Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Actieselskad Langfond (Owners of the Steamship "Langfond") v. The Canadian Forwarding and Export Company, Limited, from the Superior Court (in Review), Province of Quebec; delivered the 22nd March 1907.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD MACNAGHTEN.
LORD DAVEY.
SIR ARTHUR WILSON.

[*Delivered by Sir Arthur Wilson.*]

The action out of which this Appeal arises was brought by the Respondents, as charterers, against the Appellants, as owners, of the steamship "Langfond," to recover damages for breach of the charter party.

The charter party was made in New York on the 17th February 1902, between Bennett, Walsh, & Co., agents for owners of the steamship "Langfond," of Stavanger, and the Respondents. By it the owners agreed to let and the Respondents to hire the ship, from the time of delivery, for a period of about two months, fourteen days more or less, with an option in the charterers to continue the charter for a further period of two months, fourteen days more or less. By subsequent agreements the term of the charter was extended to at least the month of November, and its commencement was fixed as the 11th April.

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The clauses of the charter which need be noticed are as follows:—

"(4) Charterers shall pay for the use and hire of the said "vessel 760*l.* per calendar month, commencing on and from "the day of her delivery as aforesaid, and at and after the "same rate for any part of a month, hire to continue until her "delivery with clean holds to the owners (unless lost) at a "port in the United Kingdom or on the Continent between "Bordeaux and Hamburg at charterers' option.

"(6) Payment of the said hire to be made in cash monthly "in advance in New York, . . and in default of such payment "or payments as herein specified, the owners shall have the "faculty of withdrawing the said steamer from the service of "charterers without prejudice to any claim they, the owners, "may otherwise have on the charterers in pursuance of this "charter."

The owners, who, from the steamship's port of registry, seem to be Norwegian, had agents in England, Clark, Gray, & Co. They had agents in New York, Bennett, Walsh, & Co., the firm by whom the charter party was executed. They had agents in Montreal, McLean, Kennedy, & Co. The Respondents carried on their business in Montreal, and all their direct communications, connected with the charter party, were with McLean, Kennedy, & Co., through whom all monthly payments were made, up to and including that in August.

Up to that time the monthly payments were made and were accepted, though the payments were not made with strict punctuality. The controversy between the parties arose out of the payment which fell due on the 11th September.

When that payment was about to become due the steamship was in an English port, Maryport, loading a cargo of rails on account of Messrs. Hine Brothers, who had a sum of advance freight to pay to the Respondents, which it was estimated would be sufficient to meet the monthly payment due by the latter to the owners on the 11th September. Under the charter party the monthly freight was payable in New York; but on this occasion it

was proposed and agreed that it should be met by Messrs. Hine Brothers paying the freight due by them to the English agents of the owners. This is made clear by a telegram from McLean, Kennedy, & Co. to Hine Brothers, dated the 8th September, three days before the monthly freight became due, referring to the arrangement. The completion of this transaction was delayed by the fact that an agent of the Respondents in Rotterdam raised a claim to the freight payable by Hine Brothers. It was some time before this difficulty was overcome, but ultimately, on or before the 2nd October, Hine Brothers paid to the English agents of the owners 607*l.*, being the amount of freight payable upon the Maryport cargo.

On learning the amount paid in England by Hine Brothers, the Respondents, on the 2nd October, paid the balance remaining due by a cheque in favour of McLean, Kennedy, & Co. The result was that on that day nothing remained due in respect of the monthly freight payable on the 11th September.

As to the footing upon which these payments were made and accepted there seems to their Lordships to be no room for doubt. All the documents, both before and after the final payment, show that what was in question was payment in satisfaction of the sum due on the 11th September, as the hire of the ship from that day up to the 11th October.

In the meantime before the payments were completed, on the 29th September, Bennett, Walsh, & Co. telegraphed from New York to McLean, Kennedy, & Co., in Montreal: "London cables notify charterers owners say "they consider charter violated, steamer has "been withdrawn." And on the 1st October that notice was communicated by McLean, Kennedy, & Co. to the Respondents.

The steamship arrived at Montreal on or about the 2nd of October with her cargo for that port, and the Respondents were at first allowed to proceed, not only with the unloading of the ship, but with the lining her for an outward voyage. But on the 4th October the captain gave a verbal notice to the Respondents' manager that, under instructions from his owners, he must refuse to allow them to continue shipliner's work or loading the outward cargo. And on the same day the captain at the manager's request embodied this notice in a letter.

On the 8th October this action was begun by *saisie conservatoire* of the ship on the part of the Respondents. The declaration stated the facts, alleged the withdrawal of the ship on the 4th October as a breach of the charter party, and claimed damages. The plea justified the withdrawal of the ship, on the ground of the charterers' failure to pay the monthly hire on the 11th September.

The case was tried before Fortin J. in January 1905; and on the 31st of that month the learned Judge gave judgment in favour of the Plaintiffs with damages $3347.22. On the 27th January 1906 the Superior Court in Review affirmed the Judgment of Fortin J., and against that decision the present Appeal has been brought.

On the argument of the Appeal, the first question discussed was, when was the ship withdrawn? It was contended for the Appellants that the withdrawal occurred when Bennett, Walsh, & Co.'s telegram, saying that the owners declare the steamer has been withdrawn, was communicated to the Respondents, that is on the 1st October; that at that date the monthly hire was still in arrear; that the election to enforce the forfeiture was then complete; and

that nothing which happened afterwards could alter its effects.

It is unnecessary to consider whether, in the case of a ship at sea, carrying a cargo for the charterers or for shippers under them, a mere notice could operate as a present withdrawal within the meaning of the charter party. To give it that operation in the present case would be to give it a meaning which it was never intended to bear, and which no person concerned ever supposed it bore. On the 1st October Bennett, Walsh, & Co. cabled to the owners asking the specific question, when they withdrew the steamer? and got back the answer, "after "outward cargo discharged from Montreal." The Respondents never thought that the steamer had been withdrawn on the 1st, for they not only paid up what was due, but commenced the shipliner's work for an outward voyage. The master was of the same mind, for he allowed the work to proceed till the 4th October, when he interrupted it.

Their Lordships think it clear that there was no withdrawal of the steamer until that effected by the master on the 4th October. And on that date there was nothing to justify a withdrawal; for there was nothing in arrear, the full hire for the month ending the 11th October having been paid and received.

Much stress was laid in argument upon the case of *Tonnelier* v. *Smith* (2 Commercial Cases 258). That case related to a charter party similar in many respects to the present one. At the beginning of a month, it was clear that the charter party would come to a natural termination during the month, so that the amount actually earned would be less than the monthly sum which in that case, as in this, was payable in advance. The question was whether an estimate was to be made at the beginning of the

month of what would be earned, and that amount only paid, or whether the full monthly sum was to be paid at the beginning of the month, leaving the adjustment to be made afterwards? The Court of Appeal adopted the latter view. The case does not seem to their Lordships to afford much assistance in the decision of the present case.

The Appellants further raised a question as to the propriety of the damages awarded against them. But their Lordships, in the course of the argument, intimated their opinion that the objections so raised were not well founded.

Their Lordships will humbly advise His Majesty that the Appeal should be dismissed. The Appellants will pay the costs.