that the appellant's whole business might continue to be the selling or letting of houses within the prohibited area, that he would draw his entire income from commissions on these transactions within the prohibited area, but that this would be permitted according to his construction of the contract if his office was a yard beyond it. That construction with its absurd results is not in accordance with ordinary rules of honesty, with the bargain, or with business habits. I agree with the motion proposed.

LORD SUMNER—I concur.

LORD PARMOOR—I concur, but I should like to say one word with reference to the judgment of Eve, J., on which the able argument of counsel for the appellant was founded. I think myself that the case is a mere question of the construction of article 29 of the partnership agreement, bearing in mind, of course, the nature of the business. The contention was that the only matter which was prohibited under the words of article 29 was the establishment of a business within the prohibited area, and Eve, J., who adopted that construction, read in the word "establishment" after the word "business" and before the words "within a radius of one mile from the premises of the said partnership." If the covenant in question could be so construed I should have agreed with the judgment of Eve, J., and the argument of counsel for the appellant, but I think that it cannot be so construed, but has to be construed in the wider sense which has already been put before your Lordships' House, and I agree that the appeal should be dismissed.

Judgment appealed from affirmed, and appeal dismissed, with costs.

Counsel for the Appellant—Cozens-Hardy, K.C.—O. Thompson. Agents—Spyer & Sons, Solicitors.

Counsel for the Respondent—Clayton, K.C.—Jolly. Agents—Morgan & Upjohn, Solicitors.

HOUSE OF LORDS.

Friday, June 26, 1914.

(Before the Lord Chancellor (Viscount Haldane), Lords Shaw, Moulton, and Parmoor.)

THOMAS & SONS *v.* HARROWING STEAMSHIP COMPANY.

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

Ship — Charter-Party — Freight — Partial Loss of Cargo—Delivery by Floating off from Wreck.

Where by the charter-party a lump sum was due for freight upon delivery of the cargo at its destination, and the ship was wrecked just outside the port of delivery, *held* that floating off the cargo to the beach was equivalent to delivery by transhipment, and that loss of one quarter of it by "perils of the sea," as provided for in the charter-party, did not affect the shipowners' right to the full freight.

Appeal from a judgment of the Court of Appeal (VAUGHAN WILLIAMS, FARWELL, and KENNEDY, L.JJ.), reported [1913] 2 K.B. 171, affirming a judgment of PICKFORD, J., reported [1912] 3 K.B. 321, in favour of the respondents, the plaintiffs below.

The facts are stated by the Lord Chancellor.

Their Lordships gave judgment as follows:—

LORD CHANCELLOR—If I entertained any doubt about this case I should ask your Lordships to take time to consider it, but it seems to me both on the facts and on the law to be a very plain case.

It arises between the owners of the ship "Ethelwalda," who are the respondents, which ship was chartered to the appellants. The charter-party was made on the 1st September 1911, and its bearing is this. The steamer was to carry a full and complete cargo and a full and safe deckload at the charterers' risk, not exceeding what she could reasonably stow and carry, and being so loaded was to proceed to Port Talbot or as near thereto as she could safely get, and deliver the same on being paid a lump sum freight of £1600, in consideration of which the owners placed the steamer at the charterers' disposal. There was the usual clause as to perils of the seas and so on, and the final clause that the freight should be paid in cash, less freight advanced on unloading and right delivery of the cargo.

What happened was this. The steamer sailed from the port of loading and proceeded to Port Talbot, where she arrived on the 29th October. She could not get into the dock on that day, and before she got into the dock her anchors dragged and the cables parted owing to perils of the seas and she went ashore. For the rest of what happened I turn to Pickford, J.'s account of the facts as agreed with by the Court of Appeal. Pickford, J., said that the cargo consisted partly of deck cargo which was swept off. Some of the cargo drifted on to the beach and some was not recovered, but the rest, which was partly washed out of the ship—and washed out because it was assisted by holes cut in the sides of the ship to enable the cargo to get out—was saved. There was a man named Jenkins, who appears to have acted first at the instigation of the Salvage Association and afterwards by arrangement with the captain of the vessel. Pickford, J., has found as a fact that the master of the ship promised that in consideration of Jenkins going on to perform the services he, the master, on behalf of the owners, would pay for the whole of what had been done and what would be done. The fact of it was that with the assistance of Jenkins it became possible for the shipowners to see that the cargo got into the hands of the cargo owners,

who obtained delivery to the extent of two-thirds or three-fourths of the whole cargo.

The question which was argued, and the main question, is this—It was said that this was what is called a lump sum contract, and that as the ship did not arrive at Port Talbot and deliver in the ordinary way the freight is not payable. The shipowners, who were the plaintiffs in the Court of Appeal, sued for the freight, and the answer was, "No, you have not performed your contract, which is an entire contract. You were to proceed to Port Talbot and your ship never got there, so that you never really performed your contract and are not entitled to the consideration stipulated for." I do not think that the question whether the freight is a lump sum freight is in the least decisive of the character of the contract. There may be contracts, as the learned Judge said, in which the stipulation is simply for the use of the ship, which is to proceed to a certain port for a lump sum, and in that case it may be as was argued in this instance, but we have not to deal with such a contract but with this contract, and in regard to this contract I entirely concur with what the learned Judge says, that the meaning of the contract in this case is that it is an ordinary and regular charter for the services of the ship to carry a particular cargo to a particular port. The substance of the contract is to deliver the cargo, and the ship is the instrument in which the cargo is to be carried. In that state of facts the law which seems to me to apply is that laid down by Lord Ellenborough in the case of *Hunter* v. *Prinsep*, 10 East. 378, which is to this effect—The shipowners undertake that they will carry the goods to the place of destination unless prevented by dangers of the seas or other inevitable casualty, and the freighter undertakes that if the goods be delivered at the place of their destination he will pay the stipulated freight, but it is only in that event that he, the freighter, engages to pay anything. If the ship is disabled from completing her voyage the shipowner may still entitle himself to the whole freight by forwarding the goods by some other means to the place of destination. The Judge has held here what took place was equivalent to that transhipment of which Lord Ellenborough speaks. It does not matter that it was not done in lighters; it was done by cutting holes in the vessel and floating the cargo on to the beach. The point is that the cargo arrived there, and that the master was doing his best to secure that this took place. Under these circumstances the Judge has found that the facts are facts which amount to transhipment, that there was delivery of three-quarters of the cargo, and that the rest was lost by perils of the seas.

I entirely agree with that judgment of Pickford, J., confirmed as it was by the Court of Appeal, and therefore move that this appeal be dismissed with costs.

LORD SHAW—By a contract of affreightment certain shipowners for a lump sum undertook to convey a full cargo of pit-props from Uleaborg to Port Talbot. The charter-party is in no unfamiliar terms, and contains the usual exception as to perils of the seas. The ship performed the voyage almost to the harbour of Port Talbot. She anchored outside, where her cable parted owing to stress of weather and she foundered. She never, as a ship, did arrive at the port of delivery. I am of opinion that the dominant idea of this contract is delivery of the pit-prop cargo. I agree with the manner in which that idea is expressed by Farwell, L.J., who said that the gist of the contract was that the shipowner should convey and deliver to the charterer or his consignee the goods included in the charter. It is proved that the shipowner in the circumstances collected all the available cargo (for I hold that the action of the underwriters and others while the ship was in that position and subsequently to that position was action with the shipowners' authority), and they blew in the side of the vessel to facilitate discharge, and delivered all the goods except those which were lost by perils of the seas.

I am of opinion that under these circumstances the freight agreed upon was earned, and that there has been right and true delivery, taking into account that exception of perils of the seas which the contract itself contains. This appears to me to be in complete accord with the principles laid down by Lord Ellenborough. The dominant idea of the contract was delivery, and I venture to use the language of Pickford, J.—"I think if the whole of the cargo had been collected and delivered it is exactly as if the whole of the cargo had been transhipped and delivered in another ship." That being the principle as regards the whole cargo, I think that the same principle should apply if there is, as here, a delivery of a substantial part of the cargo, the balance being undelivered owing to an excepted peril. In this instance we have a contract which covers the situation which has arisen. I have no doubt that the Courts below have reached a conclusion not only in accord with shipping law but in accordance with mercantile practice and precedent.

LORDS MOULTON and PARMOOR concurred.

Judgment appealed from affirmed, and appeal dismissed with costs.

Counsel for the Appellants — Sir R. Finlay, K.C.— Leck, K.C. — Maurice Hill, K.C. Agents — Trinder, Capron, & Company, Solicitors.

Counsel for the Respondents — Adair Roche, K.C.—Robertson Dunlop. Agents—Holman, Birdwood, & Company, Solicitors.