Judgment of the Lords of the Judicial Committee of the Privy Council on the consolidated Appeals of the Australasian Steam Navigation Company, owners of S.S. "Victoria," v. William Howard Smith and Sons, owners of S.S. "Keilawarra," from the Supreme Court of New South Wales; delivered May 9th, 1889.

Present:

LORD WATSON.
LORD BRAMWELL.
LORD MACNAGHTEN.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

[*Delivered by Lord Bramwell.*]

THEIR Lordships are of opinion that it is impossible for these appeals to be maintained on the main ground put forward by the Appellants. At the trial the Appellants and the Respondents each treated the question of whether this was a narrow channel as one to be decided by the judge. Whether they were right or wrong in that is a matter upon which their Lordships express no opinion at the present moment, but they both did, not by any agreement between them, treat it as a question to be decided by the judge, and the judge did decide it, and decided it in favour of the Respondents. An application was made for a new trial, not on the ground that it was not a question for the judge, but that the judge had decided it wrongly. That being the condition of things, there was a rule for a new trial, and when it came on to be heard the learned counsel for the Appellants declared that he could not maintain his rule unless it were amended, and upon amendment being refused he declined to argue it, and accordingly it was dis-discharged. It is impossible that there can

▲ 58866. 100.—5/89. Wt 1260. E. & S.

be any appeal from a decision so acquiesced in. But that does not decide this matter entirely, for Mr. Cohen says, and it was said in the court below, that there ought to have been an amendment. Their Lordships are strong advocates for amendment whenever it can be done without injustice to the other side, and even where they have been put to certain expense and delay, yet if they can be compensated for that in any way it seems to their Lordships that an amendment ought to be allowed for the purpose of raising the real question between the parties. But the Court appealed from, who had the whole matter before them, thought it right to refuse that amendment, and upon the materials before them their Lordships think that they most properly did so, because their Lordships cannot see that any offer was made of the character described, or that any argument was presented to the Court for the purpose of showing that there was a good ground for saying that justice, according to the real facts of the case, had not been done. Their Lordships therefore think that the Court below was right in refusing the amendment. In expressing this opinion their Lordships do not say that the channel, the place where the accident is supposed to have taken place, was or was not a narrow channel, nor whether it was properly a question for the judge or jury. On these questions their Lordships express no opinion at all. It is not necessary that they should do so, because the Court below, which had those matters under its consideration as much as any other matter in the case, determined that they would not grant the amendment. It is impossible for their Lordships to reverse that exercise of their discretion. The result is that their Lordships will humbly advise Her Majesty that the appeals should be dismissed, and they direct that they be dismissed with costs.

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