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J. A. EDWARDS,
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VOL. 16. No. 1] THURSDAY, JUNE 21, 1923. [BY SUBSCRIPTION

HOUSE OF LORDS.

Friday, June 8, 1923.

HAY AND OTHERS v. MERSEY DOCKS & HARBOUR BOARD (DETINUE) AND HAY AND OTHERS v. MERSEY DOCKS & HARBOUR BOARD (LIMITATION). ("THE COUNTESS.")

Before the EARL OF BIRKENHEAD, Viscount FINLAY, Lord ATKINSON and Lord CARSON.

Collision with Dock Gates—Consequent Damage to Craft in River—Limitation of Liability—Costs.

Their Lordships to-day heard an application in regard to costs which arose out of the judgment given in favour of the appellants in the actions against the Mersey Docks & Harbour Board for detinue and limitation, reported at 14 Ll.L.Rep. 441.

Mr. R. A. WRIGHT, K.C., who appeared for the shipowners, submitted that the other respondents, the bargeowners, ought to pay the costs of the proceedings.

The EARL OF BIRKENHEAD: Why should you not pay some of the costs?

Mr. WRIGHT: I think I should only pay such extra costs as were caused by my presence, as I was an unwilling victim.

The EARL OF BIRKENHEAD: It is a novel theory that the amount of costs should depend on the amount of time spent by Counsel in an appeal.

Mr. RAEBURN, K.C., for the other respondents, the bargeowners, said that the order he suggested in regard to costs was that they should pay the costs of the appeal to their Lordships' House in so far only as the appellants' costs had been increased by the bargeowners' intervention.

Mr. STEWART-BROWN, for the appellants, said they desired their costs in the House of Lords and in the Courts below.

The EARL OF BIRKENHEAD, in giving their Lordships' decision, said the substance of the application was, first, as to the costs of the appeal to the House of Lords, and, secondly, as to the costs of the appeal to the Court of Appeal. The substance of their Lordships' decision was that, so far as the costs in the House of Lords were concerned, the ordinary order would be made, namely, that the costs should be borne by the respondents, the shipowners and the bargeowners. The case which had been made on behalf of the shipowners had not impressed their Lordships. They could have withdrawn from the litigation if they had chosen to do so, but they remained, and therefore must pay costs in the ordinary way. The bargeowners were in the same position. They were in a very favourable position, but they chose to become parties to the litigation, and they, too, must pay the costs in the House of Lords. However, as the bargeowners were not actually parties in the proceedings in the Court of Appeal, the costs in the Court of Appeal must be borne by the shipowners.

Viscount FINLAY, Lord ATKINSON and Lord CARSON concurred.

COURT OF APPEAL.

Tuesday, May 29, 1923.

CALIMERIS v. SCOTTISH METROPOLITAN ASSURANCE COMPANY, LTD.

Before Lord Justice BANKES, Lord Justice SCRUTTON and Lord Justice ATKIN.

Marine Insurance—Loss by Fire—Claim—Defence of Scuttling—Affidavit of Ship's Papers—Delivery of Points of Defence.

[*The "Calimeris."*]

In this case the defendants, the Scottish Metropolitan Assurance Company, Ltd., appealed from two orders of Mr. Justice Bail-

hache, dated Apr. 26, 1923, made in a pending action brought by the plaintiff, Mr. D. N. Calimeris, a Greek, claiming as for a total loss upon a policy of marine insurance effected with the appellants.

Mr. W. L. McNair (instructed by Messrs. W. A. Crump & Son) appeared for the appellants; and Mr. H. Claughton Scott, K.C. (instructed by Messrs. Thomas Cooper & Co.) represented the respondent.

Mr. McNair said that the appeal in the first instance was from the refusal of Mr. Justice Bailhache to order the plaintiff to make and file a further and better affidavit of ship's papers and to stay the proceedings until such affidavit had been filed; and, in the second place, against the learned Judge's order directing the defendants to deliver their points of defence within ten days.

The action concerned the total loss of the Greek motor schooner *Calimeris*, a vessel of some 1500 tons, which was insured for £30,000, and which the defendants alleged was only worth £16,000 at the date when the policy attached. The vessel was abandoned at sea on Aug. 6, 1921, after an explosion in the engine-room. There was subsequently an inquiry at Athens, the Court finding that the ship was lost by fraud, and as the underwriters were defending the present action on that ground they desired to have the fullest possible discovery.

The history of the case was that the writ was issued on Oct. 7, 1921, and on Oct. 24 Mr. Justice Greer made an order for the usual affidavit of ship's papers and fixed Jan. 31, 1922, as the date of trial. The trial, however, was postponed owing to the first affidavit of ship's papers not being filed. It was not in fact filed till Apr. 24. That affidavit was admittedly incomplete. It only contained documents relating to the last voyage, and contained no insurance instructions at all. In the following month considerable correspondence passed between the solicitors, and further documents were produced piecemeal from time to time. A further list of documents was supplied on Nov. 9, 1922, and a second affidavit of documents was filed on Mar. 17 this year, i.e., twenty months after the writ was issued. That last affidavit of documents was of a very voluminous character, and some 300 additional letters were produced which the defendants had never before seen. But on going through the correspondence they found many references to other letters which had not been produced, and which the defendants submitted were quite insufficiently accounted for. On Apr. 17 the plaintiff took out a summons asking that the defendants be ordered to deliver their points of defence, while six days later the defendants, by summons, asked for a further and better affidavit of ship's papers. It was against Mr. Justice Bailhache's decision upon these two summonses that the present appeal was brought.

In reply to Lord Justice Atkin, Mr. McNair said that the vessel at the time of her loss was on a voyage from Swansea to an Italian port with coal. She started the voyage on July 28, 1921, and on Aug. 6 she was abandoned at sea on fire off Cape St. Vincent. The crew were rescued by a Swedish steamer and taken to Barcelona, where they arrived on Aug. 10. The vessel was insured under a time policy which expired on Sept. 15, 1921.

Lord Justice Atkin: The original loss was caused by fire?

Mr. McNair: It is pleaded as perils of the sea, or fire, or explosion, or latent defects in machinery.

Lord Justice Scrutton remarked that there was no reason why the defendants should not deliver their points of defence apart altogether from whether they should have further discovery. There was the finding of the Greek Court of Inquiry, and the defendants knew what their defence was going to be, though it might be necessary for them to get further discovery.

Lord Justice Bankes observed that there seemed to be an insufficient statement as to the means the plaintiff had taken to ascertain whether certain documents were or were not available.

Mr. Claughton Scott, for the respondent, submitted that he had complied with the order for an affidavit of ship's papers, and that the present procedure was merely adopted for the purposes of delay. It was quite true that there was a certain finding by the Greek Court of Inquiry, but that Court consisted of a number of persons, and the finding was arrived at only by the casting vote of the President.

Lord Justice Bankes: So that there is something to be said on both sides.

Mr. Claughton Scott described the present appeal as an attempt on the part of the defendants to obtain far wider discovery than that to which they were entitled.

After further discussion it was ordered that the defendants should deliver their points of defence within ten days, and at the same time deliver a list of documents which they alleged should be produced or accounted for, the application for further ship's papers to stand over, with liberty to apply. The costs of the appeal were made costs in the action.

COURT OF APPEAL.

Wednesday, May 30, 1923.

ANGLO-SAXON PETROLEUM COMPANY, LTD. v. STEANA ROMANA SOCIETE ANONYME POUR L'INDUSTRIE DU PETROLE AND OTHERS.

Before Lord Justice BANKES, Lord Justice SCRUTTON and Lord Justice ATKIN.

Procedure—Service of Writ outside Jurisdiction—Contract—Sale of Oil f.o.b.—Claim for Repayment of Money had and received—Repayment due if at all within Jurisdiction of Country where originally paid—Order 11, Rule 1 (e).

In this case the defendants, a number of Rumanian oil companies (all registered in Rumania with the exception of one which was registered in Holland), appealed from an order of Mr. Justice Roche, dated Apr. 20, 1923, dismissing their applications to set aside orders of the late Mr. Justice Bray of Jan. 23, 1923, giving the plaintiffs, the Anglo-Saxon Petroleum Company, Ltd., of St. Helen's Court, London, E.C., leave to serve a writ out of the jurisdiction and notice of the writ in lieu of service.

Mr. R. A. Wright, K.C., and Mr. S. L. Porter (instructed by Messrs. E. F. Turner & Sons) appeared for the appellants; and Sir John Simon, K.C., Mr. W. A. Jowitt, K.C., and Mr. L. L. Cohen (instructed by Messrs. Waltons & Co.) represented the defendants.

By the endorsement on the writ the plaintiffs claimed damages for failure to sell and deliver oil under a contract dated Sept. 5, 1919, and made between the Ministry of Industry and Commerce (of Rumania) and the defendants, as sellers, of the one part, and the plaintiffs (by their agent, J. W. Boyle), as buyers, of the other part, and/or alternatively for money had and received by the defendants for and on behalf and for the use of the plaintiffs.

The case for the plaintiffs, as set out in an affidavit by Mr. Andrew Agnew, one of their directors, was that by the terms of the contract in question the defendants and the Rumanian Minister jointly and severally agreed to sell and the plaintiffs agreed to buy at stipulated prices 12,000 metric tons of light rectified benzine, 5000 metric tons of heavy rectified benzine, 21,000 metric tons of rectified kerosene, and 12,000 tons of kerosene distillate, to be delivered f.o.b. Rumanian ports by six approximately equal monthly instalments, commencing from sixty days after the signing of the contract. Among other provisions the contract contained the following :—

(8) Payment will be made by the deposit of a sum of £400,000 in a bank in London at the immediate disposal and to the credit of the Ministry of Industry and Commerce of Rumania immediately after receipt of this contract in London. The advance will be considered as a payment in advance of the quantities supplied up to the amount of £400,000 deposited. After delivery of the quantities corresponding with the deposit advanced the future supplies will be paid for in the following way: After the exhaustion of the above-mentioned advance, payments for further shipments will be made in cash in London to the Bank appointed by the Rumanian Government after presentation of the documents to the purchaser or to his agent or representative in London. These payments will be made without any discount or other charges.

(14) Besides the quantities to be supplied as stipulated in Clause 1, the undersigned, Lieutenant-Colonel J. W. Boyle, shall have a priority right to apply for the supply of a further quantity of 20,000 tons of petroleum "Lampant raffine," to be delivered nine months after the date of the agreement at the price of £6 15s. per metric ton, free on board Constantza. In case Lieutenant-Colonel Boyle uses his right of option, all other clauses of the present agreement shall be applicable.

By letter dated Dec. 11, 1919, addressed to the Ministry of Industry and Commerce and the defendants (other than the Internationale Roemeensche Petroleum Maatschappij), Lieutenant-Colonel Boyle (the affidavit continued) duly exercised the option on behalf of the plaintiffs. The deposit of £400,000 was duly made at the Bank of Rumania in London to the order of the Ministry of Industry and Commerce. After considerable delay in loading, the defendants, or the Rumanian Minister, delivered to the order of the plaintiffs between Jan. 17 and Aug. 1, 1920, oil which exhausted the sum of £225,000 or thereabouts of the deposit. The defendants had failed to make any further deliveries under the contract, though the plaintiffs had repeatedly offered to provide vessels to carry the oil, and, in fact, had provided vessels which the defendants failed to load. In breach of the contract, the plaintiffs complained, the defendants had failed to present to their agent or representative in London documents of title to cargoes to be delivered after the deposit had been exhausted. Further, or alternatively, the plaintiffs said, the consideration for the sum of £175,000 (being the balance of the deposit not exhausted by deliveries) had wholly failed, and by reason of such failure the defendants and the Rumanian Minister had become bound jointly and severally to repay that amount in London as money had and received to the use of the plaintiffs.

On behalf of the appellants (who had entered a conditional appearance to the writ), it was contended that the order for service out of the jurisdiction was improperly made under Order 11, Rule 1 (e), in that (1) the claim for breach of contract for failure to deliver oil was a matter arising out of the jurisdiction, and (2) the claim

for money had and received was not a matter of contract in this country, or, if it was, the money was not received by the defendants to the use of the plaintiffs, but was a deposit made to the credit of the Rumanian Minister.

JUDGMENT.

Lord Justice BANKES, in giving judgment, said: This is an appeal from an order of Roche, J., in Chambers, in which the defendants sought to have an order set aside that had been made *ex parte* for leave to issue a writ and a concurrent writ, and for service out of the jurisdiction under the following circumstances.

The plaintiffs are a company carrying on business in England; and in September, 1919, the plaintiff company by their agent, Lt.-Col. Boyle, entered into a contract in Roumania with a department of the Roumanian Government and a number of companies. One of the companies now appears to be a Dutch company, and the interlocutory proceedings in reference to that company apparently took an independent course: but, for the purposes of this appeal, it is agreed between the parties that we may treat the matter as though the contract was between the plaintiffs and the department of the Roumanian Government and a number of Roumanian companies, and that no reference need be made to the fact that one of the companies is a Dutch company. The contract was for the purchase by the plaintiffs of 50,000 tons of oil. The material provisions of that contract for the present purpose were these, that, for a large quantity of that oil, the plaintiffs were to pay in advance £400,000 in currency to be paid to a bank in England to the immediate disposal and credit of the Minister of Industry and Commerce of Roumania who was, as I have said, one of the parties to this agreement. The contract is quite plain in reference to the position as regards the oil that was paid for in advance; and with regard to that oil the contract provided that delivery should be made in Roumania. With regard to the balance of the oil that was not paid for in advance, the contract provided that, after the exhaustion of the above-mentioned advance, payments for the further shipments will be made in cash in London to the bank appointed by the Roumanian Government after presentation of the documents to the purchaser or to his agent. The contract was a contract for delivery in six months by approximately equal monthly deliveries.

Now a considerable amount of oil was delivered, but substantially less than the quantity which had been paid for in advance. Disputes arose between the parties; and eventually the plaintiffs sought leave to issue a writ for service out of the jurisdiction, and their application was founded upon an affidavit sworn by a Mr. Agnew. Some discussion has taken place as to the proper practice when such an application is made; and I agree with Sir John Simon that strictly speaking the practice appears to be that the affidavit is laid before the Judge in Chambers and the Judge makes such order as he thinks proper upon the affidavit before the writ is even drafted; and, therefore, certainly on many occasions, the Judge has not the proposed writ laid before him and he merely endorses an order upon the affidavit. It then remains, of course, with the person or the party in whose favour the order is made to draw his writ in accordance with the affidavit, and if perchance the writ is drawn to cover claims which either are not mentioned in the affidavit, or, if mentioned in the affidavit, are not causes of action which come within Order 11, it may well be that the opposite party, the defendant, may have a right to come and ask to have the writ struck out upon the ground that it is in excess of anything that could be properly allowed by an order founded upon the affidavit laid before the learned Judge. However, that point is not directly raised here because the original order of the learned Judge is challenged upon the ground that the affidavit itself did not disclose any cause of action or causes of action in respect of which the Court in the exercise of its discretion ought to have made an order allowing the issue of the writ and the concurrent writ and notice as was done.

Now for that purpose it is necessary to look into the affidavit; and when one looks into the affidavit one finds that three separate complaints or causes of action seem to me to be indicated. There is, first of all, a complaint by the plaintiffs that the defendants did not deliver the whole quantity of oil that was paid for in advance; and in respect of that claim two causes of action are indicated, firstly, that the plaintiffs have a right to have repaid the balance of the purchase price which was paid in advance, and, secondly, that they have a cause of action for damages for failure to deliver the undelivered quantity of oil which had been paid for in advance. And there is the further claim for damages in respect of the non-delivery of the oil which under the terms of the contract was to be paid for against presentation of documents. The learned Judge in the first instance made an order simply without indicating to which of those particular causes of action he considered the rule applied, and upon that order this writ was issued in this form:—

> The plaintiffs claim damages for failure to sell and deliver oil under a contract dated Sept. 5, 1919, and made between the Ministry of Industry and Commerce of Roumania and the defendants as sellers of the one part and the plaintiffs (by their agent, J. W. Boyle), as buyers, of the other part.

Now stop there for the moment; the writ so drawn would clearly cover both claims for damages which I have indicated, the claim for damages for non-delivery of the oil already paid for and the claim for damages

for the oil which had not been paid for in advance, the balance of the oil. It is quite plain that the plaintiffs had no right under the terms of Order 11 (1) (e) to an order for the issue of the writ in respect of a claim for damages for the oil which had been paid for in advance, because in respect of that oil it was deliverable in Roumania, and, therefore, there was no breach within the jurisdiction of the contract to which I have referred; and I think that that is admitted by Sir John Simon and Mr. Jowitt. Under those circumstances, therefore, the writ was drawn in a form which was too wide and was objectionable on that ground; but speaking for myself I think that the affidavit did disclose a cause of action for damages in respect of the balance of the oil which had not been paid for in advance: because it appears to me under the terms of the contract that, the price of that oil being payable in London against the presentation of documents, there was in respect of that portion of the oil a breach, within the jurisdiction, of the contract. But in reference to that part of the plaintiffs' claim it seems to me the Court must consider whether in their discretion they would allow the claim for damages for failure to deliver this oil to be split, and one claim in respect of the oil which had been paid for in advance to be prosecuted in Roumania, because in Roumania only can it be prosecuted, and the claim for damages in respect of the balance of the oil to be prosecuted here. The Court are agreed, in the exercise of their discretion, and in their opinion, that it would not be right to allow the issue of a writ the effect of which would be to split the claim for damages in the way I have indicated. In my opinion therefore, and I think in this the other members of the Court agree, the leave should not originally have been granted in respect of any part of the claim for damages for non-delivery of the oil.

There remains, however, the question as to whether or not the leave should properly have been given in respect of the other branch of the plaintiffs' claim, that is, for the repayment of the amount of the purchase price paid in advance which represented oil which the defendants have not delivered. Now the plaintiffs' claim is that they are entitled to recover from these Roumanian companies and the Dutch company, jointly and severally, the whole of that amount; and to that certain objections are taken. One is that upon the true construction of the contract the money was paid to and is recoverable, if at all, from the department of the Roumanian Government who were one of the parties to the original contract and to whom the money was to be paid. That seems to me to be a question—it may be a serious question—which will have to be decided in the action: but it does not seem to me that the point is as plain as Mr. Wright seemed to suggest it was, and that it was obvious in the absence of the Roumanian Government, as I will call them, as parties to the action, that that claim was not sustainable. It seems to me that the plaintiffs do make out a *primâ facie* case as against the defendants whom they sue and a sufficiently strong *primâ facie* case to justify the learned Judge in making the order which he did make allowing the issue of the writ in respect of that part of the plaintiffs' claim. But then Mr. Wright takes another objection, and that is this, as I understand it. He says that the claim, if any, does not arise upon the contract but upon an implied contract to repay the portion of the purchase money paid in advance for which no oil has been delivered; and he says he can find no case in which leave has been given to issue a writ out of the jurisdiction upon such an alleged cause of action. It seems to me on principle that that is, within the meaning of the rule, Order 11 (1) (e), a claim founded in contract and a claim in respect of a breach of a contract; and the question, therefore, is whether the breach complained of is a breach committed within the jurisdiction.

Now upon that it seems to me, at any rate, that a case is made out that the £400,000 being made payable under the contract in this country in currency to one of the parties to this contract, the implied contract, the contract implied by law, would be to repay the money within the jurisdiction of the country where the money was originally paid. Under those circumstances I think that the plaintiffs did by their affidavit make out a case which justified the learned Judge in making the order he did make for the issue of the writ and the proper service of notice of the writ.

I think that under those circumstances the proper order for this Court to make is to vary the order by limiting the writ which the plaintiffs have a right to issue to a writ claiming the alternative claim endorsed on the writ only, that is to say, for money had and received by the defendants for and on behalf and for the use of the plaintiffs; and to direct that the service of the writ shall stand. That, I think, is the order that the Court should make. I will consider the question of costs after my brethren have given their judgments.

Lord Justice SCRUTTON: This is an appeal relating to service out of the jurisdiction in a case which gives rise to several difficult questions. An applicaton was made by the Anglo-Saxon Petroleum Co., Ltd., to Roche, J., for leave to serve out of the jurisdiction a number of Roumanian companies and a Dutch company, for causes of action, set out in the affidavit, arising out of and in respect of a contract made for the purchase of some 50,000 tons of oil.

Now we have not to decide the merits of the case, that is to say, whether there is a good cause of action; we have to decide whether there is an arguable cause of action shown falling within the provisions of Order 11 authorising us to order service of writs out of our jurisdiction. For that purpose the intended plaintiffs bring an affidavit before the judge whom they asked to

authorize them to serve a writ out of the jurisdiction. From that affidavit it appears that there are three different matters of which the intended plaintiffs wanted to complain. They had a contract for the purchase, so they say, of 50,000 tons of oil. They say that they had paid in advance £400,000, which would not be enough to pay for all the oil intended under the contract. They say they have not received all the oil that they have paid in advance for, that in money value they have received £225,000 out of the £400,000, leaving £175,000 of oil paid for but not delivered. They say that the defendants have wrongfully refused to deliver the oil for which they, the intended plaintiffs, have paid; and they say, as I understand, three things, " (1) You having refused to deliver oil for which we have paid there is a partial failure of consideration and we want back the money we have paid —money had and received; (2) you have not delivered the oil for which we have paid and we want damages for your non-delivery in addition to getting the price back (which may or may not be right, but it is arguable); and (3) you have not delivered the oil for which we have not yet paid, and as to that we were bound under contract to pay against delivery of documents in London, and you never delivered the documents in London." The affidavit sets out those causes of action; and on that affidavit Bray, J., gave leave to serve a writ, without specifying in terms what writ it was to be, out of the jurisdiction. That order of Bray, J., was, of course, made *ex parte*. An application was then made to Roche, J., to set aside the order for the service of the writ on the ground that it did not come within the provisions of Order 11 justifying the Court in ordering service of the writ out of the jurisdiction; and Roche, J., refused to vary or to set aside Bray, J.'s order, and there is an appeal to this Court.

Now the order, if justified at all, is justified under Order 11, Rule 1, sub-s. (e), as one brought against a defendant not domiciled or ordinarily resident in Scotland or Ireland in respect of a breach committed within the jurisdiction of a contract wherever made. I leave out the last clause of the rule because I do not think, with great respect, that the case of Johnson v. Taylor, [1920] A.C. 144, has anything to do with this case at all. Now the last part of the writ for money had and received is based upon the failure of consideration for the money which persons living in England paid in England into a bank on behalf of the defendants, and, in English law, that would result in an implied contract to repay the money in respect of which the consideration had failed. It seems to me, and I so decide, because this is not a point of an arguable character—it is a question of jurisdiction—I decide this as one of the ordinary cases where the new creditor is entitled to be paid where he resides. In this case that consideration is strengthened by the fact that the original debtor, the new creditor, paid the money in England which he is seeking to have repaid to him, living in England, for failure of a consideration; and it appears to me, therefore, if the fact of the contract as to payment and the failure as to consideration be proved (as to which I express no opinion whatever as I gather that point is going to be raised) it would result in a breach of a contract within the jurisdiction, namely, failure to pay in England to the person entitled to the return of the money in respect of which the consideration has failed. Such a breach would come within the ordinary rule, Order 11, Rule 1, sub-s. (e).

That part of the writ, therefore, seems to me to be properly served out of the jurisdiction, that is to say, the Court has jurisdiction and was right in allowing and ordering such a writ to be issued and to be served out of the jurisdiction. The other two causes of action raise rather more difficult questions, as it seems to me, with regard to the oil which has been paid for by the £400,000 in advance and not delivered. It seems to me clear, and I think it is admitted, that the only breach is the breach to deliver in Roumania; and there is no breach, therefore, within the jurisdiction as far as delivery is concerned. If, therefore, the only claim had been limited to that, it would not be a case in which service of a writ out of the jurisdiction could be ordered. On the other hand, it seems to me as at present advised, with regard to the second part of the oil, the oil not yet paid for but which would have to be paid for if the documents were presented within the jurisdiction, that probably there is a cause of action arising within the jurisdiction. I say probably because I am not perfectly clear as to whether that cause of action has yet accrued. I supose the obligation to present documents does not begin until you have disposed of, in some way, the oil which has already been paid for and as to which documents need not be produced in England, but as to which delivery is to be made in Roumania; and there may be questions which I have not thoroughly considered arising out of that. Therefore, I do not finally say that that would be a cause of action within the English jurisdiction.

But the question is, therefore, when you have a claim for damages for non-delivery of a whole parcel of oil as to part of which the breach is outside the jurisdiction, and as to part of which the breach is inside the jurisdiction, what are you to do? I am not expressing any opinion on the question, which I regard as a difficult one, as to whether you can both claim for failure of consideration and claim damages; that is a subject as to which I should wish to look into the authorities more carefully than I have done, and which would afford interesting legal research to Counsel who may happen to have to consider it in the future. But it appears to me, using the discretion of the Court, that it is extremely undesirable in a claim for damages for non-delivery to split it up and say, as to part, we will deal with this in England, and as to another part, we cannot deal with this in

England and we will leave it to be dealt with in Roumania. Considering that difficulty and considering the principle, which has been several times stated by individual members of this Court, that in the case of service out of the jurisdiction you are rather to lean to the side of the foreigner if there is any doubt, I think Bray, J., erred and Roche, J., erred in including in the writ this whole claim for damages. They were certainly not right, I think, in including the claim for damages for goods already paid for which were to be delivered in Roumania, and I do not think that the probable cause of action arising in England, with regard to the oil not yet paid for, is sufficient under the circumstances to justify one in splitting up the claim for damages and giving leave to issue a writ out of the jurisdiction in respect of that part of the oil as to which there would be an obligation to present the documents in England.

For these reasons I concur in the judgment proposed by my Lord.

Lord Justice ATKIN: I so entirely agree with the judgments which have just been delivered that I do not find it necessary to give reasons of my own for concurring with the decisions at which the other members of the Court have arrived. But I should like to say this. I think this difficulty very often arises in cases of this kind owing to the somewhat loose practice under which leave to issue writs for service out of the jurisdiction is conducted. The proposed plaintiff has got to state quite definitely in his affidavit who the proposed defendant is and where he resides, and has got to show facts which would justify the Court in issuing a writ for service out of the jurisdiction within the terms of Order 11. All that is perfectly proper, one knows, and it is quite carefully considered by the Judge. But when the order comes to be made, the order in the statutory form simply provides that there shall be leave to issue a writ out of the jurisdiction upon the proposed defendant and, except that it recites that an affidavit has been read, it in no way limits the scope of the writ which is to be issued. The result is that in theory, at any rate, the proposed plaintiff who has been successful in obtaining that order may issue a writ for any cause of action he pleases, either for the causes of action stated in the affidavit or for extra causes of action or for substituted causes of action, and that writ apparently will be issued and served upon the defendant. Now it is perfectly true that the defendant, if properly advised as to the English law, can enter a conditional appearance here and may then apply to discharge the service upon him—apply to discharge the writ and order, which of course he would be successful in doing if the writ had exceeded the leave founded upon the affidavit which was intended to be given. But, on the other hand, if the defendant is a foreigner and is unaware of it and complies with the direction on the writ to enter an appearance and does enter an appearance unconditionally, he is then held to have precluded himself from raising any objection at all. That seems to me to be a difficulty, and I should have thought the practice might very well be altered or, at any rate, the intention of the authorities might be directed to the question as to whether or not the order written in itself should contain some limitation of the nature of the writ to be issued either by reference to the causes of action mentioned in the affidavit or by reference to a draft of the writ which might very well be put before the Judge at the time the order was made. That is only a suggestion, but I think that that would dispose of a good deal of the difficulty which does arise in these cases which may impose a considerable hardship upon a foreigner served with notice of a writ in respect of a procedure with which he may be entirely unaccustomed. In this particular case I think the difficulties which have arisen will be relieved by the order which we are proposing to make.

Lord Justice BANKES said that the order of the Court would be to vary the order of the Judge below by limiting the writ to the alternative claim for money had and received, service of notice of the writ so amended and appearance to the writ so amended, both to stand. As neither side had wholly succeeded there would be no costs in that Court or in the Court below.

ADMIRALTY DIVISION.

Monday, June 4, 1923.

"ZWARTE ZEE" v. "ARNFINN JARL."

Before Mr. Justice HILL, sitting with Captain OWEN JONES, C.B.E., and Captain P. N. LAYTON, C.B.E., R.D., Elder Brethren of Trinity House.

Salvage—Disabled Steamer towed from near Varne Light-vessel to Gravesend.

This was a claim for salvage services rendered by the steam tug *Zwarte Zee* to the steamship *Arnfinn Jarl* on Dec. 22 and 23, 1922.

Mr. D. Stephens, K.C., and Mr. G. P. Langton (instructed by Messrs. Thomas Cooper & Co.) appeared on behalf of the tug; while Mr. A. D. Bateson, K.C., and Mr. H. C. S. Dumas (instructed by Messrs. Constant & Constant) represented the *Arnfinn Jarl*.

The plaintiffs' case stated that the tug *Zwarte Zee* belongs to the Port of Rotterdam, and is of 604 tons gross. She is specially fitted for rendering salvage services, and is maintained on station duty in constant readiness to proceed to the assistance of vessels in distress. She is manned by a crew of 17 hands and is valued at £40,000. The *Arnfinn Jarl* is a steel screw steamship of 1151 tons gross, be-

longing to Trondhjem. About 8 40 a.m. on Dec. 22, when the *Zwarte Zee* was lying in Dover Harbour on station duty, a wireless message was received from the *City of Auckland* asking for assistance, and giving her position as three miles from the Varne Light-vessel. The *Zwarte Zee* accordingly went to her assistance. The weather was squally with a moderate gale, and there was a heavy sea running. The *Zwarte Zee* shipped heavy seas and was only able to proceed at half speed on her arrival in the vicinity of the Varne Light-vessel. The *Arnfinn Jarl* was observed about five miles distant to the south and east, and the *Zwarte Zee* proceeded to her.

Nothing further was heard of the *City of Auckland*. The *Arnfinn Jarl* was flying the N R signal and was lying to her starboard anchor head to the wind. Her rudder was broken and she was unable to steer. A heaving line was thrown on board from the *Zwarte Zee* and the tow rope was hauled up. At the request of the master of the *Arnfinn Jarl* a course was set for Dover. The *Arnfinn Jarl*, which was unable to steer, proved a difficult tow, and the tug was only able to proceed slowly. As they were approaching Dover, the master of the *Arnfinn Jarl* signalled that he wished to be taken to London. The tug then proceeded towards London with great difficulty, and at 1 a.m. on Dec. 23, as the wind had increased to a moderate gale, they decided to wait in the neighbourhood of the Tongue Light-vessel until the morning.

The towing was continued in the morning and Gravesend was reached at 2 15 p.m. The *Arnfinn Jarl*, it was claimed, was thus rescued from a position of great danger and placed in safety. But for the assistance of the tug she would probably have been driven aground, either on the Colbert Ridge or the French coast. The towing was carried out with great danger to the tug.

The defendants denied that the ship was in danger of being driven aground or that the tug was in danger of collision with the *Arnfinn Jarl*.

Mr. STEPHENS said the defendants had offered to pay £850, but that was far too small for such services as were rendered by the tug.

Mr. BATESON said the *Arnfinn Jarl* was in no danger at all, and only required a tug to help her to steer. He considered that £850 was a handsome plum for the tug to pick up.

JUDGMENT.

His LORDSHIP, in giving judgment for the plaintiffs, said: The *Zwarte Zee* is a powerful tug of 600 tons gross, with a crew of 17 hands, and is valued at £40,000. She is specially fitted to render salvage services. On the morning of Dec. 22 she was lying with steam up in Dover harbour.

The *Arnfinn Jarl* carried a general cargo. The value of the ship in her damaged condition was £18,712, and of her cargo £30,000, making a total of £48,712. She had lost her rudder and was unable to steer; and about nine o'clock on Dec. 22 she came to anchor to the south and east of the Varne light-vessel. A message was received in Dover harbour from the *City of Auckland* asking for assistance; and when the tug went out she did not find the *City of Auckland* but the *Arnfinn Jarl*, and went to her. She was flying the N R signal and the tug then took her towards Dover. The *Arnfinn Jarl*, having no steering power, constantly brought great strain on the tow rope. Off Dover the master asked to be taken on to London; and that was done.

At one a.m. on the 23rd., the weather got worse, blowing a moderate gale, and the tug manœuvred the ship to wait for daylight. Early in the morning they got into the Thames, and the tug *Masterful* assisted up to Gravesend.

It was a good service on the part of the *Zwarte Zee* and well rendered in bad weather. She was towing for 25 hours, and covered a distance of 85 miles.

The dispute is as to whether the position of the *Arnfinn Jarl* as she was anchored near Dover was one of serious danger or that degree of danger which must occur with any vessel which has lost her power to steer. I am advised that with the wind as it was she was in no serious danger of getting on the ridge or the French coast, as the wind would have carried her away, but she required assistance to get to a port of refuge, and it was very useful to have the assistance of so powerful and well-managed a tug as the *Zwarte Zee*. The assistance rendered was a good towage in bad weather and was done promptly. At the last moment a tender of £850 has been made: but I do not think that is sufficient to reward a tug of this description; and I shall award £1450.

ADMIRALTY DIVISION.

Monday, June 4, 1923.

DIXON v. OWNERS OF S.S. "RUSSLAND."

Before Mr. Justice HILL.

Salvage—Pilot's Services.

[*Undefended.*]

This was a motion on behalf of a Tees pilot, Mr. Henry Watson Dixon, for judgment in default of appearance on the other side in his salvage claim.

Mr. G. P. Langton (instructed by Messrs. Holman, Fenwick & Willan agents for Messrs. Meek, Stubbs & Barnley, of Middlesbrough), appeared on behalf of the plaintiff; while Mr. E. A. Digby (instructed by Messrs. Downing, Middleton & Lewis), represented other claimants, including the Tees Towing Co., Ltd., the tugs *Florence* and *Ironopolis* and the Cleveland Shipping Co., all of Middlesbrough.

Mr. LANGTON said the motion was on behalf of the pilot who rendered salvage service to the *Russland* in the river Tees on Mar. 13, 1923. The vessel had been sold, and there was £1100 in court. The statement of claim was delivered on May 14; and so plaintiff was not acting hurriedly in asking that the money should be paid out. The Court would have difficulty in apportioning the money between the claimants, but in this case the master of the *Russland* agreed with the pilot that he should be paid £100 if he got the vessel off on that tide; and as he did so he was entitled to be paid. The vessel went ashore in the Tees close to the entrance to the river. The pilot went on board, directed the tugs, and got her off.

Mr. DIGBY, intervening, said he represented the Tees Towing Co., who were the principal salvors; and it was in their action that the order was made for the sale of the vessel. He did not on that occasion ask for judgment, because it was desirable in a case where all the parties would not get full remuneration that all the claims should be before the Court. It would not help the plaintiff to get judgment because the President had reserved all questions of priority. He (Counsel) therefore suggested that the motion should be adjourned.

Mr. LANGTON said the agreement with the plaintiff was made before the other claimants came on the scene.

Mr. DIGBY said the ship would have been lost if they had not come on the scene.

JUDGMENT.

Mr. Justice HILL said that, as no one was opposing, he would give judgment for the plaintiff with costs but would reserve the question of the amount to be settled later.

ADMIRALTY DIVISION.

Monday, June 4, 1923.

"WESTERN HOPE" v. "REIMS."

Before Mr. Justice HILL.

Collision—Objection to Registrar's Report—Loss of Use of Vessel—Agreement to go before Registrar on Documents only.

This was a motion on behalf of the owners of the Spanish ship *Reims* in objection to the report of the Registrar to whom was referred the task of assessing the amount of the compensation due to the owners of the American ship *Western Hope*, in respect of damage caused in a collision with the *Reims*. (*See* 10 Ll.L.Rep. 487.)

Mr. H. C. S. Dumas (instructed by Messrs. Pritchard & Sons) moved on behalf of the defendants: while the respondents were represented by Mr. G. P. Langton (instructed by Messrs. Thomas Cooper & Co.).

Mr. DUMAS said that all the items of the claim were allowed as claimed except an item in respect of the loss of the use of the vessel for seven days. The amount claimed was 10,850 dols., and the amount allowed by the Registrar was 3500 dols. The claim was on the basis of seven days at 1550 dols. per day, but the Registrar allowed for five days at 700 dols. a day. The defendants objected to pay even that, because there was no evidence to show that the plaintiffs lost even five days or anything like 700 dols. a day.

The *Western Hope* at the time of the accident was lying in Barry Roads when she was run into by the *Reims*, which was held to blame. The collision voyage began on Oct. 13, 1919, and ended on May 8, 1920; and there was no demurrage at Cardiff, as the repairs were done at the end of the voyage. This voyage showed a loss of 3000 dols., while the previous voyage showed a profit of 81,000 dols. On the way back to America on the collision voyage the ship had to be towed into the Azores by the *Impoco*, with which she had been in collision. When the vessel reached America she was delayed for 41 days for repairs before starting the next voyage; and the claimants sought to attribute seven of those to the collision with the *Reims*, but there was not the slightest evidence to support that claim. The plaintiffs could not say that any portion of the delay was due to the *Reims*, for it was obvious that the ship had to undergo general repairs.

Mr. LANGTON said it was a dragging case and the ship was considerably damaged.

Mr. DUMAS said it was all above water, and that there was no necessity to drydock. It was evident that there was a serious collision with the *Impoco*.

Mr. LANGTON said it was agreed between the parties that the matter should go to the Registrar on documents only, and the plaintiffs disclosed everything they possibly could and put before the Registrar all the documents in their possession. That course was of advantage to the defendants as it saved the calling of expensive witnesses from a great distance. The plaintiffs had only got one-third of what they asked for, and therefore they had not been over-generously treated. Seven days was the minimum time in which anyone would undertake to do the repairs.

JUDGMENT.

His LORDSHIP, in giving judgment, said: I think the Registrar had sufficient evidence to justify him in arriving at the conclusion he did; and that is the only question I have to consider. In this case, very sensibly, in order to avoid the great expense of bringing witnesses from the United States, the parties agreed to try the matter on documents. It was necessarily involved in that that they would not get the same accuracy of detailed proof as if witnesses had been called, but they had the benefit of saving a great deal of expense. But when you have done that,

to my mind you defeat the whole advantage of such a procedure if you then proceed to criticise the finding on the strictest views of technical law.

There was a claim for seven days' demurrage at 1550 dols. a day; and the Registrar has not allowed that but has allowed five days at 700 dols. It was clearly proved that the ship was profitable and 700 dols. a day is very moderate. But Mr. Dumas says that there is not sufficient proof that this ship was delayed even five days by the collision. That is based upon this—that it does appear that some damage was done by another steamer, the *Impoco*, which towed the ship into the Azores on the voyage out. It also appears from the log that general repairs were done for a number of days; and Mr. Dumas says there is not sufficient proof that those repairs would not have had to be done in any case and would not have occupied the whole of the time.

I do not think the onus quite lies as Mr. Dumas puts it. There was extensive damage, and the tenders for the repairs varied from five to ten days. The one accepted was for seven days, but that included two days for removing ballast and therefore the Registrar allowed five days. There was *primâ facie* evidence that the ship was delayed for five days by reason of this collision; and therefore even on the technical ground I cannot say that the Registrar was wrong. In my view, when parties have sensibly agreed to go before the Registrar and merchants in circumstances such as these, a procedure highly advantageous, they ought to treat the finding of the Registrar as in substance the verdict of a jury.

The motion will be dismissed with costs and the report confirmed.

In reply to Mr. Dumas, his LORDSHIP said he would not encourage an appeal.

ADMIRALTY DIVISION.

Tuesday, June 5, 1923.

LORDS COMMISSIONERS OF THE ADMIRALTY ("WAR MEHTAR") v. "PRESIDENTE WILSON."

Before Mr. Justice HILL, sitting with Captain OWEN JONES, C.B.E., and Captain P. N. LAYTON, C.B.E., Elder Brethren of Trinity House.

Collision in Gibraltar Bay—Foul berth or Insufficient Moorings — Compulsory Pilotage by local Law.

In this case the plaintiffs claimed damages in respect of a collision between their steamship *War Mehtar*, of London, and the defendants' steamship *Presidente Wilson*, of Trieste, in Gibraltar Bay on the early morning of Feb. 6, 1923. The defendants denied liability.

Mr. D. Stephens, K.C., and Mr. R. H. Balloch (instructed by the Treasury Solicitor) appeared for the plaintiffs: and Mr. G. P. Langton (instructed by Messrs. Thos. Cooper & Co.) represented the defendants.

According to the plaintiffs' case, at about 2 10 a.m. on Feb. 6, 1923, the *War Mehtar*, a single screw steamship of 5502 tons gross register and 410 ft. long, was lying at anchor in the south-east corner of the Admiralty anchorage at Gibraltar, about three cables to the westward of the North Mole, laden with fuel oil. There were light variable airs; the weather was fine and clear; and the tide was flood of unknown force. The *War Mehtar* was at anchor to her port anchor with 60 fathoms of cable, and was heading about S. 38 W. true. She carried the regulation anchor lights, which were being duly exhibited and were burning brightly; and a good look-out was being kept.

In these circumstances a steamship, which proved to be the *Presidente Wilson*, was observed entering the bay on the port bow of the *War Mehtar*, showing her masthead lights and red light, and was subsequently observed to come to anchor on the port quarter of the *War Mehtar*, about two ship's lengths distant, when her navigation lights were extinguished and she exhibited two anchor lights. The *War Mehtar* continued to lie in the same position, and shortly before 3 40 a.m. the *Presidente Wilson* was observed to be swinging with her stern to starboard. Shortly afterwards, with her rudder and overhanging poop, she struck the port side of the *War Mehtar* abreast of No. 6 tank and before she cleared again struck the *War Mehtar* several times, doing considerable damage.

Plaintiffs alleged that a good look-out was not being kept on board the *Presidente Wilson*; that that vessel improperly gave the *War Mehtar* a foul berth; and that she improperly failed to keep clear of the *War Mehtar*.

The case for the defendants was that shortly before 3 25 a.m. (ship's time) the *Presidente Wilson*, a screw steamship of 12,567 tons gross and 477 ft. in length, was in Gibraltar Bay in course of a voyage from New York to Trieste laden. The weather was fine and clear, the wind unknown, and the tide setting about N.N.W. The *Presidente Wilson*, which had been anchored about 2 20 a.m. under the directions of a duly licensed pilot, was lying to her starboard anchor, heading about N.N.W., with the North Mole red light distant about ½ mile and bearing N. 75 E., and the South Mole flashing light bearing S. 33° W. The *War Mehtar* was distant about 400 yds., and bearing astern and on the starboard quarter of the *Presidente Wilson*. The regulation anchor lights were being duly exhibited on board the *Presidente Wilson*; and a good look-out was being kept.

In these circumstances the *War Mehtar* was observed to be dragging her anchor and to be approaching dangerously close to the *Presidente Wilson*. The cable of the