taken to have known, that the contract or act was *ultra vires*—(see Lindley on Companies, 6th ed. pp. 217, 351, 671). In *British Mutual Banking Company* v. *Charn-*

wood Forest Railway Company (18 Q. B. D. 714) Bowen, L.J., says—"In the present case the defendant company could not in law have so contracted, for any such contract would have been beyond their corporate powers. And if they cannot contract, how can they be estopped from denying that they have done so?" And Fry, L.J., says—"No corporate body can be bound by estoppel to do something beyond their powers" (*Balfour* v. *Ernest*, 5 C.B., N.S. 601; *Kearns* v. *Leaf*, 1 H. & M. 681; *Chapleo* v. *Brunswick Building Society*, 6 Q. B. D. 696). Those two cases turned upon the ignorance of the plaintiffs of the defendants' want of authority to accept bills. But for that ignorance it is obvious that the plaintiffs must have failed to establish personal liability against the directors. It was contended on behalf of the appellants that the inability of the receiver to create the lien contended for was merely a matter between him and the debenture holders; that they may no doubt dispute, before the court which appointed him, his claim to be reimbursed out of the assets of this company for the sum paid to obtain delivery of the goods, but that with this the appellants have no concern. If that reasoning be sound, the receiver could pledge the goods for a personal debt of his own. I do not think that it is sound. The creation of a lien such as that purported to have been given was not shown to be incidental to or consequential upon those things which the respondent was authorised to do. It was *prima facie ultra vires* as the appellants must be taken to have known. In my opinion, therefore, the lien was invalid, and the respondent is, on this ground as well as on the other, entitled to receive back the money sued for. The appeal should, I think, be dismissed.

LORD SHAW—The opinion which I have formed in this case differs from those just delivered. I have arrived at it with diffidence, and only after repeated consideration. I shall express briefly how the matter strikes me. The appellants own a line of steamships trading between Liverpool and Malta. For a good many years Messrs Ind, Coope, & Company, brewers, have been in the habit of sending by the appellants' steamers consignments of beer to themselves, care of their agents, Messrs Turnbull junior & Somerville. In the course of trade the custom had arisen of shipping upon contracts which provided that the shipowner should have a lien over the consignments for the freight applicable to the cargo and for all freights unpaid. In the present case it is admitted that £171 was due from Ind, Coope, & Company to the appellants in respect of previously unsatisfied freights. A lien was claimed under the terms of the contract accordingly. The lien has been released by payment, subject to the determination of the point whether such a lien was in the circumstances enforceable. There can be no doubt that under the contract and by the terms of the bill of lading the payment is due; and no one questions that, had certain events not occurred in the history of Ind, Coope, & Company, the lien was good. A few days, however, before this contract was made, a receiver and manager was appointed of the estate of Ind, Coope, & Company, at the suit of debenture-holders. The fact that there was such a receiver and manager was brought home to the appellants, because a week after his appointment—namely, on the 13th January 1909—the shipping instructions to the appellants were—"Please deliver ale as below, charging to, Yours respectfully, Ind, Coope, & Co., Limited, By Arthur F. Whinney, Receiver and Manager, C.C.C." In the instructions the consignees were stated to be, "Ind, Coope, & Company, Limited, c/o Turnbull jun. and Somerville, Strada Reale, Valetta, Malta," and the bill of lading which followed named the consignees as "Messrs Ind, Coope, & Co., Limited, c/o Messrs Turnbull jun. and Somerville, or to his or their assigns." The bill of lading, following in this the previous practice of the business, created a lien which covered "any previously unsatisfied freight . . . due either from shippers or consignees to the shipowner." It is plain, accordingly, to my mind that if Messrs Ind, Coope, & Company, were either shippers or consignees, the contract which Mr Whinney made would cover debts due by Ind, Coope, & Company, unless either of two things had occurred, namely, (1) that the entity known as Ind, Coope, & Company had ceased to exist in law, or (2) that Ind, Coope, & Company still subsisting in law, a contract entered into at that date, naming them as consignees, was a contract made *sub conditione*, and the condition was of such a character as to wipe out completely that part of the contract which stipulated for a lien in respect of all previously unsatisfied freights. With regard to the first point, namely, whether Ind, Coope, & Company, as a legal entity was continued after the appointment of a receiver I respectfully agree with the judgment of Fletcher Moulton, L.J.—"It was suggested that Ind, Coope, & Company, Limited, after the appointment of the receiver and manager was a different entity from that which it was before that date. To my mind this is a complete fallacy. The company then was, and still is, a going concern. No steps had been taken to wind it up. The debenture holders found that it was to their interest to keep the company alive, and so long as it lives it is, and must be, one and the same company. No one but the limited company of that name can carry on the business of Ind, Coope, & Company so long as that company exists. The whole beneficial interest in its assets may have passed to the debenture holders and others, and this may fundamentally change the position of those who seek to enforce legal rights against it; but its identity is unchanged, and as the consignee under the bill of lading is Ind, Coope, & Company, Limited, it

is the same consignee to whom the previous consignments were sent, and these unpaid freights come within the lien clause exactly as they would have come if the debenture holders had not taken steps to enforce their security." I do not desire to put the point in any language of my own, adopting as I do in its entirety this paragraph of the learned Lord Justice's opinion.

The second question is—Was a contract containing a clause so specific and clear, a clause which included within the scope of the lien freights previously unsatisfied by Ind, Coope, & Company, was that clause substantially excised from the contract by reason of the appointment of a receiver? I cannot see my way clear to hold that it was. It may be quite true that the effect of the appointment of a receiver would be to place all creditors for debts of the company outstanding at the date of the appointment in a class separate from those who made advances or rendered service to the company after or during the receivership. But in point of fact what Mr Whinney did in this contract was himself to make—even although he were considered a different person in law from Ind, Coope, & Company—a shipping contract, one of the terms of which was that the outstanding debts of the appellants should be paid as the agreed-upon return for the then present service of conveying certain goods under the bill of lading to Malta. It was free to him to make that bargain; and it was free to the appellants the shipping company to decline to carry the goods or to stipulate for higher freights or different terms. But in my humble opinion, with the utmost deference to the learned Judges who reached a different result, it is not free for him to say that he is not bound by an integral portion of the bargain, or to put forward the plea that he had not read a certain part of the contract which *quoad ultra* he admits must stand. They were satisfied to go on as before, and the contract was thus made in circumstances which I find clearly expressed in the judgment of Hamilton, J.—"He" (that is, Mr Whinney) "instructed the goods to be shipped on the terms that the contract was to contain the usual clause under the bill of lading so long in use, and he gave instructions for the shipment of the goods in continuation of a course of business and with no such indication that the terms of that business were to be limited as would lead to the inference that any different contract arose in the case of this shipment from the contract that has arisen in the case of prior shipments." The question is raised in several of the judgments of the Courts below as to whether the shippers Ind, Coope, & Company formerly, and Ind, Coope, & Company per Whinney latterly, were the same shippers. There is much to suggest that substantially they were—the continued entity of Ind, Coope, & Company being as stated. But I do not think it necessary to deal separately with that point, for in my judgment it is sufficient to say that by the express terms of the contract Ind, Coope, & Company were the consignees of this cargo—stated as such by name. Although the fact of a receivership had occurred in the history of that concern, that fact did not, as I have observed, disable the receiver from making the contract in these terms, or from shipping goods in accordance with the custom which had obtained previously. I do not find sufficient in this case to entitle me to say that I can upset that contract or import into its conditions something foreign to the previous relations of the parties, or excise from the contract what it itself stipulates, namely, that the lien was to cover past freights due to the appellants by the shippers. I admit the difficulties of the case, but I tender my respectful assent to the conclusions reached by Hamilton, J., and Fletcher Moulton, L.J., remarking finally that I take it to be somewhat serious that the holders of contracts of that kind should find them substantially modified by events which impinge upon and cut down their terms, and leave it thus open to a receiver to make contracts in comprehensive terms, which he had an undoubted power to make, but upon the construction of which it is open to him to maintain that they are less comprehensive in law than they bear to be on the face of the statement, and therefore that the carriers must, on the one hand, stand bound by the contract of carriage, but, upon the other, be limited in their rights of lien and recovery under that contract.

LORD MERSEY—It is unnecessary to restate the facts of this case. They will be found set out sufficiently in the judgment of Hamilton, J., and they are not in dispute. It is important, however, to consider two preliminary matters before turning to examine the terms of the contract out of which the action arises. The first is as to the position and powers of Mr Whinney as receiver and manager of Ind, Coope, & Company, Limited, and the second is as to the nature of the action itself. Mr Whinney was a receiver and manager appointed by the Court; he was not appointed by the debenture holders, although, no doubt, he was appointed at their instance; nor was he appointed by the company. He was agent for neither the one nor the other, and therefore could make no contracts upon which either could sue or be sued. The contract in this case affords a sufficient illustration of what I mean. The debenture-holders could certainly not be sued upon it, for they as a body never had power to carry on the business or to contract in relation to it, nor could the company be sued upon it for they had ceased to be able to make any contracts by an agent or otherwise. Thus no question of *ultra vires* arises. Mr Whinney was merely an officer of the Court, directed by the Court, and by the Court alone, to do a certain thing—namely, to carry on the business of Ind, Coope, & Company, Limited, in the ordinary way,

until such time as the Court might otherwise direct. An obligation was placed on him of making the contracts which might be necessary for so carrying on the business, and annexed to that obligation was a correlative right to be indemnified out of the assets of the company in respect of the liabilities which he might thereby incur. If he were to make contracts not necessary for the carrying on of the business, as, for instance, if he were to buy an excessive quantity of malt, or if he were to sell an unduly large quantity of beer, so as to cripple the business, he would be personally liable on the contracts, and when he came to pass his accounts the Court might refuse him any indemnity out of the assets in respect of the liabilities which he had thereby incurred, and might also condemn him in damages for the loss resulting to the business in carrying out the contracts. It would not be for the persons contracting with him to inquire whether the contracts were such as came within the ordinary course of the business. Mr Whinney, who alone could ascertain whether they were so or not, would have to take the risk of making a mistake in that connection. This was the position of Mr Whinney with regard to the company of which he was appointed receiver and manager, and with regard to third parties with whom he might contract. As to the nature of the action brought by him, it is sufficient to say that it was an action brought by him in his personal capacity to recover back money of his own which he had paid to the defendants in order to obtain possession of goods on which the defendants alleged, and he denied, that he had created a lien in their favour. The action was not brought to try the right of the company or of the debenture-holders to the possession of the goods. There was nothing in it in the nature of interpleader, and it raised one simple question, namely, had Mr Whinney created in the defendants a right to hold the goods as against himself, not as against the company, until the alleged lien was discharged? Such was the position of Mr Whinney in the litigation, and such was the nature of the action brought by him. I have only referred to these matters because I think that some confusion arose during the argument in respect to them. The respondents did not take a different view of them from mine in the courts below, nor do I think that they intended to put forward a different view before your Lordships' House.

I come therefore to the question in the case—namely, did Mr Whinney create a lien on the goods in respect of the back freights? It is said, in the first place, that he did not because he could not, inasmuch as the goods were not his. To this contention there are two answers — first, that he was in lawful possession of the goods with power to pass the property in them by virtue of the order of the court under which he was acting. He could certainly sell them and give a good title to a buyer; he could also, as part of the carrying on of the business, forward them to the Maltese agency and make such contracts as might be necessary or usual in that behalf; and in the next place it appears to me that if by the contract of affreightment he purported to give a lien, it does not lie in his mouth to deny that the goods were his. It is not a case of warranty that he had an authority from someone else to give a lien. In such a case he would only be liable in damages for breach of the warranty. It is a case in which the goods for all relevant purposes were his own and had been shipped as his own. In the next place, it is said that the words of the contract did not create the lien alleged, and this I conceive to be the real question in the case. Now the terms on which the goods were carried are to be found only in the bill of lading, a document which in the ordinary course of business, would be filled up by Mr Whinney or his clerk, and then presented to the steamship owners for signature. The terms were the same as those on which the steamship company had carried goods for Ind, Coope & Company for many years past. The contract, therefore was one which it was in the ordinary course of Ind, Coope, & Company's business to make. These terms gave to the steamship company "a lien and right of sale over the goods shipped in respect of any previously unsatisfied freight, due either from the shippers or consignees to the shipowners." Then who were the consignees? Now no business man looking at this bill of lading could have any doubt on that point. The goods are "to be delivered (at Malta) to Ind, Coope, & Company Limited, c/o Messrs Turnbull, junior & Somerville, or to his or their assigns." The reference to Turnbull, junior & Somerville amounts to no more than a notification of an address at which Ind, Coope, & Company are to be found, and the word "order," which appears in this part of the bill of lading, merely means that the document must be endorsed before the goods can be delivered up in exchange for it. Ind, Coope, & Company were thus the consignees, and Mr Whinney did by the very terms of the contract of affreightment give to the defendant shipowners the lien which they set up. Both Hamilton, J., and Buckley, L.J., were of opinion that Ind, Coope, & Company were the consignees mentioned in the bill of lading. Hamilton, J., says "Mr Whinney had his beer forwarded upon the terms that it should be consigned to Ind, Coope, & Company, Limited," and Buckley, L.J., says—"I agree that the company were in this transaction the consignees.' Buckley, L.J., however, adds—"but not in the sense in which the defendants seek to affirm that they were such;" and he then goes on to state in what sense the word "consignees" is used in this bill of lading. He says, in effect, that the consignees mentioned in the bill of lading are Ind, Coope, & Company, "by Mr Whinney as receiver and manager. Here the learned Lord Justice is doubtless referring to the order for shipment of the 13th January 1909, which is an order addressed by Mr Whinney to the agents of the steamship company directing them to

deliver the ale to Ind, Coope, & Company, Limited, Malta. This order is signed "Ind, Coope, & Company, Limited, by Arthur F. Whinney, Receiver and Manager." But I am at a loss to understand how the fact that the shipper describes himself in the shipping instructions as a receiver and manager can affect the question as to who are the consignees. Ind, Coope, & Company do not, and indeed cannot, exist in two different senses. The company has not been wound up, nor is it even in liquidation. The only change that has happened is that, instead of the business being managed by an official appointed by the board of directors, it is managed by an official appointed by the court; but the company is still the same company and the business is the same business. Mr Whinney started no new business; he merely continued the old one, and Mr Whinney himself clearly understood this when on January 6 he telegraphed to Turnbull junior & Somerville—"We continue to do business as heretofore, Receiver, Ind, Coope, & Company." It was said during the argument that to let the shipowners have the benefit of the lien would be to make them secured creditors, taking priority over the debenture-holders. The answer is that the shipowners are not concerned with the debenture-holders. They made their contract with Mr Whinney, and it is the money of Mr Whinney which they are claiming a right to keep in this action. If Mr Whinney had provided the money in order to free the goods from a lien which as against the company he ought not to have created, he will not get the amount allowed in his accounts, and the company will be none the worse. To construe the bill of lading contract as the Court of Appeal has construed it is, in my opinion, to twist it from its plain meaning and to deprive the shipowners of part of the consideration for the carriage of the goods for which they stipulated, which was conceded to them. Another point was taken by the learned Lord Justice in the course of the argument in the Court of Appeal—namely, that Mr Whinney could not without the leave of the Court bind the debenture-holders by charging the goods with the back freights. It was a point which had not been taken before Hamilton, J. I think it sufficient to say of it that the same considerations which dispose of the earlier points dispose of this point also. If this contract was one which came within the meaning of carrying on the ordinary business of the company (as I think it was), Mr Whinney required no leave; the making of it was authorised, and in fact enjoined, by the order of the court appointing him; and if it did not, it is he, and not the shipowners, who must bear the consequences. For these reasons, I think this appeal ought to be allowed, and the judgment of Hamilton, J., restored.

LORD CHANCELLOR—Lord Ashbourne, who is not able to be present to-day, desires me to say that he concurs in the view taken by the majority of your Lordships.

Appeal dismissed.

Counsel for Appellants—Bailhache, K.C.—Robertson Dunlop. Agents—Rawle, Johnstone, Gregory, Rowcliffe, & Rowcliffe, Solicitors.

Counsel for Respondent—Sir A. Cripps, K.C.—Leck. Agents—Davidson & Morriss, Solicitors.

HOUSE OF LORDS.

Friday, July 14, 1911.

(Before the Lord Chancellor (Loreburn), the Earl of Halsbury, Lords Ashbourne, Macnaghten, Dunedin, Shaw, and Robson.)

JOHNSTON *v.* O'NEILL.

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

Fishings—Eel-Fishings—Title—Possession—Prescription—Immemorial Use by Public—Navigable Non-Tidal Lake.

An exclusive right was claimed to the eel-fishing over the whole of Lough Neagh, a large navigable non-tidal inland lough in Ireland by the holders of a long lease, who were in right of a title to the fishings conferred by the Crown in 1661. The title of the Crown had been previously affirmed in certain inquisitions. The claimants and their authors produced some leases of the fishings in the lough, and proved occasional payments made in respect thereof at various dates since the date of the Crown grant. It was proved in defence, and not disputed, that the public had for centuries fished for eels habitually and continuously in the lough as of right.

Held that the public cannot prescribe a right of fishing in inland non-tidal waters, and (*diss.* the Lord Chancellor, Lords Shaw and Robson) that the claimants had sufficiently established their title to the exclusive enjoyment of the fishings notwithstanding the continuous practice of fishing by the public.

Per Lord Macnaghten—"The Crown is not of common right entitled to the soil or waters of an inland non-tidal lake. No right can exist in the public to fish in the waters of an inland non-tidal lake."

Per Lord Dunedin—"The public cannot have a right to the fishing in question. The Crown may have had a right to it when it granted the patent. The only competitor to the Crown and its patentee must be some other private owner or owners, corporation or *quasi*-corporation."

The lessees of the eel-fishings of Lough Neagh claimed a declaration of their sole right thereto and an injunction against the defendants, who were a number of