The risks covered by the policy were the risks usually described in such a contract, namely, "perils of the sea and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said . . . goods." It was not contended on the plaintiffs' behalf (nor could it have been) that these words covered any risk except the risk of damage by perils of the seas, but it was said that the loss was due to such a peril. The learned Judge held that the damage was not due to a sea peril at all, but was solely due to the weakness of the hulk, and he thereupon dismissed the action. Their Lordships are of opinion that the learned Judge was right. There was no weather nor any other fortuitous circumstance contributing to the incursion of the water. The water merely gravitated by its own weight through the opening in the decayed wood and so damaged the opium. It would be an abuse of language to describe this as a loss due to perils of the sea. Although sea water damaged the goods, no peril of the sea contributed either proximately or remotely to the loss. There is ample authority for so holding, but it is sufficient to cite the judgment of Lord Herschell in "*The Xantho*," L.R., 12 A.C. 503, where he says—"I think it clear that the term 'perils of the sea' does not cover every accident or casualty which may happen to the subject-matter of the insurance on the sea. It must be a peril 'of' the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves which results in what may be described as wear and tear."

An attempt was made during the argument to attribute a different meaning to the expression "perils of the sea" when used in a policy on goods from that which it bears when used in a policy on ship; but no authority was cited for the distinction, nor would it be right in principle to make any such distinction. In the case above cited an attempt was made to draw a distinction between the meaning to be given to the words when used in a bill of lading and in a policy of insurance, but Lord Herschell said—"It would, in my opinion, be very objectionable, unless well settled authority compelled it, to give a different meaning to the same words occurring in two maritime instruments."

In this case the damage, though doubtless proximately due to sea water, was not in any sense due to sea peril. It does not therefore fall within the policy.

Their Lordships are of opinion that the appeal should be dismissed, and they will advise His Majesty accordingly. The appellants must pay the costs of the appeal.

Appeal dismissed.

Counsel for the Appellants—Atkin, K.C. —Bailhache, K.C.—Raeburn. Agents—William A. Crump & Son, Solicitors.

Counsel for the Respondents—Sir R. Finlay, K.C. — Mackinnon. Agents — Thomas Cooper & Company, Solicitors.

HOUSE OF LORDS.

Friday, July 26, 1912.

(Before the Lord Chancellor (Loreburn), Earl of Halsbury, Lords Macnaghten, and Lord Atkinson.)

KISH AND ANOTHER *v.* TAYLOR, SONS, & COMPANY.

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

Ship — Charter-Party — Bill of Lading — Lien for Dead Freight — Unseaworthiness — Deviation.

The terms of a charter-party provided that the shipowners should have a lien for dead freight upon the cargo, which was to be of a specified amount and to be delivered to the charterers' order, "all other conditions as *per* charter." As the charterers failed to load a complete cargo, the shipowners took so much deck cargo that the ship was rendered unseaworthy, and encountering storms was obliged to deviate for repairs. The shipowners claimed against the holders of the bill of lading for loss caused by the charterers' failure to load sufficient cargo. *Held* that the right to dead freight arose before the ship sailed and was not lost by the ship's unseaworthiness or deviation, and that dead freight is damages for breach of contract.

Appeal from a judgment of the Court of Appeal (COZENS-HARDY, M.R., FLETCHER MOULTON and FARWELL, L.JJ.), 1911, 1 K.B. 625, *reversing* WALTON (J.), 1910, 2 K.B. 309.

The *facts* appear from Lord Atkinson's judgment, in which the rest of their Lordships concurred, and which was delivered as follows:—

LORD ATKINSON—In this case the appellants, the owners of the ship "Wearside," claim a lien upon the goods of the defendants, the endorsees of a bill of lading, dated the 23rd January 1908, which purported to incorporate all the conditions, provisos, and exceptions contained in a certain charter-party, dated the 18th December 1907, made between these owners and the Mississippi Transportation Company of Gulfort, Mississippi.

By this charter-party the "Wearside" was bound to proceed to Mobile, and there or at Pensacola load a full and complete cargo of timber of the kind described, and being so loaded to proceed to a port on the Continent between Bordeaux and Hamburg (Rouen excluded), and at charterers' option to discharge at two ports on the Continent and one port in the United Kingdom. The port of Liverpool was ulti-

mately selected as the port of discharge in the United Kingdom. The charter-party contained the following clauses, amongst others—(1) a clause authorising the "Wearside" to deviate for the purpose of saving life and property; (2) a clause to the effect that the master or owners of the ship were to have an absolute lien on the cargo for all freight, dead freight, demurrage, and average; and (3) a clause that any difference between charter-party and bills of lading freight was to be settled at the port of loading before the vessel sailed; if in favour of vessel, to be paid in cash at current rates of exchange less insurance; if in the charterer's favour, by captain's bills payable ten days after arrival at port of discharge.

The vessel duly arrived at Mobile, and subsequently went to Pensacola to load. The charterers were admittedly under this charter-party absolutely bound to furnish a full cargo. They failed to do this. They only shipped 801¼ standards, all of which were properly stowed in the hold of the vessel. Fully loaded she would have carried 1390½ standards. The cargo shipped was therefore short by 589¼ standards. Now it is not suggested that at the time when the charterers thus broke their contract the vessel was not perfectly seaworthy, was not fit in every way to receive her full cargo, or that her owners had up to that time failed in any respect to carry out, or were not ready and willing to carry out, their contract fully. There was therefore nothing to justify or excuse this breach of contract by the charterers, and the right to recover damages for the breach had accordingly accrued to the owners. These damages are what is styled dead freight. In Carver on Carriage, par. 666, dead freight is defined to be the compensation payable to the shipowner when the charterer has failed to ship a full cargo. Freight is the recompense which the shipowner is to receive for carrying the cargo to its port of discharge. The two things are wholly dissimilar in their nature, though of course the freight which the shipowner would have earned if the charterers had fulfilled his contract will in most cases be a fair measure of the damages which he is entitled to recover, and it is in my view clear, from the decision of your Lordships' House in *M'Lean* v. *Fleming*, L.R., 2 H.L. Sc. 128, that an agreed lien does not cover such damages though they be unliquidated.

Walton (J.) states in his judgment that it was not disputed before him that the words occurring in the bill of lading—"all other conditions as per charter"—import into that document the provision of the charter-party giving to the owners of the vessel an absolute lien on the cargo for dead freight amongst other things. Indeed in the face of the authorities this could not be disputed successfully. They are, I think, clear upon the point. So that before the vessel had loaded more than the 801 standards the right to recover this compensation had accrued to the owners, and they had become entitled to a lien on the cargo in respect of it. The master of the vessel, after the default of the charterers, and in their relief, obtained additional cargo from other sources. Unfortunately he overloaded his ship with deck cargo to such an extent as to make her unseaworthy. She proceeded to sea, encountered bad weather, and by reason of her overloaded condition her master was obliged, in order to save his vessel and the lives of his crew, to take refuge in the port of Halifax. Some of the deck cargo was carried overboard, other portions were jettisoned, other portions damaged, and the vessel herself was so much damaged that it was absolutely necessary to have some repairs done upon her and to have a portion of her cargo re-stowed. The owners have paid for these repairs, and have compensated the owners of the lost, jettisoned, and damaged cargo for the loss which they have sustained, and do not claim from anyone concerned any contribution on foot of the expenditure thus resulting from their improper act in overloading their ship. They do not seek in any way to take in this respect any advantage of their own wrong, in the proper sense of that expression.

The "Wearside" duly arrived at Liverpool. The respondents' portion of the cargo was uninjured and the ship was ready to deliver it. The respondents, however, dispute the existence of the shipowners' lien for dead freight to any amount, mainly on two distinct grounds. First, they contend that as every shipowner is held to warrant the seaworthiness of his ship, the breach of that warranty puts an end to the contract of affreightment contained in the bill of lading, which becomes, they say, void *ab initio*, and consequently that though the goods in specie have been duly carried to their destination undamaged, the endorsees of the bill of lading are only obliged to pay the shipowners for their services such sum as they may be entitled to as common carriers by sea instead of the remuneration stipulated for in the bill of lading.

Second, they contend that the deviation to the port of Halifax was unjustifiable in this respect, that however necessary it may have been in order to save the ship and cargo and the lives of the crew owing to the perilous condition to which the vessel was in fact reduced, yet as that condition was in part due to the act of the master in overloading her with deck cargo to such an extent as to make her unseaworthy, the deviation must be treated as a deviation made without any necessity whatever, a gratuitous alteration of the voyage rendering the contract of affreightment contained in the bill of lading void *ab initio*. Of the several points raised by the respondents in the Court of Appeal this latter was the only one decided. The Lords Justices held that the respondents' contention was right, that the deviation constituted a new voyage different from that with which the bill of lading and

charter-party were conversant, and that the former of these documents, if not both, were therefore void *ab initio*.

Mr Atkin, on behalf of the respondents, was driven to admit that if his contention on the first point was sound it would be competent for every indorsee of a bill of lading whose goods had in fact been carried safely and with due expedition to the appointed port of discharge to contend that, by reason of some of those comparatively trifling omissions on the part of the master which have been held to render a vessel unseaworthy—such as sailing without two anchors, sailing without an adequate supply of medicines and medical appliances for the crew—he was released from all the obligations imposed upon him by the bill of lading, the argument being that the provision of a seaworthy ship was a condition-precedent, and not having been performed the contract of affreightment was entirely displaced. No authorities were cited in support of this proposition. I think that it is in conflict with the principles of English law.

In *Dakin* v. *Oxley*, 15 C.B.N.S. 646, Willes (J.), deals exhaustively with the question whether, under the laws of different Continental and other foreign countries, the indorsee of a bill of lading is relieved from his contract where the cargo arrives at the port of lading in specie, though damaged through the negligent navigation of the ship by her master and crew, and as to the law of England on this point he speaks thus—"The test to the right to freight is the question whether the service in respect of which the freight was contracted to be paid has been substantially performed, and according to English law freight is earned by the carriage and arrival of the goods, though they be in a damaged condition when they arrive. Freight must be paid even where the damage is culpable, and the parties must be left to their cross-action."

The case of "*The Europa*," [1908] P. 84, is, I think, an authority against the respondents' contention. There the action was brought by the shipowner against the charterer in respect of goods damaged by one of the perils of the sea excepted by the charter-party, not by the unseaworthiness of the ship, which was admitted. It was held by Bucknill and Bargrave Deane (JJ.), on a line of reasoning which appears to me convincing, that the charter-party, notwithstanding this unseaworthiness, was not displaced; that, on the contrary, the clause excepting perils of the sea was alive and operative; and that the shipowner, despite his breach of warranty, was protected under it from liability for the injury done to the goods.

Neither in *Steel* v. *State Line Steamship Company* (3 A.C. 72), nor in *Gilroy, Son, & Company* v. *Price & Company* (1893 A.C. 56), was it suggested that the breach of warranty of seaworthiness put an end to the contract of affreightment, and relegated the shipowner to his rights as a common carrier by sea. On the contrary, the observations of Lord Blackburn, in the former case, seem to indicate that the indorsee of the bill of lading might be disentitled to recover, despite the fact of unseaworthiness, unless that unseaworthiness caused the damage. He is reported to have used these words—"So here I think that if this failure to make the ship fit for the voyage, if she really was unfit, did exist then, the loss produced immediately by that, though it was a peril of the seas which would have been excepted, is nevertheless a thing for which the shipowner is liable, unless by the terms of his contract he has provided against it"; and further on he says—"I have no doubt what the result will be; it will be a question whether, taking the whole circumstances together, this ship was reasonably fit when she sailed to encounter the perils, and whether the damage that happened was a consequence of her being unfit, if she was unfit"—which appears to me to imply that if the damage was not a consequence of this unfitness, the shipowner's liability must be determined by the provision of his contract of affreightment so far as it dealt with that liability.

In *Baumvoll Manufactur von Scheibler* v. *Gilchrest & Company* ([1892] 1 Q.B. 253), Lord Esher, M.R., is reported to have used these words—"The first cause of action which they allege is for breach of the bills of lading, and secondly, they allege negligence in sending the ship to sea from New Orleans is an unseaworthy condition. It is not a sufficient breach of a bill of lading that a ship went to sea in an unseaworthy condition, but it must always be shown that the unseaworthiness was the cause of the loss." The fact that a ship is not in a fit condition to receive her cargo, or is from any cause unseaworthy when about to start on her voyage, will justify the charterer or holder of the bill of lading in repudiating his contract and refusing to be bound by it, and of course the parties can by mutual consent rescind their contract of affreightment, but repudiation or recision are questions of fact. They have not been found by the Judge at the trial in this case. It lay upon the respondents to procure findings upon them, if they wished to escape on these grounds from the obligations of their contract.

Having regard, therefore, to the authorities which I have cited, and to the absence of all authority to support the respondents' contention on their first point, it is, I think, unsound and unsustainable according to the law of this country.

On the second point it is not disputed that it is *prima facie* not only the right but the duty of the master of a ship to deviate from the course of his voyage and seek a harbour or place of safety, if that course be reasonably necessary in order to save his ship and the lives of his crew from the perils which beset them. Neither is it disputed by the appellants that they are answerable in damages to every person who sustains loss or injury by reason of the breach of their warranty of the seaworthiness of their ship, and they further

admit that they cannot require the owners of the cargo or any portion of it to recoup them to any extent for any loss which they may have sustained or expense to which they may have been put as a result of this breach of warranty, or of any course which they may have had to take in consequence of it. The appellants further admit that voluntary or unwarranted deviation may render the contract of affreightment void *ab initio*, as was decided by the Court of Appeal in *Joseph Thorley, Limited* v. *Orchis Steamship Company* ([1907] 1 K.B. 660). What they contend is, in effect, this, that justifiable deviation does not avoid the contract; that to use the language of Lord Watson in a case presently to be referred to, "it is the presence of the peril and not its causes" which justify it, and that it is, therefore, immaterial whether the unseaworthiness of the ship or her negligent navigation contributed directly to the peril or not. Judged by that test it is not disputed that the deviation in the present case was justifiable, and if so, that the contract of affreightment was not void *ab initio*, so that the question for decision resolves itself into this—Is it the presence of the peril and not its cause which determines the character of the deviation, or must the master of every ship be left in this dilemma that whenever, by his own culpable act, or a breach of contract by his owner, he finds his ship in a perilous position, he must continue on his voyage at all hazards, or only seek safety under the penalty of forfeiting the contract of affreightment? Nothing could, it would appear to me, tend more to increase the dangers to which life and property are exposed at sea than to hold that the law of England obliged the master of a merchant ship to choose between such alternatives.

The Court of Appeal appears to have considered that they found in Lord Watson's judgment in *Strang, Steel, & Company* v. *Scott & Company*, 14 App. Cas. 601, a principle which was applicable to the present case. They did not refer to any other authority in support of their decision on this point. With the utmost respect I am quite unable to concur with them. In that case, through the negligence of the master the ship was driven ashore and part of her cargo was jettisoned.

The question with which Lord Watson was dealing in the passage cited from his judgment by Flether Moulton, L.J., was what he styled the first question raised in the case—namely, "Whether innocent owners of cargo, sacrificed for the common good, are disabled from recovering a general contribution by the circumstance that the necessity for the sacrifice was brought about by the ship-master's fault?" He says—"Each owner of jettisoned cargo becomes a creditor of the ship and cargo saved, and has a direct claim against each of the owners of the ship and cargo for a *pro ratâ* contribution towards his indemnity, which he can enforce by direct action." Further on he says—"The Rhodian law, which in that respect is the law of England, bases the right to contribution, not upon the causes of the danger to the ship and cargo, but upon its actual presence." And before the passage last cited, he says—"The principle upon which contribution becomes due does not appear to differ from that upon which the claim for salvage services are founded. But in any aspect of it the rule has its foundation in the plainest equity. In jettison the rights of those entitled to contribution, and the corresponding obligations of the contributors, have their origin in the fact of a common danger which threatens to destroy the property of them all, and these rights and obligations are mutually perfected wherever the goods of some of those shippers have been advisedly sacrificed and the property of the others has been thereby preserved. There are, however, two well-established exceptions to the rule of contribution for general average which it is necessary to notice."

He then proceeds to deal with the first exception in the passage cited. Lower down he deals with the second exception, deck cargo. He says—"But the owner of deck goods jettisoned, though not entitled to general contribution, may nevertheless have a good claim against the master and owners who received his goods for carriage upon deck." And after stating that such exceptions as are recognised in *Schloss* v. *Heriot*, 14 C.B.N.S. 59, are in truth limitations of the rule introduced from equitable considerations in the case of actual wrongdoers, he states the conclusion of the Judicial Committee thus—"The owners of the goods thrown overboard, having been innocent of exposing 'The Abington' and her cargo to the sea peril which necessitated jettison, their equitable claim to be indemnified for loss of their goods is just as strong as if the peril had been wholly due to the action of the winds and waves."

To permit a wrongdoer to recover contribution in such a case would indeed be to permit him to take advantage of his own wrong, for his wrongdoing necessitated the sacrifice out of which his claim for contribution would spring. The present case is wholly different. Here the claim of the appellants arose before they were in default at all. It does not spring from their default; it is entirely independent of their default. It springs, on the contrary, from the respondents' fault, and the contract of the respondents provides a specific and particular method, a lien, by which it may be enforced. It is in truth the respondents, not the appellants, who seek to take advantage of the appellants' wrong in order to deprive the appellants of a right which the respondents' wrong gave them. This distinction between the case of *Strang Steel & Company* v. *Scott & Company* and the present case is to my mind crucial, and prevents the decision in that case from being any help whatever to the proper decision of the present.

On the whole, therefore, I am of opinion that a master whose ship is, from whatever

cause, in a perilous position does right in making such a deviation from his voyage as is necessary to save his ship and the lives of his crew, and that while the right to recover damages for all breaches of contract, and all wrongful acts committed either by himself or by the owners of his ship, is preserved to those who are thereby wronged or injured, the contract of affreightment is not put an end to by such a deviation nor are the rights of the owners under it lost.

Speaking for myself, I may say that I think that it would not be consistent with any principle of justice that these rights should be lost. The fact that by a policy of insurance the insurer merely indemnifies the insured against loss from certain risks, and it is therefore his right not to have these risks increased, differentiates, I think, altogether the case of an insurer from the case of an indorsee of a bill of lading whose goods have been brought safely and undamaged to the port of discharge. The respondents' contention on the second point is to my mind, therefore, as unsustainable as that on the first.

The respondents' contention on their third point amounts, as I understand it, to this. The freight mentioned in the bill of lading is, they say, 26s. per load of 50 cubic feet. *Gardner* v. *Trechmann*, L.R., 15 Q.B.D. 154, decides that where the freight mentioned in the charter-party is more than that mentioned in the bill of lading, the indorsee of the latter, claiming as such, is, in the absence of special agreement to the contrary, only bound to pay the lesser freight. Here there is a special agreement in the last clause of the charter-party providing that any difference between the two should be settled at the port of lading before the vessel sails.

Therefore, as dead freight is still freight, it should either not be paid at all as it is not included in the freight mentioned in the bill of lading, or if payable at all it should, under the last clause of the charter-party, have been settled and paid at the period of loading before the vessel sailed at all. The answer to this ingenious but very fallacious argument is, that dead freight is not freight at all properly so called, but is in reality damages for breach of contract, for convenience nick-named dead freight, and that neither the last clause in the charter-party nor the case of *Gardner* v. *Trechmann* has any application whatever to it.

On the whole, therefore, I am of opinion that on the three points argued before your Lordships the respondents fail, and that the appeal ought to be allowed, with costs, and further that the case should be remitted to the Court of Appeal to deal with the award of damages by Walton (J.) against which both parties have appealed.

Judgment appealed from reversed. Case remitted to the Court of Appeal. Respondents to pay to the appellants their costs of this appeal. Costs in the Court of Appeal to depend on the final issue.

Counsel for the Appellants—Bailhache, K.C. — Adair Roche — Spratt. Agents — Betterell & Roche, Solicitors.

Counsel for the Respondents — Atkin, K.C. — Holman Gregory, K.C. Agents — Trinder & Capron, Solicitors.