opinion that it is very doubtful whether under such circumstances the shipowner is not liable throughout for the seaworthiness both of the ship and of the lighter until transhipment has actually taken place. It is part of the voyage—he has chosen to shift the goods from his steamer into the lighter out of the ordinary circumstances, and it may well be that he is liable for that. It is not necessary to go into that point because, if I am right, what was done was something outside what the shipowner was at liberty to do under the terms of his contract and was a breach of his contract, and that is the only reason why I do not enter into that point. If these views are well founded the judgment of the Court below was right, and I accordingly move that the appeal be dismissed with costs.

LORD SHAW—I agree with the conclusion, but I desire to rest my judgment upon this fact. This contract was one divisible into two parts. It was a slump or through contract at a slump or through rate, extending from the other side of the Atlantic to the Baltic. At Hull the situation of parties to some extent changed. The obligation of the shipper was to deliver at Hull. He was obliged to tranship at Hull into another vessel. The question at what stage transhipment begins may raise serious issues, but upon that I do not now desire to commit myself. According to the view presented by the shipowner there was an interregnum, some period during which the voyage to Hull had ended and the shipment to Sweden had not begun. That may be so. I do not wish on that point to express dissent from what was said by the Lord Chancellor. But my opinion is that whatever be the view of the contract, at all events it is not disputed that the duty resting upon the shipowners was to tranship, and it has not been maintained in argument that the ordinary duty of transhipment should not be accompanied by the ordinary duty of avoiding negligence. I find that the course of transhipment adopted was to put these valuable goods into a lighter. Upon the evidence it was demonstrated that they might as well have been put into an eggshell. It was an unseaworthy craft, liable to be probed by a boathook, to be penetrated through and through, and liable to sink. Intrinsically there is no difference between a man pretending to fulfil his obligation of transhipment by putting goods into an unseaworthy lighter and the case of a man who fulfils his obligation of transhipment by putting the goods into the sea. These goods, for all purposes of law and of fact, are just the same as if dropped by negligence in the course of what they are pleased to call transhipment into the bottom of the dock. That being so, I do not think that there was any duty of transhipment performed here. Upon that ground I hold that liability attaches to the shipowners.

LORD MOULTON—I prefer to base my judgment upon the facts rather than discuss and decide questions of law which are really not necessary for the case. In this instance I think that the shipowners are liable on the plain ground of negligence in the performance of the duty which everyone admits that they undertook. They allege that they had a right to put these goods into lighters for the purpose of their being transhipped and forwarded to the place of destination. No one can contest that they must do that with all due care. What are the facts? It is not denied that the lighters in this port are frequently left unattended, are pushed about, drift up against each other, are left without charge or control during the night and for long periods. If a person is aware of what happens and puts goods into these lighters it is his duty to see that he puts the goods into lighters which can stand such work. There is no evidence that the slightest care was taken in the selection of the lighter. The shipowners think that they are exonerated from negligence by the fact that these things are common. That is no answer to the charge of negligence. We know that in many trades there is a standard of care far less than is required. On the decided facts of this case the shipowners knew that the lighters are used in this rough way, and yet they used this lighter as the depository for these goods without taking the slightest care that the lighter was fit for the purpose. For these reasons I think that the appeal should be dismissed with costs.

Their Lordships affirmed the judgment appealed from and dismissed the appeal with expenses.

Counsel for the Appellant—Leck, K.C.—Raeburn. Agents—Botterell & Roche, for Hearfields & Lambert, Hull, Solicitors.

Counsel for the Respondents—Leslie Scott, K.C.—Roche. Agents — Waltons & Company, for A. M. Jackson & Company, Hull, Solicitors.

HOUSE OF LORDS.

Monday, June 29, 1914.

(Before the Lord Chancellor (Viscount Haldane), Lords Shaw and Moulton.)

WEBBER *v.* WANSBROUGH PAPER COMPANY, LIMITED.

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

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1, *sub-sec.* 1 —*Accident Arising Out of and in the Course of the Employment—Boundary between a Ship and the Shore.*

When a sailor leaving a ship on which he had been employed during the day had crossed on a plank connecting the ship with a permanent iron ladder fixed on the quay and had slipped and hurt himself whilst climbing the ladder, *held* that the sailor had not yet left the ship, and the accident therefore arose "out of and in the course of his employment."

Judgment of the Court of Appeal *reversed.*

Cook v. *Owners of Ship "Montreal,"* 102 L.T.R. 164, *distinguished.*

Appeal *in forma pauperis* from a judgment of the Court of Appeal (Cozens-Hardy, M.R., Kennedy, and Swinfen Eady, L.JJ.), reported 109 L.T.R. 129, who had reversed a judgment of the County Court Judge of Somersetshire, sitting as an arbitrator under the Workmen's Compensation Act 1906.

The appellant was a seaman employed in the ketch "Charlotte," and lived at Watchet. On the day of the accident he had been assisting to discharge the cargo from the vessel in Watchet Harbour. He had put on the hatches and had finished his work for the day and was going to his home. When the vessel was at Watchet he lived at home. The vessel was moored near the quay, and a plank had been placed from the vessel to a permanent ladder fixed to the wall of the quay, which was the property of the harbour authority. He passed along the plank and was ascending the ladder when he slipped and injured his foot. The ladder and plank were the only means of access to and from the vessel.

The County Court Judge found that the accident arose out of and in the course of the employment, and made an award in favour of the appellant, but the Court of Appeal set aside his award.

Their Lordships gave judgment as follows:—

Lord Chancellor (Haldane) — In a case in which this House is about to differ from the Court of Appeal it usually takes time to consider its judgment and to formulate it, but the present case appears to me, and I think it appears to your Lordships, to be one which is governed partly by what the County Court Judge has found, and partly by a principle which has been laid down by the Court of Appeal itself, and has been affirmed in this House. I think that the Court of Appeal would probably have come to a different conclusion from that which it actually reached had it not been that it conceived itself to be bound by the case of *Cook* v. *Owners of Ship "Montreal,"* 102 L.T.R. 164, a case which I feel obliged to say is not one which can be relied on as governing the case before us.

Here the plank which was used for the purpose of enabling the seaman to leave the ship was a plank which was applied to the rung of a ladder descending the side of the quay and forming a part of the quay belonging to the dock authority; but none the less it may have been that, as the learned County Court Judge found, "the ladder in this case was the means of access to the ship, and was the proper means of access. This is the crux of the case. Webber would not have been on that ladder unless it had been for his employment." He explains what he means in his preliminary note—"Ladder was at the time of accident means of access to ship, and nowhere else, and proper means of access. As much part of access as plank." Under these circumstances I think that the County Court Judge must be taken to have found that in point of fact the ladder, for the occasion on which the seamen had to get to the quay, was something specifically appropriated for that purpose by the employers. If so, then the test which was laid down by Lord Moulton in the Court of Appeal, and afterwards adopted by this House, applies. What Moulton, L.J., laid down in the Court of Appeal, in *Kitchenham* v. *Owners of "Johannesburg,"* and this House afterwards adopted, was enunciated by him in these words—"I do not think it difficult to lay down the general principle by which our decisions ought to be guided. The return to the ship is in the course of his (the seaman's) employment, but the risks do not become risks arising out of his employment until he has to do something specifically connected with his employment on the ship. Thus, if the risk is one due to the means of access to the ship, as in *Moore* v. *Manchester Liners*, [1910] A.C. 498, 48 S.L.R. 709, the accident is rightly said to arise out of his employment; but if the accident is shown to arise from something not specifically connected with the ship it cannot be said to arise out of his employment. I do not think that the dividing line is when he actually touches the ship or the special means of access thereto. For instance, if it was shown that when the sailor returned to the ship there was a dense fog, and that in trying to find the gangway, which I will suppose was not lighted, he fell into the water and was drowned, I think that the accident would arise out of his employment. But if all that is shown is that it occurred during his return to the ship, but while he was still on the shore, and before he had taken any specific step towards getting on board the vessel, I think that it would not thereby be established that the accident arose out of his employment."

That passage is adopted in the judgment of Kennedy, L.J., in the present case, and it may well be that not only he but his colleagues would have taken a different view of its application but for the case of *Cook* v. *Owners of Ship "Montreal."* In that case the ship was moored to a dolphin connected with the quay by means of a permanent bridge. The dolphin was not railed, and was badly lightly. The seamen got on to the dolphin safely, but fell between it and the quay and was drowned; and it was held that the accident did not arise in the course of his employment, the reason being that the dolphin was treated as being as much a part of the land as the quay itself in that case. Obviously the dolphin was a large structure, in some respects not unlike the quay itself in its arrangements, and it is a very difficult thing to say of the dolphin, to which the public had access, and no doubt frequented, and on which people might be for many purposes, that it was in the same position as a ladder which has been specifically appropriated by means of a plank as the means of access on the occasion to the quay. That being so, and the law being, as Buckley, L.J., points out in the case of *Cook* v. *Owners of Ship "Montreal,"* that "In the obligations contractually existing between master and servant it is part of the duty of the master

to afford the workman, when he is dismissed, reasonable facilities for leaving the place of employment, and that if the servant is injured while availing himself of those facilities the master may be liable," the conclusion in this case seems to me to be a very simple one. I see no reason why we should disturb the conclusion come to as a point of fact by the County Court Judge. It may be that there is a certain amount of inference in his finding as to the facts, but that does not prevent us, as long as the learned County Court Judge had evidence on which to act and has not misdirected himself on points of law, from accepting what he has said in accordance with the principle which has been laid down frequently in this House. Of course, if *Cook* v. *Owners of Ship "Montreal"* had really governed the present case, then the learned County Court Judge must be taken to have misdirected himself, but I have already indicated to your Lordships why in my opinion that is not so. Therefore I am of opinion that the learned County Court Judge was right and that the Court of Appeal were wrong in disturbing his finding, and I move that the judgment of the Court of Appeal be reversed and that of the County Court Judge restored. The appellant must have his costs here and in the Court of Appeal taxed according to the usual rule in the case of an appeal *in forma pauperis*.

LORD SHAW—I concur.

LORD MOULTON—This case is, in my view, eminently a border-line case. I do not think that there is any doubt as to the principles of law which we ought to apply. They may be said to be two in number—one is that which was laid down in *Kitchenham* v. *Owners of "Johannesburg"*, [1911] A.C. 417, 49 S.L.R. 626, and the other is that which was laid down by Buckley, L.J., and has been referred to by the Lord Chancellor, namely, that employers are bound to give reasonable means of access and exit to their workmen. If I thought that the County Court Judge was of opinion that the plank alone was a reasonable mode of access and exit for the workman I should have thought that it was not our business to disturb his finding, and that this appeal must fail, but on examining his findings carefully I think that he thought that the ladder on which the plank landed the workman was not such a safe portion of the quay that the responsibility of the employers ceased when they had put the workman there. Nothing that I say must be supposed to mean that I think that under no circumstances would it be sufficient to land a sailor on one of these vertical ladders fixed to the sides of docks, with which we are well acquainted; to a sailor that ought to be almost as safe as walking on the highway. But I do not think that it necessarily follows that it is so. Certainly if the person had not been a sailor I should have thought that the probability was that it was not so, but in this case I see no reason for thinking that the learned County Court Judge misdirected himself in finding that the ladder was part of the access to the vessel in the sense of being there, for the sufficiency and safety of which the employers were liable. If that be so, there is an end of the case if the accident occurred before he was outside the scope of his employment, and therefore I agree with the motion which has been made by the Lord Chancellor that this appeal should be allowed.

Their Lordships reversed the judgment appealed from, with expenses.

Counsel for the Appellant — Knockes— Dale. Agents—E. E. Baron Reed, London— C. P. Clarke & Company, Taunton, Solicitors.

Counsel for the Respondents—Neilson— Langton. Agents—Holman, Birdwood, & Company, Solicitors.

HOUSE OF LORDS.

Wednesday, July 1, 1914.

(Before Lords Dunedin, Atkinson, Parker, and Parmoor.)

DUNLOP PNEUMATIC TYRE COMPANY *v.* NEW GARAGE AND MOTOR COMPANY.

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

Contract—Breach—Measure of Damages—Liquidated Damages or Penalty.

Where there was an agreement by retailers to sell a manufacturer's goods under certain restrictions as to price, &c., and pay £5 "by way of liquidated damages and not as a penalty" for each article sold in breach of the agreement, *held* that the stipulation was for liquidated damages.

The assertion in the agreement that a sum is payable as liquidated damages and not as a penalty is not in itself conclusive.

The naming of a single sum as compensation for different breaches differing in the damage they are likely to inflict creates a presumption that that sum is to be taken as a penalty, but that presumption may be rebutted, *e.g.*, as here, when the damage though varying in degree is such that accurate preestimation is impossible.

Their Lordships' considered judgment, from which the *facts* appear, was delivered as follows:—

LORD DUNEDIN—The appellants through an agent entered into a contract with the respondents under which they supplied them with their goods, which consisted mainly of motor tyres, covers, and tubes. By this contract, in respect of certain concessions as to discounts, the respondents bound themselves not to do several things, which may be shortly set forth as follows: —Not to tamper with the manufacturers' marks, not to sell to any private customer or co-operative society at prices less than the current price list issued by the Dunlop Company, not to supply to persons whose supplies the Dunlop Company had decided