to the satisfaction of the Court that at the time of the institution of the cause any owner or part-owner of the ship is domiciled in England or Wales."

Lopes, in support of the motion.—If this defence were allowed, it is evident that the purpose of the statute would be almost entirely frustrated The applicability of the statute cannot depend upon the nature of the cargo, if it applies to a cargo of rum, "*Don Francisco*" (Lush 468), it must apply to a cargo of wood, and whether the cargo consists of one or many articles, and whether the damage consists in the partial injury or total destruction of the thing carried, the statute must equally apply. Looking to these considerations the word "carried" in the statute must mean "to be carried," engaged to be carried under bill of lading By the 3rd section of the Bills of Lading Act (18 & 19 Vict c. 111), the bill of lading representing goods to have been shipped is conclusive of the shipment against the master, save in the case of fraud by the shipper or holder of the bill of lading, so that even the defence of non-shipment would not avail, but this defence is consistent with the fact that the goods were shipped and were lost on the voyage by the negligence of the master The statute must surely apply

Lushington, *contra*—The jurisdiction of the Court rests wholly upon the statute In *The* "*Kasan*" (*ante*, p 1) it was decided that the words "any breach of duty or contract" must be limited by the preceding words, so as to apply only to the case of goods carried into England or Wales, and in *The* "*Ironsides*" (Lush 458), the circumstances of which were peculiar, it was in fact decided that the word "carried" means "actually carried," as distinguished from "engaged to be carried," for otherwise the judgment must have been in favour of the plaintiff Here the goods, in respect of which the action is brought, were not carried into England, and the case therefore is without the statute The plaintiff cannot treat the loss as a partial loss upon the entire consignment, the bulk of which was actually delivered in England, for the claim is for a total loss of particular goods

Dr. Lushington This is a cause brought under the provisions of the 7th section of the Admiralty Court Act The damage complained of is that a cargo of wood goods, specified **[104]** in a bill of lading, was short delivered in Hull The 4th article of the answer raises the defence that the articles not delivered were not carried into any British port, that is, not actually carried, and therefore that the case is not within the statute

If this position could be maintained the consequence would be that if separate articles constituting half a cargo, or, indeed, if an entire cargo was totally lost by the negligence of the master, the owner or consignee would have no remedy under the provisions of this statute There would be no remedy whenever there was a total loss of a single barrel or bale or other separate article Such a construction would in the majority of cases render the statute wholly ineffectual. But I think that the intent of the statute is to give a remedy to the owner or consignee whenever the ship arrives in a British port, and the cargo is not duly delivered in consequence of a breach of contract or duty on the part of the owner, master or crew of the ship This intention is sufficiently expressed, the term "carried" means "carried or to be carried" This case is distinguishable from *The* "*Ironsides*" (Lush 458), where there was a transhipment The fourth article of the answer must be struck out, and the plaintiffs must have their costs

Brooks and Dubois, proctors for the plaintiffs
Coote, proctor for the defendants

THE "CHIEFTAIN" March 3, July 21, 1863—Master's wages and disbursements—Wages "earned on board"—24 Vict c 10, s 10—Right of mortgagee.—A master is entitled to sue the ship for wages as 'earned on board the ship' within the tenth section of the Admiralty Court Act, 1861, if he performed the duties of master, although during his service he did not sleep on board the ship, and many of his duties were performed on shore He may also sue for disbursements made by him during such service on the ship's account, but not for mere liabilities incurred The mortgagee of a ship may come in and defend his interest in the ship sued, but can rely only on defences open to the owner of the ship

[S C. 2 New Rep 528; 32 L. J (Adm.) 106, 8 L. T 120, 9 Jur. (N. S.) 388, 11 W R. 537, 1 Mar L C (Crockford) 327 Followed, *The* "*Edwin*," 1864, p. 281,

post. Distinguished, *The "Red Rose,"* 1865, L R 2 Ad & Ecc. 80, n Considered, *The "Feronia,"* 1868, L. R. 2 Ad & Ecc 65, *The "Fairport,"* 1882, 2 P. D. 48 Referred to, *The "Joseph Dexter,"* 1869, 20 L T 820, *The "Oricuta,"* [1894] P 271, *The "Ruby,"* [1898] P 59 See further, p 212, *post.*]

This was a cause of master's wages and disbursements The petition of the plaintiff was originally as follows —

1 The plaintiff, John Coward, having been duly appointed by **[105]** Donald MacLarty, the owner of the barque "Chieftain," master of the said barque, at the wages of £10 a month, and 30s per week as board wages, has served as such master from the 26th of May 1862 to the 14th of February 1863

2. The plaintiff, as master of the said barque, disbursed various sums, necessary expenses for and on behalf of the said barque, *and has also become liable to a large sum in respect of necessaries ordered by him and supplied to the said barque*, and in respect of wages due and owing to the crew of the said barque

3. Donald MacLarty, the owner of the "Chieftain," is insolvent, and the barque is in possession of the Thames Graving Dock Company, Limited, the mortgagees thereof, application has been made to the said owner and the said mortgagees by the plaintiff, for payment of his wages and disbursements, and they have refused to pay the same

4. The plaintiff claims as follows —

		£ s d
Wages from 26th of May 1862 to 14th of February 1863 at £10 per month		95 0 0
Board wages, during same time at 30s per week		57 0 0
Travelling expenses, 15s per week		28 0 0
Sundry disbursements		15 0 0
Paid for labour before crew were shipped		69 14 5
		264 14 5
Wages due to crew	£48 3 0	
Necessaries supplied to barque on plaintiff's order	1303 0 0	
		1351 3 0
Total		£1615 17 5

Notice of motion was then given on behalf of the defendants, the Thames Graving Dock Company, that so much of the petition should be struck out as related to the claim for wages due to the crew, and to necessaries supplied to the barque on the plaintiff's order.

The 191st section of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), provides that—

"Every master of a ship shall, so far as the case permits, have the same rights, liens and remedies for the recovery of his wages which by this Act or by any law or custom any seaman, not being a master, has for the recovery of his wages."

[106] And the 10th and 35th sections of the Admiralty Court Act, 1861 (24 Vict. c 10), enact—

S. 10. "The High Court of Admiralty shall have jurisdiction over any claim by a seaman of any ship for wages earned by him on board the ship, whether the same be due under a special contract or otherwise, and also over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship."

S 35 "The jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by proceedings *in rem* or by proceedings *in personam*"

Clarkson, in support of the motion —The liabilities which the master has incurred are not "disbursements" within the 10th section of the Admiralty Court Act, and the Court has not jurisdiction

Lushington, *contra* —These liabilities are within an equitable interpretation of the word "disbursements" The master may be sued in respect of them and thrown into prison. In *The "Glentanner"* (Swab 415, 423), the Court held that the master suing for his wages was, upon the mortgagees setting up a counter-claim,

entitled to include in his accounts against the ship an item of £400 in respect of a draft upon the owner, which the owner had dishonoured So in *Randall* v. *Raper* (E. Bl & E. 84), the Court of Queen's Bench decided that a plaintiff suing for a breach of warranty on goods sold might recover damages, which he had become liable to pay but had not paid to a third party to whom he had resold the goods with a rewarranty The master may lose his lien if he does not proceed to enforce it with all reasonable despatch

Dr. Lushington. The question for the Court is whether liabilities incurred by the master on behalf of the ship can be included in the term of "disbursements" If they can, the Court has jurisdiction by the 10th section of the Admiralty Court Act, but if they cannot, the Court has not jurisdiction, for before that statute the master could not sue here even for actual disbursements, and before the statute of 1854 not even for wages, unless in exceptional circumstances The Court would be glad to assist the master, who is undoubtedly placed in a very hard position, but it is my duty to consider the terms of the statute

The case of *The "Glentanner"* (Swab 415), which has been referred to, was decided upon the statute of 1854, which gave the Court **[107]** authority upon any right of set-off or counter-claim being set up to a claim for master's wages, "to enter into and adjudicate upon all questions, and to settle all accounts then arising or outstanding and unsettled between the parties to the proceeding, and to direct payment of any balance which is found to be due" These words are almost without limit, and are very different from the specific term "disbursements" Moreover there, though this does not seem to me very material, the master had been actually sued, and judgment had gone against him The other case of *Randall* v. *Raper* (E. Bl & E. 84) is inapplicable, because it does not turn upon terms at all, but upon a question of personal liability.

The terms of the statute, "disbursements made," appear clear to me, and I am of opinion that liabilities incurred but not paid are not within these terms I must therefore grant the motion

Upon the application of Mr Clarkson the learned Judge then ordered the ship to be released from arrest on bail being given to the amount of £464

The petition having been amended accordingly, the defendants then pleaded an answer, which stated that they were mortgagees; that during the whole period, in respect of which the plaintiff claimed wages as master, his services consisted solely in superintending the ship's repairs, loading, &c, whilst in dock, and that the plaintiff lived and slept on shore, and it then submitted that the plaintiff had not, as master, earned wages on board the "Chieftain" within the meaning of the Admiralty Court Act, 1861, and that the Court had not jurisdiction to entertain the plaintiff's claim for wages or disbursements, and that the defendants were entitled to priority over any such claim of the plaintiff.

The facts proved in evidence were as follows:—In March 1862 the "Chieftain" was placed in the defendants' graving-dock for repairs, and she there remained until the 25th of November, when she went into the Victoria Docks On the 30th of May 1862 the plaintiff was appointed master by Donald MacLarty, the then owner, by the following letter —

"30th May 1862

"Dear Sir,

"I shall be glad if you will take charge of the 'Chieftain' on the terms we spoke of, viz £10 a month and £5 a month—in all **[108]** £15 a month—with the usual and customary board wages and other expenses in port. We talked of commission on earnings, but that can be gone into before sailing Keep an eye on the work and the shipkeeper, whom you will pay £1, 1s. a week, and advise me regularly to the old address while in Liverpool.

"Yours truly,

"DONALD MACLARTY, junior."

The plaintiff thereupon took charge of the ship, superintended the repairs, paid the shipkeepers, &c, and, on the ship coming off the pontoon, employed and paid men to pump her; and afterwards superintended the loading of the ship for Singapore (for which place she had been chartered), signed the bills of lading, shipped a crew, ordered ship's stores to a large amount, and otherwise transacted the ship's

business. He did not, however, sleep on board the ship, except on one or two occasions. On the 16th of January 1863 the ship was taken into possession on behalf of Messrs. Redfern & Co, but the plaintiff continued acting as master until the 25th of March, when he was discharged by Mr. Wilson, to whom Redfern & Co. had, on the 13th of March, sold the vessel. Meanwhile, on the 21st of January 1863, the defendants had taken a mortgage of the ship from the owner on account of their debt, and Redfern & Co, having satisfied their own mortgage out of the proceeds of the sale, handed over the balance to the defendants, but with notice of the outstanding claim of the plaintiff. This balance was insufficient to pay the defendants' claim.

Cleasby, Q.C., and Lushington for the plaintiff.—These were wages "earned on board the ship" within 24 Vict. c. 10, s. 10. The Court has, moreover, jurisdiction so far as the wages are concerned by the 191st section of the Merchant Shipping Act. The disbursements sued for were made by the plaintiff as master, and on account of the ship, and are therefore within the letter as well as the spirit of the Act of 1861.

Both these claims of the master come before any mortgage Master's wages are preferred to a bottomry bond, "*Salacia*" (Lush 545); and to a mortgage claim, "*Caledonia*" (Swab. 17), "*Glentanner*" (Swab 415); and there is no reason why master's disbursements should not stand on the same footing as his wages.

Further, the defendants are no longer mortgagees, nor have they any lien on the ship, nor any interest in this cause, because **[109]** the money paid to them by Redfern & Co. was not paid under a mistake of fact.

Karslake, Q.C., and Clarkson for the defendants.—The wages were not "earned *on board* the ship." The phrase "on board" was no doubt advisedly used; it came probably from the 181st section of the Merchant Shipping Act, which appoints a seaman's right to wages to commence "either at the time at which he commences work, or at the time specified in the agreement for his commencement of work or presence *on board*, whichever first happens." If the claim for wages falls on this ground, the claim for disbursements will fall also

Cleasby replied.

Dr. Lushington: This action is brought against the barque "Chieftain" and her freight by John Coward, suing as master for his wages and disbursements. An appearance was entered on behalf of the Thames Graving Dock Company, who claim an interest in the ship as mortgagees; and upon the facts stated in the pleadings and proved in evidence I have to decide whether the Court has jurisdiction to entertain the master's claim, and whether, if so, it can be maintained against the claim of the defendants.

It is perfectly clear, in my opinion, that the plaintiff was hired by MacLarty, the then owner of the ship, to be the master and to perform the duties of master of the ship, which was at that time in the graving-dock undergoing repairs. I am also of opinion that there are very many duties which devolve upon a master when the ship is undergoing such repairs, in one word, the duties of superintendence, seeing that the necessary work is done and done rightly, for such matters cannot be satisfactorily accomplished without being overlooked by some confidential and experienced person. These duties I consider to be properly the duties of a master; they were performed by the plaintiff, and subsequently he discharged many other duties, which are also within the scope of the ordinary office of a master. Though he did not sleep on board more than once or twice, he was constantly on board looking after the ship's concerns, he made the necessary disbursements for the ship; he hired the crew and paid them their wages; he superintended the loading of the ship and signed the bills of lading, and it was undoubtedly intended that he should command the ship on her voyage to Singapore. In short he did, to all intents and purposes, perform all those duties which appertain to the character of a master taking com-**[110]**-mand of a ship destined for a long voyage. He did not sail in the ship, because he was discharged by Mr Wilson, who in the meantime had by purchase become the owner of the ship Such are the facts of this case

Upon these facts it is contended, on behalf of the defendants, that whatever claim the plaintiff may have against the shipowner who employed him, he cannot sue the ship in this Court, because the Court has not jurisdiction. This argument is founded on the 10th section of the Admiralty Court Act, which gives the Court

"jurisdiction over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship." The argument of Mr. Karslake—confining my attention for the present to the claim for wages only—is this, that the wages must be earned *on board* the ship in the most literal sense, and that the master has no claim in this Court if he did not live on board the ship This construction of the statute would lead to many difficulties. I remember the time perfectly well, before steam-tugs came into use, when it was the custom for East Indiamen to go round to Deal, the master remaining behind in London to do the ship's business, and joining the ship again at Deal. Though circumstances are altered a similar course of proceeding might still sometimes be adopted Could it be contended that the master suing for wages would not be entitled to recover wages during the period that the ship was going round to the final starting port; would the Court have to divide the case into fractions, when in point of reason there would be no principle whatever to support such a subdivision? Again, I might put the case of the celebrated Russian embargo, when the ships were detained for months and months in Russia, and during all that time most of the masters and crews, instead of remaining on board ship, stayed on shore for the sake of comfort, in consequence of the inclemency of the weather; and we all know it was held (*a*) that they were entitled to their wages, though they did not actually perform and could not perform their duties on board ship. Again, it might happen that in many of the extensive voyages which take place in the East, the master might be absent from the ship for a month, and yet might be performing most important and necessary duties for the interests of the owners, and for the completion of the voyage. I should therefore be most reluctant to put upon the statute the construction for which the defendants contend But I also think that that construction is not the reasonable interpretation of the **[111]** words used I am of opinion that the wages were earned on board the ship. The plaintiff was on board during the day, and whenever he was required. The words used are "earned on board," not "earned at sea," and I am of opinion that his wages were earned on board, although he did not sleep on board, and although his duty required him on many occasions to be absent from the ship, more especially for the purpose of going into the city, and there accelerating matters for the ship's voyage. Moreover, in this construction, which in all respects appears to me the reasonable one, I am confirmed by the 181st section of the Merchant Shipping Act, which Mr. Karslake has cited That section enacts, that "a seaman's right to wages and provisions shall be taken to commence either at the time at which he commences work or at the time specified in the agreement for his commencement of work or presence on board, whichever shall first happen"; and the 191st section gives the master the same rights, liens and remedies for his wages that the seaman has for his wages If, then, the seaman may be entitled to wages from the time specified in his agreement for his commencement of work or presence on board, though in point of fact, through the interposition of other orders, his work on board does not then actually commence, the master must have a similar right. I cannot, therefore, hesitate in pronouncing that the Court has jurisdiction over the plaintiff's claim for wages

The defendants, however, then say that the plaintiff's claim cannot prevail against their interest, which I will assume to be that of mortgagees. Now, a mortgagee stands in the shoes of the owner, and can set up no defence in this Court, except what the owner can set up This has been the practice of the Court for many years: it allows the mortgagee to come in and defend, but it confines his right of defence to the defences competent to the owner. As it is manifest that the owner would have no defence here to the plaintiff's claim for wages, so neither have the defendants as mortgagees The defendants have disclaimed relying upon the 4th section of the Admiralty Court Act, or upon the fact of their having furnished necessaries to the ship; and as common creditors, indeed, it is clear that they have no *persona standi* here

There remains then only the question as to the disbursements The argument against the right of the master is that he could only recover disbursements made by

(*a*) *Beale* v. *Thompson*, 4 East, 546; *Delamainer* v *Winteringham*, 4 Camp. 186. The seamen, in these two cases, were imprisoned by the Russian Government. [See *Horlock* v. *Beal*, [1916] A. C 486.]

him whilst he was earning wages on board the ship But I have already decided that the master was earning wages on board the ship within the meaning of the Act, and therefore the objection to the claim for disbursements fails also.

[112] I have no doubt that the master is entitled to the lien he claims both for wages and disbursements I regret that an innocent party should be the loser; but both parties are innocent, and if I adopted the argument of the defendants I should be throwing great confusion into proceedings brought by masters I should then have to decide when the master's duties commenced on board, in the most literal and exclusive sense—when they ended, when they began again—for what period a claim could be made, and for what not, whilst we all know that the practical duties of a master begin, not when the ship sails, but long before—that those duties are not confined to duties on board the ship, and that they are most important to the success of the voyage and the safety of the ship In the present case I pronounce for the claim of the master

Stocken, solicitor to the plaintiff.

Cotterill & Sons, solicitors to the defendants

A second action had been entered by the master for his wages from the date of the institution of the first cause to the date of his discharge The learned Judge pronounced for this claim also

[113] IN THE PRIVY COUNCIL.

Present—Lord Chelmsford
Lord Kingsdown.
The Lord Justice Knight Bruce.

THE "CARRIER DOVE" July 30, 1863.—Collision—Defence of licensed pilot—Burden and degree of proof—17 & 18 Vict c 104, s 388.—In a cause of collision, a defendant relying upon the statutory defence (17 & 18 Vict c. 104, s. 388) that the accident was occasioned by the default of a pilot acting in charge of the ship, and employed by compulsion of law, is bound to give strict proof that the collision was occasioned by the pilot's default and by that only. Where, therefore, the improper navigation of the defendant's vessel consisted in getting under way for the purpose of docking, under circumstances which rendered that proceeding dangerous to other vessels, and the defendant only proved that the pilot (as well as the captain) was on deck giving general orders, but did not prove the particular order, nor produce the pilot as a witness. *Held* (affirming the judgment of the Court of Admiralty), that the defendant remained liable for the damage

[S. C 2 Moore, P. C (N. S) 260; 15 E R. 899, 8 L. T 402; 1 Mar L C. (Crockford) 341. Considered, *The "Livia,"* 1872, 25 L. T. 887. Distinguished, *Oakley* v. *Speedy*, 1879, 40 L. T. 881. For salvage proceedings arising out of the same collision, see 15 Moore, P. C (N. S) 243, 15 E R. 893]

[117] *Present*—Lord Kingsdown.
Dr Lushington
Sir Edward Ryan.

THE "LACONIA." July 10, 11, 25, 27; August 5, 1863.—Consular Court at Constantinople—Jurisdiction over British and foreign subjects—6 & 7 Vict c 94—Order in Council, 27th August 1860—Admiralty jurisdiction—Rule as to dividing damages in collision cases.—In almost all transactions, whether political or mercantile, a wide difference subsists in the dealings between an Oriental and a Christian state, and the intercourse between two Christian nations. As between two Christian states, all claims for cession of jurisdiction or exemption from jurisdiction within the territory of the other require, generally at least, the sanction of a treaty · but may nevertheless be proved by evidence of consent otherwise, and such consent may be expressed by usage and conscious acquiescence; especially in transactions with Oriental states.—The Ottoman Government has for a long time acquiesced in allowing to the British consular authorities in Turkey a jurisdiction between British subjects and the subjects of other Christian states. Such acquiescence of the Ottoman Government does not vest a compulsory power in a British Court in Turkey over the subjects of