(Cozens-Hardy, M.R., Fletcher-Moulton and Buckley, L.JJ.).

The dependants appealed.

At the conclusion of the argument for the appellants their Lordships gave judgment as follows:—

Lord Chancellor (Loreburn)—I think that this appeal should be dismissed. The question which was argued before us was that this accident, which proved fatal to the unfortunate master of the vessel, arose out of his employment. He fell off the pier into the water while waiting to return to his ship. It was not established by the evidence that he had to go ashore on the ship's business, and I think that the risk from which he perished was not one specially connected with his employment, such as crossing a plank or a gangway leading to the ship or going in a boat to the ship might be. Under these circumstances I think that the conclusion at which the Court of Appeal arrived was right, and that this appeal should be dismissed.

Lords Atkinson, Gorell, and Robson concurred.

Appeal dismissed.

Counsel for Appellants—Greer, K.C.—Clement Davis. Agents—Bower, Cotton, & Bower, Solicitors.

Counsel for Respondents—Atkin, K.C.—Alexander Neilson. Agents—Botterell & Roche, Solicitors.

HOUSE OF LORDS.

Friday, June 16, 1911.

(Before the Lord Chancellor (Loreburn), Lords Atkinson, Gorell, and Robson.)

T. W. THOMAS & COMPANY, LIMITED *v.* PORTSEA STEAMSHIP COMPANY, LIMITED.

(On Appeal from the Court of Appeal in England.)

Ship—Bill of Lading—Incorporation of Terms of Charter-Party—Arbitration Clause.

A bill of lading provided that goods should be delivered to the shipper or his assigns, "he or they paying freight for the said goods with other conditions as per charter-party with average accustomed." . . . "Deck load at shipper's risk, and all other terms and conditions and exceptions of charter to be as per charter-party, including negligence clause." The charter-party contained an arbitration clause.

Held that the terms of the bill of lading were insufficient to incorporate therewith the arbitration clause of the charter-party, which could only be done by clear and explicit language.

A company of shipowners (*respondents*) brought an action for demurrage against the holders of a bill of lading, the material terms of which are stated *supra in rubric.* The holders of the bill (*appellants*) relied upon an arbitration clause in the charter-party. The County Court Judge and the Admiralty Divisional Court held that this clause had been incorporated in the bill of lading and granted a stay. This judgment was reversed by the Court of Appeal (Vaughan Williams, Buckley, and Kennedy, L.JJ.).

The holders of the bill appealed.

At the conclusion of the arguments their Lordships gave judgment as follows:—

Lord Chancellor (Loreburn) — The question in this case seems to me to be whether an arbitration clause found in the charter-party is applicable to the contract evidenced by the bill of lading, and to disputes arising between the shipowners and the holders of the bill of lading under that document. The bill of lading itself is the primary document to be considered. It acknowledges the shipment of the goods in the usual way and the terms upon which they are to be delivered. There are two paragraphs in it which refer to the charter-party. One of them is in the body of the bill of lading, and provides that the goods shall be delivered to "William Malcolm Mackay or his assigns, he or they paying freight for the said goods with other conditions as per charter-party with average accustomed." Now it is well settled that under words of that kind you cannot say that the arbitration clause in the charter-party is incorporated or made applicable. Then there is another paragraph in the bill of lading relating to the charter-party. It is as follows—"Deck load at shipper's risk, and all other terms and conditions and exceptions of charter to be as per charter-party, including negligence clause." I do not think that this paragraph brings into the bill of lading the arbitration clause any more than the other one does. The arbitration clause is not one that concerns shipment or carriage or delivery, or the terms upon which delivery is to be made or taken. It only governs the way of settling disputes between the parties to the charter-party and disputes arising out of the conditions of the charter-party, not disputes arising out of the bill of lading. In my opinion the Court of Appeal relied rightly upon the decision in *Hamilton* v. *Mackie*, 1889, 5 Times L.R. 677, and if it is desired to put upon the holders of a bill of lading an obligation to arbitrate because that obligation is stated in the charter-party it must be done explicitly.

Lord Atkinson—I concur with the judgment of the Lord Chancellor. I think that it is a sound rule of construction that when it is sought to introduce into a document like a bill of lading a negotiable instrument, a clause such as this arbitration clause, not germane to the receipt, carriage, or delivery of the cargo or to the payment of the freight, the proper subject-matters

with which a bill of lading is conversant, this should be done by distinct and specific words, and not by general words such as those written in the margin of the bill of lading in this case. With regard to the other point mentioned by my noble and learned friend, I concur in his opinion.

LORD GORELL—I concur in the judgment which has been delivered by the Lord Chancellor, but I should like to say a few words about this case, because it is one of a class of cases which constantly occur, and these questions as between consignees and shipowners are really of very great commercial importance. The charter-party in this case was made between certain shipowners and certain charterers for the loading of a large cargo of wood goods (of course I am taking it quite shortly) at, I think, the port of Halifax or some other port for a port in this country. There was a clause for cesser of liability, and there were provisions as to freight and the time for loading and the time for discharge, and there was also an arbitration clause in these terms—"Any dispute or claim arising out of any of the conditions of this charter-party shall be adjusted at the port where it occurs, and the same shall be settled by arbitration." Under that charter-party a cargo was provided, but it was not shipped by the charterers. It appears to have been shipped by a certain Mr William Malcolm Mackay, with whom no doubt the charterers had arranged for a cargo. The whole cargo appears to have been dealt with in one bill of lading, which, after providing for the usual exceptions, winds up by saying that the cargo is to be delivered "unto William Malcolm Mackay or his assigns, he or they paying freight for the said goods with other conditions as per charter-party with average accustomed." The bill of lading also has a marginal clause written in in ink—"Deck load at shipper's risk, and all other terms and conditions and exceptions of charter to be as per charter-party, including negligence clause." Now I think that it has hardly been argued seriously that the clause as to "paying freight with other conditions as per charter-party" in the body of the bill of lading would incorporate the arbitration clause in this case. There is ample authority against any such view, and I pass from that point. But it is said that the special clause in the margin has in fact had the effect of bringing into the bill of lading the arbitration clause which is found in the charter-party. To my mind the question is one of construction, and when one turns to the marginal clause in question I have very serious doubt whether it carries the question one bit further than the clause which is found in the body of the bill of lading, except of course so far as it brings in the exceptions in the charter-party, and these exceptions are to include the negligence clause, because it adds really in words to the words in the body "with other conditions as per charter-party," nothing more than that all other terms and conditions are to be those of the charter-party. Now the case of *Hamilton* v. *Mackie* (*cit.*) has already decided that the words "all other terms and conditions as per charter-party" (I think that those are the exact words) have not the effect of bringing the arbitration clause into the bill of lading. We have not had a full report of that case so as to enable us to judge whether there was a cesser clause there or not, but I cannot help thinking myself, having regard to the date of that decision and to the fact that there was a full cargo, as I understand the report, that it is extremely probable that there was a cesser clause in that case, as it had become quite common at the date when that decision was given; and the conclusion to which I come is that that case was rightly decided and that it really governs the present case; but whether it does so or not, it seems to me that the marginal clause does not contain words which incorporate the arbitration clause in the present case. I think that the true view to take of such a clause is that the "terms and conditions" do not really include more than what refers to those matters which have to be dealt with both by the shipowner and the consignee in relation to the carriage, discharge, and delivery of the cargo. To what extent they include what refers to those matters or any of them I do not pause to consider, but I do not see that they deal expressly with the arbitration clause in any way, and of course it is sufficient for present purposes to say that they do not; but my view is that what they deal with is no more than that which I have already stated. Now that being so, if one considers this case a little more broadly, the shipper is not likely, I think, to have been desirous of consenting to an arbitration clause which places upon him possibly the obligation of deciding by arbitration at any port where a dispute occurs a question in which there is any dispute. Certainly no consignee would ever be likely naturally to assent to such a proposition, because he might find himself landed in the difficulty of having to go to arbitration at a port of shipment with which he had no further connection than the mercantile one of correspondence. It therefore seems to me, when one looks at the matter broadly, that the true construction to place upon the clause is that which I have already suggested; and that the point may be made still plainer by trying to see what would be the effect produced if this clause of arbitration were actually written into the bill of lading. If it were written in it would at once be seen that it is not a clause which is consistent in its terms with the terms of the bill of lading. It is consistent with disputes arising under a charter-party, and that again leads to the conclusion that it was never intended to be inserted as a part of a bill of lading which was to pass from hand to hand as bills of lading, being negotiable instruments, usually do. But there is a wide consideration which I think that it is important to bear in mind in dealing with cases of this class. The effect

of deciding to stay this action would be that the bill of lading holder or the shipowner (in this case it would be the shipowner, but it might just as well occur where a bill of lading holder is concerned) who does not wish for an arbitration is ousted from the jurisdiction of the courts and compelled to decide all questions by means of arbitration. Now I think, broadly speaking, that very clear language should be introduced into any contract which is to have that effect, and I am by no means prepared to say that this contract, when studied with care, was ever intended to exclude or carries out any intention of excluding the jurisdiction of the courts in cases between the shipowner and the bill of lading holder. It seems to me that the clause of arbitration ought properly to be confined, as drawn, to disputes arising between the shipowner and the charterer, and therefore I concur in the motion which the Lord Chancellor has made that this appeal should be dismissed.

LORD ROBSON—The question here is whether the appellants, who are consignees of the goods, can compel the shipowners to submit to arbitration on a claim for demurrage instead of bringing an action. For this purpose they must show that the bill of lading, which constitutes the contract between the shipowners and themselves, contains a clear stipulation to that effect. There is an arbitration clause in the charter-party applicable to "any dispute or claim arising out of the conditions of this charter-party," and providing that it "shall be adjusted at the port where it occurs, and settled by arbitration." The appellants contend that this clause is incorporated in the bill of lading by reference. There are two references in the bill of lading which purport to incorporate all or some of the terms of the charter-party. With regard to the clause in the body of the document which expresses the obligation of the shipowner to deliver the goods to the consignee, "he or they paying freight with other conditions as per charter," very little need be said. These words have been the subject of a series of decisions which establish that such a reference does not incorporate every clause or term of the charter-party, but only those terms which are *ejusdem generis* as that for the payment of freight. There is, however, written in the margin of this bill of lading a clause which deals with the incorporation of the provisions of the charter-party in somewhat wider terms. It says—"Deck load at shipper's risk, and all other terms and conditions and exceptions of the charter-party are to be as per charter-party, including negligence clause." In these words we have no specific reference to the payment of freight so as to import a limitation on their generality, but I do not think that they differ in effect from the clause in the body of the bill of lading so far as the question in the present case is concerned. Both clauses are subject to the rule that the terms of the charter-party when incorporated or written into the bill of lading shall not be insensible or inapplicable to the document in which they are inserted, and it is not absolutely clear that, when thus tested, this arbitration clause is applicable to a dispute between persons other than the parties to the charter. It relates expressly only to disputes "arising out of the conditions of this charter-party," and would stand in the bill of lading with that limitation. In one sense it is perhaps difficult to imagine any dispute relating to the chartered voyage which might not be said to arise out of the conditions of the charter, but we are dealing here with obligations founded primarily on the bill of lading, which is a different contract, and is made between different parties, though it relates in part to the same subject-matter. The limitation of the clause to the conditions of this charter-party is therefore, to say the least, embarrassing and ambiguous when it comes to be made part of the bill of lading. It requires, indeed, some modification to make it even read intelligibly in its new connection. It is to be remembered that the bill of lading is a negotiable instrument, and if the obligations of those who are parties to such a contract are to be enlarged beyond the matters which ordinarily concern them, or if it is sought to deprive either party of his ordinary legal remedies, the contract cannot be too explicit and precise. It is difficult to hold that words which require modification to be read as part of the bill of lading, and then purport to deal only with disputes arising under a document made between different persons, are quite sufficiently explicit for the appellant's purpose. On the whole, therefore, I think that their contention fails.

Appeal dismissed.

Counsel for Appellants—Leslie Scott, K.C.—Holman Gregory, K.C. Agents—Botterell & Roche, Solicitors.

Counsel for Respondents—Bailhache, K.C.—Albert Parsons. Agents—Downing, Handcock, Middleton, & Lewis, Solicitors.

HOUSE OF LORDS.

Monday, June 26, 1911.

(Before the Lord Chancellor (Loreburn), the Earl of Halsbury, Lords Ashbourne, Atkinson, Shaw, and Mersey.)

MOSS STEAMSHIP COMPANY, LIMITED *v.* WHINNEY.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Company—Debenture Holders—Receiver and Manager—Shipment of Goods by Receiver—Bill of Lading—Clause of Lien for Previous Arrears of Freight.

A brewery company had habitually shipped beer by the appellants' steamships under bills of lading which provided for a lien to the shipowners for unsatisfied freight due either from