

course for the Sheriff to pursue was to report the matter to the Lord Advocate had not met with approval when submitted in the Inner House. The Lord Ordinary should not exercise his discretionary powers in favour of the bankrupt seeing the bankrupt had himself entirely to blame, and could at any moment obtain his liberation by giving the information asked. His recent examination had been no more satisfactory than the former one.

LORD TRAYNER—I am of opinion that the first examination was very unsatisfactory, but I think the bankrupt was in a better position at the second examination, and I have a feeling that he then told all that he could tell in answer to the questions put by the Sheriff. I may point out that a granting of liberation will not prevent the bankrupt from being examined at any other time by the Sheriff regarding the disposal of the funds which the trustee thinks are still in his possession, and the Sheriff will then have the power to consider whether the answers are satisfactory, and if they are not, to incarcerate the bankrupt again. I think that imprisonment since 4th November last was sufficient to have induced the bankrupt to answer as well as he could at the examination which took place after the decision of the Second Division, and that all the circumstances point to the man having done his best as he had been advised to do by his agent and his relatives. It is, however, with considerable hesitation that I come to the conclusion that I may recal the warrant for the bankrupt's imprisonment and grant an order for his liberation.

An interlocutor recalling the warrant of imprisonment and granting liberation was accordingly pronounced on 12th March 1888.

Counsel for the Petitioner—G. W. Burnet.
Agent—T. Carmichael, S.S.C.

Counsel for the Respondent—A. S. D. Thomson.
Agent—W. Officer, S.S.C.

Tuesday, March 20.

SECOND DIVISION.

[Sheriff of Lanarkshire.

THE SEVILLE SULPHUR AND COPPER COMPANY, LIMITED, v. COLVILS, LOWDEN, & COMPANY (OWNERS OF THE S.S. "ETHELWOLF").

Ship—Seaworthiness—Exceptions in Charter-Party.

In an action at the instance of the charterers of a steamship against the shipowners for the value of a cargo which the defenders had failed to deliver in consequence of the vessel being lost, the pursuers averred that the loss was caused by the unseaworthiness of the vessel when she sailed. The defenders founded upon a clause in the charter-party freeing them from liability for "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, ^{and} or errors or negligence of navigation of whatsoever nature and kind, during

said voyage." It was proved that the vessel was lost in consequence of the failure of the steam power, and that this failure was caused by the action of mud which had been introduced into the boiler when it was filled with muddy water before the voyage commenced. *Held* (*dub.* Lord Young) that the vessel was not seaworthy when she sailed, that therefore the clause of exemption in the charter-party did not apply, and that the defenders were liable.

Ship—Steamship—Sails.

The captain of a steamship whose steam-power had broken down, and which was drifting on a lee shore, attempted to navigate her by means of her sails. Several of the sails split when they were set. The vessel went upon shore and was lost. *Held* that a steamship is not meant to be navigated under canvas alone, and that the steam-power having broken down, the condition of the sails could not be considered the primary or even a contributory cause of the wreck.

By charter-party, dated 2d September 1886, entered into between Colvils, Lowden, & Company, owners of the steamship "Ethelwolf" of Glasgow, and the Seville Sulphur and Copper Company, Limited, 80 George Square, Glasgow, it was agreed "that the said ship, classed 100 A1, and being tight, staunch, strong, and every way fitted for the voyage, shall with all possible despatch proceed direct to (with outward cargo for owners' benefit), and thence to the port of Seville, and there, after being reported to charterers' agent as ready to receive cargo, load in turn in the customary manner at the place ordered by said agent, a part cargo of cupreous sulphur ore ^{and} other lawful merchandise, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, furniture, &c. Being so loaded, the said ship shall proceed to one of the undernoted ports (as ordered on signing bills of lading), and there deliver the said cargo at the place and in the manner directed by the consignees, to whom the ship is to be addressed . . . Penalty for non-performance of this agreement—estimated amount of freight (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, ^{and} or errors or negligence of navigation of whatsoever nature and kind during said voyage always excepted)."

Following on this charter 350 tons of sulphur ore, belonging to the charterers, were by 4th December 1886 shipped on board the "Ethelwolf." The bills of lading were in these terms—"Shipped in good order and condition by J. S. Macdougall, as agent for the Seville Sulphur and Copper Company, Limited, Seville, on board the good ship 'Ethelwolf,' whereof Cargill is master, now in this port, three hundred and fifty tons of sulphur ore, which are to be delivered (the act of God, the Queen's enemies, fire, and all other dangers and accidents of the seas, rivers, and navigation of what nature and kind soever excepted) in the like good order and condition at Swansea (North Dock), unto the Seville Sulphur and Copper Company, Limited, of 30 George Square, Glasgow, or to their assigns, freight and all other condi-

tions as per charter." The "Ethelwolf" sailed from Seville with her cargo on 5th December. On 10th December she was lost on the coast of Spain, near Vigo.

This was an action in the Sheriff Court at Glasgow at the instance of the charterers against the shipowners, concluding for payment of £1224, 12s. 6d., the value of the cargo shipped, in respect the defenders had failed to deliver it.

The ground of action was that the cargo had been lost in consequence of the unseaworthiness of the "Ethelwolf" when she sailed on the voyage in question.

The defenders pleaded that the loss of the "Ethelwolf" having been brought about by causes falling under the exceptions specified in the charter-party they were not liable.

According to the case for the pursuers the unseaworthiness consisted in the state of (1) the boiler and (2) the sails. The evidence for the pursuers was, that antecedent to the start from Seville the boilers were in a frail condition, and that there was leakage. Further, that on the 4th December, the night before the start, the engineer had filled the boiler with water from the river Guadalquivir, which was very muddy.

The nature of the boiler was thus described by the Sheriff-Substitute in his note—"The three furnaces with their apparatus of tubes, &c., are all inside the circumference of the boiler. Water goes around, above, and under them. The tops or 'crowns' of the furnaces are a good deal below the ordinary level of the surface of the water in the boiler. The test water-gauge or test-glass at the side shows (when in order) the height of the water in the boiler. The proper surface of the water space of the boiler should be somewhere within the range of the gauge. If there is no water in it the water may be too low; if it is all water, the water may be too high in the boiler, and air space or steam space too small. When once the boiler has been filled, the fires lighted, steam got up by degrees, and the engines started, the water that goes off in steam is for the most part returned to the boiler, after having been reliquified in the condenser. So the boiler mostly feeds itself when all is in order. But there is always a certain but small amount of waste of steam from various causes. To make up for this there is an auxiliary or supplementary feed pump, by which very small quantities of water can be added, so small as not to lower the temperature to an appreciable extent, or to let down steam. But if from any cause these feed pumps, principal or supplementary, are out of order, or if the boiler has had to be emptied for purposes of cleaning and repairs, there is nothing for it, if at sea, but to pump up cold sea-water into the boiler by means of the donkey-engine. This does no harm, or very little harm, if done when the boiler is cold; but if done when the boiler, though not so red hot as to explode, is still hot, it causes the metal to shrink, and the boiler therefore to leak severely. Again, it has to be remarked that a danger occurs when any portion of the boiler plates gets red hot, and is so when cold water is introduced; and the arched furnace crowns or tops, from their position, are naturally exposed to the greatest heat. As long as they are in contact with water the heat passes through them into the water, but if the water in the boiler is allowed to get so low that the upper

surface of the crowns is uncovered, or if a thick coating of mud is allowed to accumulate on them between them and the water, the heat no longer passes through, but tends to make them red hot. The hotter they get the softer they get, and the greater tendency they have to sink, and to yield to any pressure from within the boiler, and if they yielded to any considerable extent they might crack, and the boiler become useless if it did not explode."

According to the case for the defenders the boiler was in a good and seaworthy condition when the vessel left Seville, but they led evidence to show that in going down the Guadalquivir she struck on a mudbank; that she wasted steam in getting off, and more water had to be pumped into the boiler; and that it was then the muddy water was taken into the boiler, and not before leaving Seville.

On the 8th, when the "Ethelwolf" was at sea, the engineer noticed that the water in the gauge-glass, which was the only instrument to indicate the state of the water in the boiler, was very muddy, but that it indicated the boiler was full. He therefore stopped his auxiliary feed-pipes, but the same day the furnace crowns came down, and accordingly the boiler had to be emptied to avoid an explosion. As the ship, however, was then drifting towards the land, the engineer, at the urgent request of the captain, pumped in cold sea water while the boiler was still hot, which increased the leakage. The result was that the steam power gradually failed until on the morning of the 10th it failed altogether. An attempt was made to navigate the vessel under sail, with the result that three sails split out of five which were set. The "Ethelwolf" was abandoned on the 10th, and shortly afterwards became a total wreck.

The Sheriff-Substitute (ERSKINE MURRAY) on 26th September 1837 pronounced this interlocutor:—"... Finds (3) that on the whole it appears that when the 'Ethelwolf' started from Seville on 5th December last she was not (whether from the weakly condition into which the boiler and its pipes had been allowed to get or from the boiler having been filled with muddy water at Seville, the mud from which constituted an element of danger to the boiler) in what constitutes a seaworthy condition in the eyes of the law: Finds (4) that on her voyage down the river Guadalquivir, she having stuck for half-an-hour on a bank and lost some steam, more muddy water had to be pumped into the boiler: Finds (5) that she proceeded on her voyage till on the 7th and 8th she experienced some rough weather with north-west winds off the coast of Spain near Cape Finisterre: Finds (6) that the gauge-glass which ought to show the depth of water in the boiler got out of order in consequence of the mud in the water, and on the afternoon of the 8th the furnace crowns began to sink, which showed either that they had got encrusted with mud or that the water in the boiler had gone dangerously low: Finds (7) that there can be no doubt that in reality the water in the boiler had got very low, and that much had been lost by leakage: Finds (8) that the engineer at once drew the fires, either with the intention (which he was unable to carry out from the position of the ship) of emptying and then repairing the boiler, or simply of enabling him to refill the boiler with

cold water pumped in from the sea without danger of explosion: Finds (9) that the captain hurrying him to get up steam in consequence of the dangerous position of the ship, he refilled the boiler with cold water from the sea while it was still hot, which caused a shrinkage of the tubes and greatly increased the leakage, so that although by the early morning of the 9th he was able to get up steam, it was only to about one-third of the proper power: Finds (10) that after running about ten miles out to sea the captain resolved to steer for Vigo, and accordingly turned the ship's head to the south-east: Finds (11) that the steam power gradually failed (the leakage of the boiler increasing), till on the morning of the 10th it failed altogether, when they were only a few miles from Vigo, but unfortunately there was a thick fog, and though the wind was not high there was a strong sea from the west: Finds (12) that during the last few days when the steam power was weak or in abeyance an attempt had been made to utilise the sails of the 'Ethelwolf' to get her out of danger, but though some of them were of a little use, the most of them were found to be so weak that they either gave way at once or had to be repaired before they were used: Finds (13) that the 'Ethelwolf' being thus helpless, and another steamer, the 'Hanover,' passing, a vain attempt was made to convey a tow-rope on board the latter with the object of the 'Ethelwolf' being towed into Vigo: Finds (14) that this failing the 'Ethelwolf' was abandoned, and her crew taken into Vigo by the 'Hanover,' and shortly thereafter the 'Ethelwolf' drifted on the rocks and became a total loss: . . . Finds on the whole case and in law (1) that (for the reasons stated in the note annexed hereto) the causes of the loss of the 'Ethelwolf' and its cargo do not fall under the exceptions in the bill of lading and charter-party; (2) that the 'Ethelwolf' was not (in a legal sense) seaworthy at the time of her departure from Seville: Therefore repels the defences, and decerns against the defenders, in terms of the prayer of the petition: Finds the defenders liable to the pursuers in expenses, &c.

"Note.—. . . The law affecting charter-parties has been considerably modified and clearly defined very recently, especially in the three cases of the 'Inchmarree,' the 'Xantho,' and the 'Inchrhona,' in each of which on 14th July last the House of Lords reversed a judgment of the English Court of Appeal, and in the judgment of the House of Lords in the case of *Steele v. Craig*, 4 R. (H. of L.) 103. Taken together the recent judgments bring out the following results:—

"In the first place, shippers proving non-delivery of goods establish a *prima facie* case, and it lies on the shipowners to bring the loss within one of the perils excepted in the bill of lading or charter-party—'Xantho,' Court of Appeal, June 9, 1886, Times Law Reports, ii. 704; to this extent the judgment of the Court of Appeal was not interfered with by the House of Lords. The next thing is to ascertain the meaning and comprehension of the exception of 'perils of the seas.' A peril of the seas is any accident or casualty occurring at sea, by which sea-water gets into a vessel and does damage—'Inchrhona' case, *Hamilton, Fraser, & Company v. Pandorf & Compang*, Times Law Reports, iii. 768. It is not (though some eminent Judges

formerly expressed views of a contrary nature) necessarily the result of storm or violent weather, or what may be called the sea's bad behaviour (Lord Bramwell in the 'Inchrhona' case above cited, and 'Xantho' case in H. of L., Times Law Reports, iii. 766). It does not cover every accident on board, for there may be a peril on the sea without its being a peril of the sea. For example, if rats eat part of a cargo, that is not a peril of the sea though it is a peril on the sea, but if the rats eat holes in the timbers or pipes of a seaworthy vessel, by which sea-water comes in and does damage, that damage is by a peril of the sea. Again, damage by accident to machinery on board a vessel is not a peril of the sea, but if as a consequence sea-water comes in, that is a peril of the sea—'Inchrhona' case above cited, 'Inchmarree' case, *Thames and Mersey Marine Insurance Company v. Hamilton, Fraser, & Company*, July 14, 1886, Times Reports, iii. 764. The results of natural decay and ordinary wear and tear do not come under the exception—'Xantho' case in House of Lords above cited. A peril of the sea must be something that happens in this transit—*Steele v. Craig* (H. of L.) as above cited. There is really no difference (though the contrary was formerly held by some eminent Judges) between the meaning of the term 'peril of the seas' in an insurance policy, and the meaning of the same term in a bill of lading or charter-party; in both their meaning is as above stated. The difference in effect arises from the difference of the contracts. A policy of insurance is an absolute contract to indemnify for loss by perils of the sea, and the question of fault or negligence entering as an element among the causes of loss is of no moment, the proximate cause of the loss only is looked at, whereas in the case of a bill of lading or charter-party the contract is one of carriage, the general scope of which infers obligations on the shipowner—(1) to provide a seaworthy ship; (2) to carry with reasonable care, and so in the case of the latter contract the Court will look behind the immediate cause forming a peril of the sea to ascertain whether a remote cause of that peril was not the unseaworthiness of the vessel or the want of reasonable care on the part of those in charge of it, which it could not do in the case of a contract of insurance, and the carrier will be usually under the necessity of establishing that no negligence of his had led to the calamity—'Xantho' case above cited; 'Inchrhona' case above cited; Mr Justice Willes in *Grill v. Iron Screw Collier Company*, 4 L.R.C.P. 614, as approved of in 'Xantho' case.

"The next question that arises is as to the effect of the exception as to 'errors or negligence of navigation' contained in the charter-party of the 'Ethelwolf.' Such a clause, it has been held by the Courts, must always be interpreted strictly against the shipowner, and would not save him from the result of previous personal negligence of his own, e.g., if he had knowingly employed a drunken or inefficient captain (*Chartered Bank of India v. Netherlands Company*, 10 L.R., Q. B., p. 532). Further, even though such an exception as to error or negligence did not specially bear only to refer to error, &c., at sea it will be held by the Courts only to apply to matters subsequent to the sailing of the ship with goods on board. Errors or

negligence previous to that moment are not covered by it (*Steele v. Craig* in H. of L. above cited). It is true that in the cases of *Carmichael*, 3 Times Law Reports, 636, and in that of the 'Warkworth,' June 28, 1884, 9 L.R., Prob. Div. 145, the Appeal Court held that improper navigation included something negligently done or omitted to be done before navigation commenced; but these were cases not under charter-party or bill of lading, the former being at the instance of the shipowner himself against an Association of Shipowners assuring each other, and the latter in a collision case under the Merchant Shipping Act, circumstances which raise other questions than those in a contract of carriage. The case of *Good*, 6 L.R., C.P. 563, was of a similar nature to that of *Carmichael*, and in any event, these three judgments were by Courts inferior to the House of Lords, and if the decisions are contradictory those of the lower Court must yield. In reality, however, this difficulty cannot arise in the present case, for the charter-party of the 'Ethelwolf' limits the errors, &c., to those in the course of the voyage. So any such error, &c., previous to her starting from Seville is excluded.

"Finally as a shipowner is bound to provide a seaworthy ship the question arises: What is seaworthiness? As defined by Lord Chancellor Cairns, 'a vessel is seaworthy when it is in a condition to encounter whatever perils of the sea a ship of that kind and loaded in that way may be fairly expected to encounter.' Want of seaworthiness as defined by Lord Blackburn is the non-fulfilment of the obligation to make the ship reasonably fit for the voyage (*Steele v. Craig*, H. of L. as above cited). This seaworthy condition and reasonable fitness of the ship must be not only as regards its structural condition but also in other respects. Thus a port being left unfastened at the time of the loading of a vessel, in a position in which it could not be noticed or fastened by the crew during the voyage in consequence of cargo being piled against it, was held to make the vessel unseaworthy for the voyage (*Steele v. Craig* above cited). Again the shipowner's guarantee of his vessel's seaworthiness is a guarantee against latent defects. Thus a latent defect in a crank shaft constitutes unseaworthiness, and when damage results exceptions in the bill of lading from perils of seas and navigation, from loss or damage from machinery, and from all and every dangers of the seas, and of navigation of whatever kind, are held not to apply to a vessel which was from such a latent defect unseaworthy at the time of sailing. (*The 'Glenfruin'*, 1885, L.R. 10 Prob. Div. 103).

"Applying the above law to the case of the 'Ethelwolf,' it is clear that in the first place it lies on the shipowners as they have failed to deliver the goods to show that they are freed from liability by the exceptions in the bill of lading and charter-party.

"There can be no doubt that the wreck of the 'Ethelwolf' was a peril of the sea whether there was stormy weather or not. Had this been the only exception the shipowners would have been bound also to show that the wreck could not have been avoided by the exercise of ordinary care and intelligence on their part, or the part of those for whom they were responsible. But the words inserted in writing in the charter-party

as to errors and negligence modify this obligation. The *onus* still lies on them, but they discharge it if they prove that (the proximate cause of loss being a peril of the sea); the indirect cause was error or negligence of navigation during the voyage. It will not however say them if the indirect cause of the loss was error or negligence previous to the sailing of the 'Ethelwolf' from Seville. It has also to be kept in view that a breakdown of machinery even from a latent defect is not of itself a peril of the sea. Further, at the back of all this the defenders require to show that the 'Ethelwolf' was seaworthy when she started from Seville, not merely as regards construction, but as regards her condition in any respect; that she had not in fact on board the seeds of evil which developed in the course of the voyage, and became an essential cause of her loss"—(*The Sheriff-Substitute then reviewed the evidence, and arrived at the conclusion stated in his interlocutor*).

The defenders appealed; and argued—The *onus* of proving that the vessel was unseaworthy when she started on her voyage from Seville rested upon the pursuers—*Boyson v. Wilson*, March 6, 1816, 1 Starkie's Rep. 236. There were two occasions on which muddy water had been taken into the boiler, first at Seville, and secondly on the mudbank. If the furnace crowns came down by reason of the mud taken in on the bank, then that was a peril of the sea. If, however, they came down by reason of the muddy water taken in at Seville, which was not proved, that was an error in navigation, as having been done in preparation for the voyage, and came within the exceptions in the charter-party—*The "Xantho,"* July 14, 1887, L.R., 12 App. Cas. 503; *Steele v. Craig*, March 16, 1877, 4 R. (H. of L.) 657, Bell's Com. i. 597, 663, 664; *Pickup v. Thames Insurance Company*, May 16, 1878, L.R., 3 Q.B.D. 595; *Carmichael & Company v. Liverpool Indemnity Association*, May 19, 1887, L.R., 19 Q.B.D. 242; *Good v. London Protecting Association*, June 23, 1871, L.R., 6 C.P. 563; "*The Warkworth*," June 28, 1884, L.R., 9 Prob. Div. 145. The accident, however, really arose from the negligence of the engineer, who thought that the boiler was full of water. He therefore stopped the auxiliary feed pipes; that caused the water to fall so low as to leave the furnace crowns exposed, and the fire from the furnace made them come down, so that the fires had to be extinguished. When the captain insisted on having steam got up the cold seawater caused the pipes which were still hot to shrink, and the boiler to leak, so that no head of steam could be got up. That was caused by the negligence of the engineer during the voyage, and so was within the exceptions in the charter-party. This case differed from that of *Steele v. Craig*, as there was in that case a fault in the structure of the vessel, viz., one of the ports was left open, which could not be put right during the voyage. As regarded the sails the evidence showed that these were quite in good order, and in fact helped the ship to wear round, but even if nothing had happened to them the ship could not have been saved by them alone.

The respondents argued—The only document to be dealt with here was the charter-party, as the bill of lading could not by a general reference to the charter-party incorporate any excep-

tions not expressly stated in the bill of lading itself—*Russell and Others v. Niemann*, June 24, 1864, 17 C.B. (New Series), 163, and 34 L.J., Com. Pleas, 10. The important question was, when was the muddy water taken into the boiler? Because it was admitted that mud in the boiler caused the accident in one of two ways, either the mud obscured the gauge glass, and so misled the engineer, or the mud caused the furnace crowns to become heated. It was admitted that they had taken water in at Seville, and that the Guadalquivir was a very muddy river, but it was said that the mud was really taken in after she had left Seville, so that it was a peril of the sea. But the "Ethelwolf" was only upon the bank for half or three-quarters of an hour, and could not have taken in enough muddy water in that time to have caused the accident. If a ship had in her, when she started upon her voyage, something which only needed moderately bad weather to turn it into a source of danger, then she was unseaworthy. Negligence in getting the ship ready before she started did not come within the exception of "negligence upon the voyage," because the moment of starting was the time at which seaworthiness was to be judged of. That was held to be the law in the case of *Steele v. Craig*, July 20, 1877, 4 R. (H.L.) 103; *Kopitoff v. Wilson and Others*, February 23, 1876, L.R., 1 Q.B.D. 377; *Tattersall v. The National Steamship Company*, March 11, 1884, L.R., 1 Q.B.D. 103; "*The Glenfruin*," March 31, 1885, L.R., 10 Prob. Div. 103. As regarded the sails, part of the equipment of a steamship were her sails; if she was seaworthy these must be in good condition, but they were not so here. It was enough for the pursuers to show that there was a possibility of the sails enabling the vessel to weather the storm.

At advising—

LORD JUSTICE-CLERK—The parties to this action are respectively the Seville Sulphur & Copper Company, who are the pursuers, and the owners of a steamship called the "Ethelwolf," who are the defenders. The pursuers demand a sum of £1224, 12s. 6d. as the value of a cargo of minerals shipped by them on board the "Ethelwolf" for delivery at Swansea, which obligation they allege that the defenders failed to fulfil.

The defenders admit that they received the goods on board, and that they became bound to deliver them in terms of the charter-party founded on. But they maintain that as the vessel was lost on her voyage from causes for which they are not responsible, they are not liable for the value of the goods.

The contract of carriage is constituted by charter-party, the terms of which are substantially these—[reads clauses of charter-party quoted above].

It is maintained for the defenders that the circumstances under which this vessel was lost substantially fall under the exceptions contained in the charter-party. As the vessel was lost and the cargo with it, the contract of carriage was of course not implemented, and the shipowners must in the first instance discharge themselves of their liability. It is entirely a case between carrier and customer. There is no question with insurers.

The immediate cause of the loss of the vessel

does not admit of dispute. She sailed from Seville on the 5th of December 1886 for her destination at Swansea. On the 8th her boilers gave symptoms of leakage, and it was found necessary to extinguish the fires, and after some temporary attempts to get up steam, they finally gave way on the 10th, and in spite of an unsuccessful attempt to run to Vigo under canvas, the crew were obliged to abandon the vessel, and were taken off by another steamer, and she became a total wreck.

In this state of the facts the pursuers maintain that the vessel was unseaworthy, first, from the state of her boilers, and secondly, from the imperfect condition of her sails. The defenders, on the other hand, contend that the derangement of the boilers arose after the commencement of the voyage, and was within the exception in the charter-party, while they deny that the state of the sails was defective, or in any way led to the loss of the ship.

In regard to the last point, I may as well dismiss it with the remark that whatever was the condition of the sails, it was not the primary or even a contributory cause of the wreck. A steamship is not meant to be navigated under canvas alone, although it sometimes may be so, but in this instance it seems quite clear that, however good the sails had been, they could not from the position of the vessel and the state of the wind and weather have availed to avoid the calamity. The cause therefore of the loss of the vessel was the failure of her steam power.

On this matter we have a very large, intelligent, but conflicting body of evidence. It is not disputed that the steam-producing machinery had suffered injury, although the parties differ as to the time and the cause. When the fires were blown down on the 8th of December the leakage was admittedly such as to render an explosion probable if not inevitable. It does not appear that although the boiler had been under suspicion, even before the arrival of the ship at Seville, there was, when she left, any material defect in her construction, but before she had sailed for three days the engineer and his assistants began to see that there was something materially wrong. The gauge-glass, which is constructed so as to indicate the height of the water in the boiler, was found to be erroneous in its indications, to show the water muddy, and to exhibit "false water," as the technical term seen to be. At last no doubt remained. The boiler was leaking profusely, and on the 8th came the result I have described.

The contending parties account for this occurrence differently, although it is not disputed that the presence of mud in the boilers and connections, which is admitted, had a tendency to produce the results which ensued.

On this part of the case the defenders maintain that the muddy water which was introduced into the boilers, and was the cause of the mishap, was taken in owing to the steamer having partially grounded on a mud bank in the river about 50 miles from Seville, and that this cause was within the exception contained in the charter-party, having occurred in the course of the voyage. On the other hand, the pursuers allege that the night before the vessel sailed from Seville her boiler, which had been emptied for cleaning, was refilled with water from the Guadal-

quiver, a river notoriously muddy.

It is not disputed that the ship was delayed by partial grounding on the mud bank in question on the morning of the 5th of December, and that some of the water of the river was at this time supplied to the boiler after leaving Seville. The question of fact therefore on which the case turns is, whether the water with which the boilers were entirely filled at Seville before, she started was muddy, and produced the results which turned out so disastrous?

I think that on the evidence no doubt remains on this matter. The testimony of Thomson, the engineer, is sufficient to establish it. He describes the steps which he took by blowing down and cleaning out the boiler at Seville, and then he adds that "at ten o'clock at night I filled the boiler after consultation with the captain. The tide was about high water then," so he filled it from the river. That was on the night of Saturday the 4th. They sailed next day, Sunday the 5th of December. In re-examination he says—"We had muddy water in the Guadalquiver. It was very bad, and it was worse at low tide. Did you get a message from the owners about it?—Yes, but it was too late. I had the boiler blown down before the captain told me."

There is ample evidence from witnesses of experience that the presence of mud in the boiler was quite sufficient to account for such failure of the machinery as occurred here, as well as for the time which elapsed before the ultimate results made themselves known. Without going into further detail I am of opinion that this steamship was lost, and with it the cargo, by reason of the failure of the propelling power; that this failure was caused by the action of mud which had been introduced into the boiler when it was filled at Seville with muddy water from the river Guadalquiver the night before the voyage commenced.

The only question which remains is, whether the ship was seaworthy when she sailed from Seville on the morning of the 5th of December. I am of opinion that she was not; and if I am right in attributing the failure of her motive or propelling power to the muddy water of the river at Seville, this steamship was not fit to go to sea when she sailed, as the result only too clearly proved.

I do not think it necessary to go into the general question as to what constitutes unseaworthiness. A steamship, the boilers of which will not generate steam, is not capable of navigation or carriage with safety to life or cargo. It is a stronger case than that of *Steele v. Craig*, for in that case there was no structural defect, only careless stowage of the cargo, which prevented one of the port-holes from being closed. But the propelling power of a sea-going ship is of its essence, and if this vessel for the time had none it could not be seaworthy.

No doubt the injury to the boiler was the unthinking or ignorant act of the engineer, and did not arise from organic or radical defect. It was accidental, and not structural. But so was the stowage in the case of *Steele v. Craig*, for but for the temporary impediment caused by the cargo the construction of the vessel was not in fault.

It makes no difference in my opinion that the defect was in the machinery and not in the fabric of the vessel. The power of locomotion

on the waters is as much of the essence of a sea-going ship as the capacity of flotation, and a steamer without steam is as little the vessel which the charter-party describes, and which the defenders undertook to furnish, as a sailing vessel without sails would have been.

LORD CRAIGHILL was absent through illness, but intimated his concurrence.

LORD RUTHERFURD CLARK concurred.

LORD YOUNG—I should not perhaps, with such concurrence as has been expressed in your Lordship's judgment, venture to express any doubt, but I had some doubts as to the result, and these doubts have not been entirely removed. I therefore think it right to give expression to them, although I confess the judgment which must be pronounced is probably the right one.

The Sheriff-Substitute's interlocutor contains a number of findings, but the material one in fact is the third—"Finds (3) that on the whole it appears that when the 'Ethelwolf' started from Seville on 5th December last she was not (whether from the weakly condition into which the boiler and its pipes had been allowed to get, or from the boiler having been filled with muddy water at Seville, the mud from which constituted an element of danger to the boiler) in what constitutes a seaworthy condition in the eyes of the law." The corresponding finding in point of law is "that the 'Ethelwolf' was not (in a legal sense) seaworthy at the time of her departure from Seville," and I think that the opinion of the Sheriff-Substitute and of your Lordships was that this unseaworthiness arose not from any defect in the machinery of the vessel, but from the fact that the ship's boiler had been filled with very muddy water before she left Seville, and the question of fact therefore upon which I have the doubts I expressed is, whether the evidence shows that there was unseaworthiness before the commencement of the voyage?

I have to notice as introductory to what I wish to say that the charter-party which was entered into in Glasgow provided that the vessel should proceed to Seville, should there take in certain cargo, and proceed to a certain port. Now, there is a clause in this charter-party which guards against there being any liability upon the shipowners from any "errors or negligence of navigation of whatsoever nature and kind during said voyage." Under this charter-party the vessel did proceed to Seville, but before she could start from there on her return voyage it had to be seen to that there was water in the boilers, and she filled her boiler with water from the Guadalquiver. The Guadalquiver is a notoriously muddy river, but still the ships lying there do take the water from the river into their boiler. Of course the muddy state of the river may be so bad at certain times that the shipmaster instead of taking in the water from the river should send elsewhere for it. Whether this is an error of navigation in the sense of the charter-party is a doubtful question. I rather think it was an error of navigation to take the water into the boiler in a muddy condition, and the evidence shows that it was the muddiness that contributed to the loss of the ship, but I have a doubt as to whether that constitutes unseaworthiness in what the Sheriff-Substitute calls "a legal sense." The ship was sea-

worthy when she arrived at Seville, she was seaworthy until those in charge of her filled the boiler with muddy water, and my only doubt was as to whether that error constituted unseaworthiness. If it did amount to unseaworthiness, then the law is quite clear that the shipowner is liable for any loss or damage occasioned to the cargo by such unseaworthiness.

The Court pronounced this interlocutor—

“Find in fact (1) that in December 1886 the pursuers shipped at Seville on board the steamship ‘Ethelwolf’ belonging to the defenders three hundred and fifty tons of sulphur ore of the value of £1224, 12s. 6d., to be carried to Swansea, and delivered there to the defenders or their assigns as stipulated between the parties in the charter-party, and relative bill of lading; (2) that by the said charter-party and bill of lading the defenders undertook to carry the said goods and deliver them at the port of their destination, the act of God, fire, and all and every other dangers and accidents of the seas, rivers, and errors or negligence of navigation of whatsoever kind during the voyage being excepted; (3) that before the commencement of the voyage from Seville the boiler of the said ship was filled with muddy water from the river Guadalquivir, which, after the ship had put to sea, caused leakage of the boiler, and ultimately failure of the steam power, in consequence of which the ship became unmanageable, was abandoned, drifted on rocks near Vigo on the coast of Spain, and became a total wreck: Find in law that the cause of the loss of the ship does not fall under any of the exceptions of the charter-party and bill of lading, and that the defenders are liable to the pursuers in payment of the value of the said goods: Therefore dismiss the appeal: Affirm the judgment of the Sheriff-Substitute appealed against: Of new decern in terms of the conclusions of the petition: Find the pursuers entitled to expenses in the Inferior Court and in this Court,” &c.

Counsel for the Appellants—Balfour, Q.C.—Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Respondents—Asher, Q.C.—Salvesen. Agents—Boyd, Jameson, & Kelly, W.S.

Tuesday, March 20.

FIRST DIVISION.

[Lord Lee, Ordinary.

THOM v. BAIN.

Mandate—Mandatory—Power to Compromise Action.

Held that a mandatary is not entitled without special authority to compromise an action.

Mrs Margaret Isabella Jane M'Laren or Thom, wife of George Robertson Thom, jute merchant, Calcutta, then residing at Salisbury Cottage, Dun-

dee, and the said George Robertson Thom, as administrator-in-law for his wife, and as an individual, raised on 4th July 1887 an action of damages for slander against David Dorward Bain, merchant, No. 62 Commercial Street, Dundee, and residing in Garland Place, Dundee.

On 30th June 1887 the pursuers of the action had granted a mandate in favour of Hugh Patrick Davidson, commission merchant, Salisbury Cottage, Dundee, in these terms—“Dear Sir,—We hereby appoint you our mandatary in the action which we have instituted against David Dorward Bain, merchant, 62 Commercial Street, Dundee, and residing at Garland Place there, for £5000 sterling of damages, and we authorise and instruct you to prosecute and follow forth said action in the Court of Session, and to employ Mr R. Mitchell, solicitor, Perth, and such Edinburgh agents and counsel as to you may seem best.—Yours truly, MARGARET I. J. THOM—GEORGE ROBERTSON THOM.” Davidson accepted the appointment.

By interlocutor of 17th November 1887 the Lord Ordinary (LEE) approved of an issue for the trial of the cause, against which the defender reclaimed.

The defender lodged a tender in these terms—“Guthrie, for the defender, stated that he admitted the statement in reference to the pursuer Mrs Thom contained in the letter addressed by him to the pursuer Mr Thom to be unfounded, and he withdrew the said statements, and expressed regret that they had been made. He further tendered to the pursuers the sum of 100 guineas, with expenses, in full of the claim made by them in the present action.”

On 22d December 1887 an agreement was entered into between H. P. Davidson, who had been sisted as mandatary for the pursuers, of the *first part*, and David Dorward Bain of the *second part*, in these terms:—“Whereas there is presently pending in the Court of Session an action for damages for slander at the instance of George Robertson Thom, merchant, presently in Calcutta, and his wife, against the second party, in which action the first party is mandatary for the pursuers, and it has been arranged between the parties hereto that said action should be settled extra-judicially, and they have agreed to settle the same on the following terms—*First*, the second party repeats the retraction and apology contained in the minute of tender lodged for him in the process; *second*, the second party shall pay to pursuers in said action the sum of £200 in name of damages, payable as follows, viz., £150 in cash, and £50 within four months from the date hereof; and he shall also pay to the pursuers the sum of £150 within four months of the date hereof as in full of all their claims for the expenses incurred by them in the action, for which last-mentioned sums of £50 and £150, amounting together to £200, the second party shall grant in favour of the first party for behoof of the pursuers a promissory-note, payable four months after date.—In witness whereof,” &c.

Counsel for the pursuers repudiated this settlement, and asked for time to communicate with the pursuers, who were resident in India. Time was granted, and the pursuers wrote repudiating the agreement. Notice was thereupon given on behalf of the pursuers for the trial of the cause.