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LAW REPORTS

Including extended Reports of Cases appearing in
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Edited by
H. P. HENLEY
of the Middle Temple, Barrister-at-Law

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LAW REPORTS

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VOL. 55. No. 1] THURSDAY, MAY 28, 1936. [BY SUBSCRIPTION

COURT OF APPEAL.

Monday, May 4, 1936.

WILLIAM CORY & SON, LTD. v. DORMAN, LONG & CO., LTD. (THE "TURK.")

Before Lord Justice SLESSER, Lord Justice ROMER and Mr. Justice FINLAY.

Limitation of liability—Collision between barge and cofferdam — Collapse of cofferdam—Negligence of barge—Contention by plaintiffs that they were bailees for hire or charterers by demise of the barge, who had contracted to take over the sole charge and management thereof and were responsible for its navigation, manning and equipment —Barge in ownership of lighterage company, subsidiary to plaintiff company—Allegation by plaintiffs that they had entered into a verbal agreement with the lighterage company whereby all the barges owned by the lighterage company were to be handed over to the plaintiffs and operated by them in consideration (inter alia) *of the trading results of lighterage, &c., accruing to the lighterage company—Merchant Shipping Act, 1906, Sect. 71 —Merchant Shipping Act, 1921, Sect. 1 (2).*

———Held, by C.A., dismissing plaintiffs' appeal, that no such verbal agreement was proved; and that the real position was that the plaintiff company were throughout managing for the lighterage company, a separate entity, as their agents—Limitation refused.

Charter-party—Transfer of rights in ship —Doubt expressed whether rights can be transferred by oral agreement.

This was an appeal by Messrs. William Cory & Son, Ltd., Fenchurch Street, London, E.C., from a judgment of Mr. Justice Branson (53 Ll.L.Rep. 13) refusing their petition for limitation of liability in respect of damage resulting from a collision between their barge *Turk*, of London, and a cofferdam belonging to the respondents, Messrs. Dorman, Long & Co., Ltd., of Zetland Road, Middlesbrough, which was in course of construction in connection with the erection of a bridge over the western entrance to the Victoria Docks.

The respondents had contracted with the appellants for the latter to supply barges for the removal of soil from the cofferdam, and on June 22, 1933, the barge *Turk* collided with the cofferdam, causing it to collapse.

The respondents sued the appellants, alleging that the collision and consequent damage was due to the negligence of a bargee in the appellants' employ, and the Court of Appeal (50 Ll.L.Rep. 161) upholding Mr. Justice Branson (49 Ll.L. Rep. 106) gave judgment for the respondents; and the appellants then sought to limit their liability under the Merchant Shipping Acts, 1894-1921.

Mr. Justice Branson refused limitation; and the plaintiffs now appealed.

Mr. K. S. Carpmael, K.C., and Mr. E. E. Addis (instructed by Messrs. William Charles Crocker) appeared for the appellants; Mr. Lewis Noad, K.C., Mr. W. L. McNair and Mr. C. A. Roberts (instructed by Messrs. Hair & Co.) represented the respondents.

Mr. CARPMAEL said that the effect of the

collision between the barge and the cofferdam was that the latter had to be rebuilt. Messrs. Dorman, Long & Co. sued Messrs. Cory & Son and Cory Lighterage, Ltd., and Mr. Justice Branson held that Messrs. Cory & Son were alone to blame; and that decision was upheld by the Court of Appeal. In the limitation action the same Judge held that the appellants had not established that any contract had been made between them and Cory Lighterage, Ltd., whereby the appellants became charterers by demise or hirers of the *Turk* within the meaning of Sect. 1 (2) of the Merchant Shipping Act, 1921. Counsel said that it was plain that his Lordship thought that the appellants came within the spirit though not within the etter of the 1921 Act. The appellants conended that they were charterers by demise r hirers because they had control of the barge and navigated her by their own servant, and that they were therefore entitled to limit their liability to the amount of £600 odd, which was computed on the barge's tonnage. The appellants said that Cory Lighterage, Ltd., had divested themselves of all control of the barge, and that the appellants were not acting as managers for that company.

COUNSEL said that he thought that his Lordship had overlooked some very material facts: (1) that from 1932 Cory Lighterage, Ltd., ceased to provide any money for the operation of the barges, it all being provided by the appellants; (2) that thereafter the barges were run by the appellants' servants; (3) that all stores and equipment were supplied and paid for by the appellants; (4) that thereafter the appellants contracted with third parties as principals; and (5) that from 1932 all bad debts were borne by appellants.

Counsel for the respondents were not called upon.

JUDGMENT.

Lord Justice SLESSER: This appeal fails. It is an appeal from a decision of Mr. Justice Branson which follows a former decision of the same learned Judge dealing with the same matter.

The material circumstances of the case are these. Messrs. Dorman, Long & Co., Ltd., the constructional engineers, were engaged under a contract with the West Ham Corporation to construct a bridge over the western entrance to certain docks. For that purpose it became necessary to construct a cofferdam, and they made a contract with Messrs. William Cory & Son, Ltd., for the supply of barges to take away the soil. One of these barges was called the *Turk*, and on June 22, 1933, a bargee on the *Turk* so negligently brought the *Turk* into collision with the cofferdam that the cofferdam was caused to collapse, whereby damage was suffered to the structure of the cofferdam.

That action, which was heard by Mr. Justice Branson in the first place in March, 1934, was determined in this manner. There having been two defendants sued, whom I will mention in a moment, the learned Judge decided that one was responsible and the other was not. The two defendants sued were Cory & Son, Ltd., and another company called Cory Lighterage, Ltd. The question in that case was which of these two companies was responsible for the negligence of the bargee on the *Turk*. It was in respect of his negligence that liability was claimed against the company. The learned Judge came to the conclusion that Mr. Elliott, the negligent bargee, was the servant of the first defendants, that is to say, William Cory & Son, Ltd., and not the servant of the lighterage company. That case went to the Court of Appeal, which refused to disturb the finding of Mr. Justice Branson.

In those circumstances the present case arose; and it arose because by reason of the provisions of the Merchant Shipping Acts, in certain cases where there is liability in damages of owners of ships, in the case of an occurrence taking place without their actual fault or privity, the damages for which they might otherwise be liable are limited. Mr. Carpmael on behalf of his clients seeks here to avail himself of that limitation. The limitation applies only in cases where the material section is satisfied. Sect. 503 (1) (ii) of the Merchant Shipping Act of 1894 provides that the damage in such a case shall, in respect of loss or damage to vessels, goods, merchandise or other things, be an aggregate amount not exceeding £8 for each ton of their ship's tonnage. There is no dispute as to the figures in this case. If that limitation can be applied, the amount of damage is considerably less than the sum which otherwise would fall to be awarded. Under that section, the benefits of the section accrue to the owners of a ship. There is an amendment to that provision by Sect. 1 of the Merchant Shipping (Liability of Ship-

owners and Others) Act, 1900, to the effect that:

> The limitation of the liability of the owners of any ship set by Sect. 503 of the Merchant Shipping Act, 1894, in respect of loss of or damage to vessels, goods, merchandise, or other things, shall extend and apply to all cases where (without their actual fault or privity) any loss or damage is caused to property or rights of any kind, whether on land or on water, or whether fixed or moveable, by reason of the improper navigation or management of the ship.

This, it is not disputed, is sufficiently wide to cover the present case.

By Sect. 71 of a later Act, the Merchant Shipping Act of 1906 (this is one of the sections to be considered in this case), it is provided that:

> Sects. 502 to 509 of the principal Act shall be read so that the word "owner" shall be deemed to include any charterer to whom the ship is demised.

There is yet a further extension by Sect. 1 (2) of the Merchant Shipping Act, 1921, that

> the expression "owner" shall include any hirer who has contracted to take over the sole charge and management thereof. . . .

In this case, the learned Judge has found in his judgment, after consideration of certain facts which I shall mention, that it is not possible for Messrs. Cory & Son, Ltd., to bring themselves within either the original definition in the Act of 1894 or the extended definitions in the Acts of 1906 and 1921. He has therefore given judgment against them in this action, thereby making them liable for the full damages to be ascertained, apart from the statutory limitation. From that decision appeal is brought to this Court.

The reasons why Messrs. Cory & Son, Ltd., say that they are the owners of this ship within the meaning of Sect. 503 of the principal Act of 1894, or alternatively are charterers to whom the ship has been demised under Sect. 71 of the Act of 1906, are these. Messrs. William Cory & Son, Ltd., are the well-known coal merchants, who at one time owned barges; but there was formed, under their auspices, no doubt, a subsidiary company called Cory Lighterage, Ltd. Prior to 1916, the plaintiffs, William Cory & Son, Ltd., themselves carried on a large lighterage business, but in that year they caused to be incorporated this new company, Cory Lighterage, Ltd., and all their lighters were transferred to this new company, Cory Lighterage, Ltd., who became thereby the owners of the lighters, and thus, among other barges, then or subsequently the lighterage company became the owners of the *Turk*. The servants who were employed upon these lighters, including the *Turk*, became the servants of this new company, Cory Lighterage, Ltd.; books of account were opened for the new company; it had a board of directors of whom, it is true, all but one were directors of the plaintiff company, but they in all respects carried on their business and made contracts and employed servants and generally organised and carried on this business of lighterage work as an entity separate from Messrs. William Cory & Son, Ltd. Had this accident happened at that time, I think there can have been little doubt that anybody who had been negligent on a barge in 1916, after this company had been formed, would have been a servant of the lighterage company.

A new arrangement was made in 1917. At that time it was decided that the management of the lighterage company, which they had formerly conducted themselves, should be carried on in the future by Messrs. William Cory & Son, Ltd., and down to 1927 it appeared that matters went on in that way. In 1927 a minute was passed by the lighterage company to the effect that all trading by them should cease. The minute was actually carried by the management committee of Messrs. William Cory & Son, Ltd., but apparently that was agreed between the two companies; at any rate a notice was sent out from Messrs. Cory & Son, Ltd., to the various persons with whom they were in business—there is one exhibited dated July 27—that the secretary had been instructed to advise that at the earliest possible date trading in the name of Cory Lighterage, Ltd., was to cease, save for contracts which were then running in the name of Cory Lighterage, Ltd.

It appears to be the case, as the learned Judge finds, that thereafter the contracts with third parties were actually made with Messrs. Cory & Son, Ltd., but Cory Lighterage, Ltd., continued to exist, and the evidence goes to show that, although the agreements with third parties were

made in the name of Messrs. William Cory & Son, Ltd., nevertheless all the profits which accrued from the trading transactions were accounted for in the books of the lighterage company, and that all the expenses of earning the profits, the wages and the like, were all accounted for as debits of the lighterage company. There is no minute of any change in the manner of conducting the business which goes to show, as Mr. Carpmael contends, that Messrs. William Cory & Son, Ltd., had become principals in the transaction. I think the learned Judge on the evidence was entitled and indeed could not avoid coming to the conclusion that the only changes which took place, either in 1917 or in 1927, were that, as regards management between Messrs. William Cory & Son, Ltd., and Cory Lighterage, Ltd., Messrs. William Cory & Son, Ltd., were entrusted with the duties of management, but that, as before, the actual principals remained the lighterage company at all material times.

Now, in those circumstances, Mr. Carpmael argues that he can bring himself within the sections to which I have referred. With regard to the section of the principal Act, it will be remembered that in the Act of 1894 there is no express reference to a charterer at all; that is only brought in by the later Act. He has to show, within the meaning of that earlier section limiting his liability, that he is an owner.

A number of cases have been cited to us on this point, and there are two cases in the House of Lords to which consideration must be given. The first case is a case in 1893, the case of Baumwoll Manufactur von Carl Scheibler v. Christopher Furness, [1893] A.C. 8. There it is said:

> The owner of a ship, registered as such and as the managing owner under the Merchant Shipping Act, 1876, who has parted with the possession and control of the ship under a charter-party to the charterer, is not liable for the loss of goods shipped under bills of lading signed by the captain who is the servant of the charterer and not of the owner and who has no authority from the owner to pledge his credit, although the shipper of the goods has no notice of those facts.

In that case, as the headnote recites, the parting with the possession and control took effect under a charter-party, and the effect was, in substance, to put the charterer, as Lord Herschell says, substantially in ownership of the vessel during the period of the charter. It is pointed out by Lord Herschell, on p. 16,

> that this is a case in which by the charter-party the charterer has become, *pro hac vice* and during the term of the charter, the owner of the vessel, when one is considering the rights and liabilities which arise from the acts of the master, and the crew of the vessel . . . .

Therefore it was held that, notwithstanding that registration remained in the owner, for the purpose of considering the liability there the charterer was to be treated for that purpose *pro hac vice* as owner of the vessel.

The second case, which is really to a like effect, is the case of Sir John Jackson, Ltd. v. Owners of the steamship *Blanche*, [1908] A.C. 126. That decides:

> The charterer of a ship by demise who has control over her and navigates her by his own master and crew is "owner" of the ship within Sects. 503 and 504 of the Merchant Shipping Act, 1894, and entitled to the limitation of liability to damages conferred upon "owners" by those sections.

Now, that case, were the facts of it at all similar to the present ones, would be a very important case in Mr. Carpmael's favour, because it is dealing with these very matters; but, in my view, the more these cases are examined the more do they stand out in contrast to the circumstances of the present case. In that case Lord Loreburn, on p. 130, said this:

> It being thus ascertained that the word "owner" does in some parts of the Merchant Shipping Act, 1894, include charterers by demise, is it so in Sect. 503?

He comes to the conclusion, notwithstanding the fact that there was, as I have said, no reference to charterers by demise at that time in the section of the Merchant Shipping Act, that nevertheless they may be included under the heading "owners," and, speaking of the definition of "owner," points out that

> it must of necessity also include a charterer by demise who has control of the ship and navigates her with his own master and crew. Otherwise the operation of this Act becomes impracticable.

Lord Atkinson, on p. 136, says:

> I see no reason why the word "owner" or "owners," when used in Sects. 503 and 504, should not be construed, as it must be construed in many other sections, so as to include a charterer by demise.

In consequence, I assume, of a doubt which had existed before the House of Lords had come to that final decision, dealing with the matter as it stood, namely, the decisions of the lower Courts to the contrary effect, it had been provided by the later Act, Sect. 71 of the Act of 1906, that the word "owner" should be deemed to include any charterer whose ship is demised.

A preliminary difficulty arises in this case upon which I do not think it necessary to express any final opinion. It was whether, on any view, Messrs. William Cory & Son, Ltd., can be said here to be charterers. In contradistinction to all the cases that have been considered, there is no document in writing in this case of any kind, transferring any of the rights upon which Messrs. William Cory & Son, Ltd., rely, from the lighterage company to Messrs. William Cory & Son, Ltd., which can be said to be in the nature of a charter. It has been said on the authority, as far as I know, of an observation of Vice-Chancellor Wigram in Lidgett v. Williams, 14 L.J. Ch. 459, that the rights in a ship can be transferred by charter orally. That passage is quoted in several of the text books. There is a passage for example in Carver to that effect, but when the text book is looked at on that particular point, the only authority is that case. For myself, I wish to leave the matter open. I must confess that I feel the gravest doubts whether it is possible to transfer property by a charter when there is no instrument of any kind. The history of the charter-party shows it was developed in the law merchant from indenture and earlier documents and that the charter-parties had always to have been evidenced in writing. A charter-party is an indenture of covenants and agreements made between merchants and mariners concerning their sea affairs (Termes de la Ley); so also I doubt whether a person contracting orally for carriage by sea can properly be called a charterer, which is the word employed in Sect. 71 of the 1906 Act.

I do not think it necessary, however, in this case to express a final opinion upon the point which might contradict the opinion expressed by Vice-Chancellor Wigram, for this reason, that there is here, in my opinion, upon the finding of the learned Judge, nothing to constitute a transference of the ownership of the ship, either by charter-party in writing or orally.

But Mr. Carpmael says alternatively: If this transference be not done by charter, then on the evidence in any event, Messrs. William Cory & Son, Ltd., were owners within the meaning of the Act of 1894, quite apart from the 1906 Act at all. He says that the evidence goes to show that they controlled and navigated the ship and, therefore, for that purpose were sufficiently an owner within the observations of Lord Herschell, Lord Loreburn and Lord Atkinson, to which I have referred.

As to that, I think that the learned Judge has come to a conclusion which it is impossible to reconcile with such a view. The learned Judge, as I read his judgment, has decided that, in making this contract with Messrs. Dorman, Long & Co., Ltd., Messrs. William Cory & Son, Ltd., were merely acting as the agents of the lighterage company and they were not principals. He has come to the conclusion that the lighterage company were at material times still receiving the profits of this and similar contracts and were being made liable for the debts and the like and that they were still in truth the owners of this lighter for all relevant purposes.

In those circumstances, holding that the learned Judge was fully entitled to come to that decision, it follows that the appellants cannot avail themselves of these Acts. The appeal must be dismissed, with costs.

Lord Justice ROMER: I agree. I confess I feel some sympathy with Messrs. William Cory & Son, Ltd., because they seem to have fallen between two stools. At the hearing of the action before Mr. Justice Branson, in which the plaintiffs, Messrs. Dorman, Long & Co., Ltd., claimed damages for injuries done to their cofferdam, it was not a matter, presumably, of any great importance whether they made Messrs. William Cory & Son, Ltd., or Cory Lighterage, Ltd., responsible, nor do I imagine at that time that the question as to which of those two companies was liable was considered to be a matter of importance by the two defendants themselves. The learned Judge, however, appears to have been invited, at the instance of the defendants, who appeared by

the same Counsel and solicitors, to regard Elliott, who was the man at the time of the accident in charge of the *Turk*, as being the servant of Messrs. William Cory & Son, Ltd. On that footing, the learned Judge, accepting that view of the evidence which was submitted to him, dismissed the lighterage company from the action, and judgment was given against Messrs. William Cory & Son, Ltd. Had the judgment been given against the lighterage company, there is no doubt that they could have successfully limited their liability under Sect. 503 of the Merchant Shipping Act, 1894. As I say, judgment was given against Messrs. William Cory & Son, Ltd., and now they seek to limit their liability under the section by asserting that they are charterers by demise, otherwise entitled to be regarded as the owners of the *Turk*.

The position is, as was pointed out by Lord Justice Slesser, as follows. In 1917 the management of the lighterage company, who at that time were, and still are, as I understand it, the registered owners of the fleet of lighters which before then had belonged to Messrs. William Cory & Son, Ltd., was entrusted to Messrs. William Cory & Son, Ltd. It was done by minute dated Apr. 17, 1917, which is in the documents that have been placed before us. The effect of Messrs. William Cory & Son taking over the management of the fleet of lighters was this, that they were put in complete possession of the lighters, though not the registered owners of them, and they had complete control over the working of the lighters; nevertheless they were not the owners. It is true that the word "owner" in Sect. 503 includes a person having a limited interest in the ship. What has been held by the House of Lords has now been made clear by a section in the Merchant Shipping Act of 1906; but there is no case and there is no statute which lays down that a person who has no property either at law or in equity in a ship can be regarded as the owner of the ship for the purposes of Sect. 503. Therefore in 1917 and the years that succeeded it no one could suggest that Messrs. William Cory & Son, Ltd., having complete control and possession of this fleet of lighters, were the owners of the fleet.

It is said, however, that in the year 1927, or in the year 1932, I am not sure which, a material change took place, and that as from that date Messrs. William Cory & Son, Ltd., became charterers by demise of the whole fleet of lighters. There is no document which suggests any such change at all. The only document we have had is one dated in 1927, by which it appears that as from that change the lighterage company ceased to carry on business in their name. Up to that time, Messrs. William Cory & Son, Ltd., as the agents of the lighterage company, carried on the lighterage company's business in the name of the lighterage company. As from this change in 1927, the business of the lighterage company was to be carried on in the name of Messrs. William Cory & Son, Ltd. I think myself that that is the only change which really has ever taken place.

It is, indeed, said by Mr. Carpmael that there was one very important change, that, whereas up to 1927 the lighterage company were financing the business of running these lighters, from this change the financing was done by Messrs. William Cory & Son, Ltd. That is just what would happen, having regard to the change in the manner of carrying on the business. While the business was being carried on in the name of the lighterage company, the receipts under the contracts would naturally be paid to the lighterage company, and they would have funds out of which they could finance the running of the barges; but as from that date all moneys under the contracts would be paid to Messrs. William Cory & Son, Ltd., who entered into contracts in their own name as though they were principals, and so the running of the barges was financed by Messrs. William Cory & Son, Ltd. What they did was to recoup themselves out of the receipts from the barges, handing over the profits to the lighterage company. Notwithstanding an opinion expressed by a witness to the contrary, I am myself satisfied that if in any year the lighterage business had been carried on at a loss, Messrs. William Cory & Son, Ltd., could have recovered the loss from the lighterage company.

I can myself see no trace of Messrs. William Cory & Son, Ltd., being turned into charterers by demise. I share the doubts expressed by Lord Justice Slesser as to whether in any case we could properly hold, in the absence of some written agreement, that such a position could be established. It is not necessary to express any final opinion upon that. Nor do I wish to go further into the facts than I have already done. It is sufficient to say

that I agree with the conclusion on the facts which has been arrived at by Mr. Justice Branson and by Lord Justice Slesser, and in my opinion this appeal must fail.

Mr. Justice FINLAY: I agree so completely with the way in which this matter has been put, not only by Mr. Justice Branson but also by the Lords Justices, that I do not think I can usefully add anything.

Mr. CARPMAEL: My Lords, with regard to leave to appeal, I do not know which course your Lordships would like to adopt, whether I may have leave to take instructions from my clients or ask for leave now.

Lord Justice ROMER: Is the sum involved a very large one?

Mr. CARPMAEL: About £7000, my Lord.

Lord Justice SLESSER: We do not see our way to give leave. We think in this case it is entirely a question of fact.

COURT OF APPEAL.

Thursday, Apr. 23, 1936.

BROOKE MARINE CONSTRUCTION COMPANY, LTD. v. RICHARDS.

Before Lord Justice SLESSER, Lord Justice ROMER and Mr. Justice SWIFT.

Contract — Supply of ship's engines — —Purchase of vessel without engines by defendant—Claim by plaintiffs for cost of installation of engines supplied by them—Whether contract carried out —Counterclaim by defendant—Appeal by defendant from judgment of learned County Court Judge in plaintiffs' favour — Alleged consideration by Judge of letters written "without prejudice" with view to settlement of dispute — Whether substantial wrong or miscarriage occasioned — R.S.C., Order 39, r. 6.

————Held, that although the letters were referred to by the learned Judge they were not relevant to the issue which he was trying, viz., as to whether the plaintiffs had properly carried out their contract; further, that it was not shown that any substantial wrong or miscarriage had been occasioned (Order 39, r. 6); and that therefore the appeal must be dismissed.

This was an appeal by the defendant, Mr. W. H. Richards, of Granville House, Arundel Street, London, W.C. 1, from the judgment of Deputy Judge Herbert Smith at Lowestoft County Court, on Dec. 13, 1935, in an action brought against him by the Brooke Marine Construction Company, Ltd., of Adrian Works, Alexandra Road, Lowestoft, for work done and materials supplied in connection with the fitting up of a motor cruiser for use on the Norfolk Broads.

Mr. J. P. Valetta (instructed by Messrs. Croft & Russell) appeared for the appellant; Mr. W. H. Moresby (instructed by Messrs. Wellington, Taylor & Sons, agents for Messrs. Holt & Taylor, of Lowestoft) represented the respondents.

Mr. VALETTA said that the judgment of the County Court Judge was for £23. The facts were that Mr. Richards bought a motor vessel without engines, and consulted Mr. Brooke, head of the respondent company, with regard to the engines. He bought two 25-h.p. engines and sent them to Lowestoft to be installed in the hull. The claim under the original contract was for £450, but after various adjustments had been made and credits had been given as between the parties it came down to £99, while Mr. Richards counterclaimed for £121. Counsel said that the two main grounds of appeal were that the Judge admitted for his consideration certain letters written without prejudice and with a view to arriving at a compromise; and that he misdirected himself in admitting oral evidence to vary or contradict a written document that was material to the case, and which was stated in unambiguous terms, namely, the specification of the engines, and that this resulted in a miscarriage of justice.

Counsel for the respondents was not called upon.

JUDGMENT.

Lord Justice SLESSER: This appeal fails. It is a claim for the payment of moneys for work done and materials supplied and the like in connection with a boat called *Miss Swiftly II.* The total sum was £500, but from time to time money was paid on account and various allowances made, so that the actual claim as formulated was £99 17s. 8d. During the hearing that sum was reduced to £88 11s. 6d., and the appellant set up a counterclaim for £121 3s. 10d.

The learned County Court Judge heard a great deal of evidence, and in the result he accepted to some extent the view put forward by the appellant, and gave judgment for the respondents for £23, holding that, as they were partly responsible for the long hearing of the case, which lasted four days, and for certain acts which caused some of the trouble, the appellant should only pay three-quarters of the costs of the counterclaim.

The substance of this appeal arises in this way. The parties had apparently been negotiating to see whether they could not settle their unfortunate differences, and a number of letters passed between the parties and their advisers which were written without prejudice. It is now said that the learned County Court Judge wrongly allowed his mind to be influenced by those letters.

Speaking for myself, and having heard Mr. Valetta, I have come to the conclusion that he is entitled to say that the letters ought not to have been regarded by the Judge. But if in the opinion of the Court

no substantial wrong or injustice has been occasioned by the Judge having regard to the letters, then a new trial will not be ordered. It seems to me exactly a case that falls within the provisions of Order 39, r. 6. The learned Judge refers to one or two of the letters, and the only relevance of them was in relation to a statement he made that they threw a floodlight on the action. The issue which the learned County Court Judge was trying was whether the respondents had properly carried out their contract. Whether the parties ought or ought not to have arrived at a settlement seems to me entirely irrelevant.

Mr. Valetta says that the Judge's mind was affected by the letters. I am not prepared to make such an assumption against the learned Judge. The only possible relevance of the observation and the letters might have been as to the question of costs, and in that connection Mr. Valetta cited the case of Walker v. Wilsher, 23 Q.B.D. 335. The headnote to that case says, " Letters or conversations written or declared to be ' without prejudice ' cannot be taken into consideration in determining whether there is good cause for depriving a successful litigant of costs." But that case does not seem to be of any assistance to Mr. Valetta, Mr. Richards being ordered to pay only three-quarters of the costs of the counter-claim.

With regard to the second ground of appeal, it was said that the Judge was induced to find that the motor starting-handle specified in the document was not a starting-handle and was not intended to be used as such. I am afraid that I cannot understand that. One of the grounds of complaint was that the motor was installed in such a way that the starting-handle could not be used. But the evidence from the company that supplied the engines was that the engines had no such handles at all, and that hand-starters were only supplied for overhauling purposes. The learned County Court Judge came to the conclusion that he must accept this evidence. I think that he was perfectly entitled to do so, and on that ground the appeal fails.

The whole appeal, in my view, fails, and must be dismissed, with costs.

Lord Justice ROMER: I agree.

Mr. Justice SWIFT: I agree and have nothing to add.