when it occurs on board a ship than when it occurs on land. Nor is the catching the ends of a lengthy boiler on the coamings when being lowered into the hold of a ship through a hatchway more maritime in its character than would be the catching on land of any piece of machinery on the sides of an opening shorter than itself through which it was being lowered. Neither the winds nor the waves contributed to this accident. Nor did the fact that the ship on which it occurred was water-borne. The listing of the "Atlas" to port tended to take up the slack of the chain and to diminish the extent of the drop, and therefore of the strain when the boiler got free, rather than the contrary. The statement of Lord Ellenborough in *Cullen* v. *Butler*, 5 M. & S. 461, as to the proper construction of general words such as those used in the present case, in a policy of marine insurance, has been many times approved of. He said due effect would be given to them by "allowing them to comprehend and cover other cases of maritime damage of a like kind to those which are enumerated and occasioned by similar causes." By the words "maritime damage" Lord Herschell in the *Thames and Mersey Marine Insurance Company* v. *Hamilton, Fraser, & Company*, took Lord Ellenborough to have meant not only damage caused by the sea, but damages of a character to which a marine adventure is subject.

In my view the present case is covered by this last-mentioned case. The operation which the working of the donkey-engine in that case was designed to effect was, no doubt, a preparation for the sailing of the ship, namely, the filling of her boilers with water, but the accident arose from the outlet for the water pumped up by the pump which the engine worked being closed, with the result that the air chamber of the pump gave way under the excessive pressure of the water which could not escape, and it was held on the principle laid down by Lord Ellenborough that it was impossible to say that this damage, the bursting of the air chamber, was occasioned by a "cause" similar to perils of the sea. The loading of a ship with her cargo is, no doubt, in one sense a preparation for her sailing. It is certainly not so directly connected with her sailing as was the pumping of water into the boilers of a steamship, but unless the accident which occurs in the course of those preparatory operations be occasioned by a cause similar to perils of the sea it is not covered by such a policy as this. Well, it seems to me quite as impossible in this case to say that the breaking of the crane chain or the pin of one of it shackles was occasioned by a cause similar to the perils of the sea, as it was in the last-cited authority to say that the bursting of the air chamber of the donkey-engine pump was occasioned by a cause similar to a peril of the sea. The two cases are really in principle on all fours. I am therefore of opinion that the judgment appealed from was right and should be affirmed, and this appeal be dismissed with costs here and below.

Appeal dismissed.

Counsel for the Appellants—Leslie Scott, K.C.—Darby. Agents—Lightbound, Owen, & Company, Solicitors.

Counsel for the Respondents — Adair Roche, K.C.—Mackinnon, K.C. Agents—W. A. Crump & Son, Solicitors.

HOUSE OF LORDS.

Monday, November 15, 1915.

(Before Earl Loreburn, Lords Atkinson, Parker, Sumner, and Parmoor.)

PRODUCE BROKERS COMPANY, LIMITED *v.* OLYMPIA OIL AND CAKE COMPANY, LIMITED.

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

Contract—Arbitration—Custom of Trade—Sale of Goods—"All Disputes from Time to Time Arising Out of this Contract"—Award of Arbitrator as to Custom of Trade.

In connection with a contract for the sale of goods a dispute had arisen between the parties as to whether a certain appropriation was good or not. The question was referred to arbitration under the clause in the contract, and a special case was stated for the opinion of the Court, in which certain questions were put to the Court, including one whether under the terms of a certain contract there could be appropriation of a cargo shipped on board the "C." to the buyers at a time when the vessel was wrecked and the cargo had become a total loss. The Court answered those questions in the negative. Thereupon the matter went back, and the arbitrators made an award in which they stated that while they "unreservedly accepted the said answers upon the construction of the contract as a matter of law, apart from the custom of the trade," they nevertheless found that there was a long-established and well-recognised custom of the trade by which in the circumstances of this contract there was an appropriation of the cargo to the buyers.

Held (*rev.* decision of the Court of Appeal) that under a submission to decide disputes arising out of the contract it was competent for the arbitrators to determine the existence of a custom attaching to the particular trade, inasmuch as it was impossible without introducing the custom to decide what were the rights and liabilities under the contract of the respective parties.

Hutcheson & Company v. *Eaton & Son*, 13 Q.B.D. 86, and *Re Arbitration North-Western Rubber Company and Huttenbach & Company*, 1908, 2 K.B. 907, *overruled.*

On the 30th May 1912 the Produce Brokers Company sold to the Olympia Oil and Cake

Company 6000 tons of soya beans, to be shipped from an Oriental port in December 1912, and (or) January 1913 by steamer to Hull.

Clause 3 of the contract provided—"Particulars of shipment . . . to be declared by original sellers, not later than 40 days from the date of the last bill of lading. . . . In case of re-sales copy of original appropriation shall be accepted by the buyers and passed on without delay. . . ." Clause 10 provided—"This contract is to be void as regards any portion shipped that may not arrive by the ship or ships declared against this contract. . . ."

The form of contract used was the printed form of contract issued by the Incorporated Oil Seed Association for adoption by persons engaged in the oil seed trade in sales of cargoes of Manchurian soya beans, with slight variations adopted by the parties.

By a contract dated the 9th September 1912 the Produce Company purchased from the East Africa Company (the shippers of the cargo) under a similar contract 6000 tons 10 per cent. more or less of soya beans for shipment in December 1912 and (or) January 1913. In February 1913 the Produce Company received a declaration and appropriation of a cargo of 6400-6600 tons of soya beans per steamship "Canterbury," which was stated to have sailed from Vladivostock on the 31st January, and on the same date (4th February) the Produce Company declared and appropriated this shipment to their contract with the Olympia Company. On the 4th February the steamship "Canterbury" was wrecked and her cargo totally lost, the loss being known in London about 3 p.m. on that day. The fact of the loss of the ship was not known to the East Africa Company at the time of their tender to the Produce Company, but the latter company were aware of it at the time of their making their tender to the Olympia Company.

In these circumstances the Olympia Company refused to accept the tender.

The question whether the tender was a good tender or not was referred to arbitration under the clause in the contract, and the umpire by his award dated the 7th May 1913 awarded "that the appropriation per 'Canterbury' is a good appropriation in the terms of the contract, and must be accepted by the buyers." That was carried to the committee of appeal of the Incorporated Oil Seed Association, and they stated a Special Case for the opinion of the Court. Certain questions were asked the Court, the material one being whether under the terms of the contract there could be a valid tender or appropriation of a cargo shipped on board the steamship "Canterbury" to the buyers at a time when the vessel was wrecked and the cargo had become a total loss.

The Divisional Court answered these questions in the negative. Thereupon the matter went back to the committee of appeal, and they made an award in which they stated that while they "unreservedly accepted the said answers upon the construction of the contract as a matter of law apart from the custom of the trade," they nevertheless found that there was a long-established and well-recognised custom of the trade in cases of re-sales; that buyers under this form of contract impliedly agreed with their sellers that they would accept the original shipper's appropriation if passed on without delay.

On a motion by the buyers to have the award set aside, the Divisional Court held that the arbitrators had no jurisdiction to find conclusively the existence of a trade custom, and the Court of Appeal—Buckley, Phillimore, and Pickford, L.JJ.—on the authority of *Hutcheson* v. *Eaton & Son*, 13 Q.B.D. 861, and *re Arbitration North-Western Rubber Company and Hüttenbach & Company*, 1908, 2 K.B. 907, and, against their own opinion, affirmed this decision,

The Produce Company appealed.

The House, having taken time for consideration, delivered the following written judgments:—

EARL LOREBURN—If in this case we allow the appeal it is to be understood that we are not differing from the opinions expressed by the Lords Justices. The Court of Appeal felt itself bound by previous decisions of co-ordinate authority though it disapproved of them, while this House is not bound. I agree with the opinions expressed by all the Lords Justices, and propose to give effect to them by moving that the order appealed from be reversed.

It is in one aspect of it a deplorable case. These men of business made contracts and therein agreed to arbitrate upon all disputes arising out of their contracts. Yet there have already been seven distinct stages of argument and decision, four of them in courts of law, upon a dispute arising on those contracts, and the end is not yet. I do not know how many more stages there will be. Parties have a right to prefer what some may consider the imperfect though expeditious wisdom of arbitrators to the slower and more costly justice of His Majesty's Courts. It is to be regretted when they have to encounter the inconveniences of both methods with the advantage of neither.

I will not recapitulate the facts of this case or the steps by which it has been brought here. They are admirably stated by Buckley, L.J. I go direct to the notice of motion of the 11th July 1914, by which the Olympia Company sought to set aside two awards of the same tenour. The appeal before your Lordships springs from this motion. The Olympia Company in their notice specified four grounds upon which they relied to set aside these awards, the gist of their complaint throughout being that the Arbitral Committee had found and acted upon a custom of trade.

I will deal presently with the first ground set out in this notice of motion.

The third and fourth grounds, which allege judicial misconduct by the Arbitral Committee, disappear. They were abandoned by Mr Leslie Scott when he perceived how hopeless it must be to sustain them upon the evidence. The arbitrators needed not to hear evidence in regard to customs of a

trade in which they were experts when the custom was distinctly raised and both parties had an opportunity of adducing evidence upon it and neither party chose to do so. If nothing was said about this custom in the Special Case stated for the opinion of the High Court, it was so because the Olympia Company who complained of the omission did not ask that the custom should be stated in the case which they alone asked for in order to raise points which they alone put forward. Mr Leslie Scott was well advised in abandoning these two grounds.

On the remaining ground, namely, the second, the Olympia Company partially succeeded, both in the Divisional Court and in the Court of Appeal, to the evident regret of both courts. The point was this. The Olympia Company maintained that the Arbitral Committee had no jurisdiction to find that there was a custom of trade binding the parties, and cited two authorities. Certainly these authorities appear to be in their favour, and upon them both Courts felt bound so to hold. Accordingly they adjourned the hearing of the motion and gave both parties liberty to file affidavits as to the existence of the alleged custom. They did so on the footing that there was no jurisdiction finally to find the custom.

In my opinion the Appeal Arbitral Committee had jurisdiction finally to find as they did in regard to the custom of trade. I confess that I am no better able than was Buckley, L.J., to understand the contrary principle laid down in *Hutcheson* v. *Eaton*, 13 Q.B.D. 861, and in the *North-Western Rubber Company* v. *Hüttenbach & Company*, 1908, 2 K.B. 907. When an arbitrator has power, as here, to decide all disputes arising out of a contract, including questions of law, surely he must decide what the contract is, and he cannot decide that without introducing the custom. These decisions seem to mean that he can decide on the existence of a custom only if he decides rightly. There is no magic in a custom that an issue as to its existence should be treated differently from any other issue of fact before an arbitral tribunal. With all respect it seems to me that a court plainly usurps the functions of an arbitrator when it claims to decide that issue for itself on a submission such as we find here. It is true that a court will decide for itself whether an inferior court has clothed itself with jurisdiction by an erroneous finding on something vital to the jurisdiction. I do not see the analogy. Here the jurisdiction of the Arbitral Committee to decide the dispute did not depend upon its finding about the custom. There was an agreement of the parties to submit all disputes, and this certainly is a dispute. Therefore the second ground for the motion in the King's Bench Division fails.

I come back to the first ground, which was that each of the awards was "bad on its face or wrong in point of law." I understand this to mean that on the face of the awards there is an incompatibility between the written contract and the custom. It may mean something more, as, for instance, that the custom was unreasonable, for we did not enter upon this part of the case. I was tempted to suggest that, having the case before us, we should dispose of it once for all by deciding this first ground also. But the respondents deprecated that course and the appellants were lukewarm, if not disinclined, and it is undesirable that this House should, without necessity, act as a court of first instance without the aid of considered judgments in other courts, which are of priceless value to a final Court of Appeal. Therefore the first ground of the motion still remains to be disposed of by the Divisional Court. Not having heard argument I express no opinion upon the scope of the first ground, still less upon its merits.

I think the best course will be to reverse the order appealed from, to declare that the motion of which notice was given on the 11th July 1914 ought to be dismissed as to grounds 2, 3, and 4 contained in the notice, and that the case be remitted to the Divisional Court to determine it upon the first ground contained in the notice.

The reversal is merely a technical reversal, for the judgments were given in accordance with previous decisions, and against the opinion of the judges.

LORD ATKINSON—Owing to the course the argument in this case has taken, the second only of several questions raised by the notice of motion to set aside the award of the Appeal Committee, upon which the Divisional Court made the order affirmed by the order now appealed from, remains to be decided by this House.

That question is, whether the Appeal Committee exceeded their jurisdiction in determining that the usage or custom mentioned in the award dated the 25th June 1914 existed in fact, or in deciding that the respondent company were bound by the alleged usage to accept the appropriation therein referred to.

The Divisional Court by their order directed that the motion should stand adjourned, both parties to be at liberty to file, within a week, further affidavits on the question of the existence of the custom mentioned in the awards. This order amounts therefore in effect to a decision (1) that arbitrators or an umpire were incompetent to decide finally the question of the existence of a trade usage or custom affecting obligations under a commercial contract, though the submission entered into by the parties fully empowered them to decide all disputes arising out of that contract, and (2) that the Divisional Court had itself jurisdiction to determine that question.

The Court of Appeal, feeling itself bound by the authority of the two cases of *Hutcheson* v. *Eaton*, 13 Q.B.D. 861, and *The North-Western Rubber Company* v. *Hüttenbach*, 1908, 2 K.B. 907, upheld this decision, but at the same time, by a line of reasoning absolutely convincing in my opinion, showed that those cases were wrongly decided. *Prima facie* one would suppose

that authority to decide disputes arising out of a contract necessarily conferred authority to decide what were the terms of that contract. It would appear to me to be impossible for any judge or arbitrator to determine whether any particular dispute arose out of a contract unless and until he knows what that contract is. This involves that the arbitrator must in such a case construe the contract which the parties entered into, and thus determine what they meant to express by the language they have used. If, for instance, in a contract relating to any art or trade or business the parties use terms having technical meanings in that art, trade, or business, then those terms should *prima facie* have that meaning attributed to them, simply because the parties to the contract presumably used those terms in their technical sense. In such a case it would appear to me that arbitrators or an umpire would, under such a submission as existed in this case, necessarily have authority to determine what was the technical meaning of those technical terms.

It would, I think, be quite impossible for any court of law not to treat such a determination as one made with full authority, and final in itself. Now, is there any essential difference between such a case as that and a case where it is sought to construe the language of a contract in relation to, and through the medium of, a trade usage or custom? In my opinion there is not. The language expressing a trade custom is taken to be imported into the language used by the contracting parties, whether written or oral, because it is presumed that they had the usage in their minds when they made their contract, made it in reference to that usage, and intended that the usage or custom should form part of it. If they have used language in their contract inconsistent with the custom, that is one of the most effectual ways of negativing this presumption, excluding the custom, and declaring that their contract is unaffected by it.

Erle, C.J., in *Meyer* v. *Dresser*, 16 C.B.N.S. 646, at p. 660, states the law upon this point very neatly thus—"In the cases where local usages are imported into a contract it is because they tacitly form part of the contract itself, like those contracts in which we find the words 'other usual terms.' They then form part of the contract itself. The contract expresses what is peculiar to the bargain between the parties; the usage supplies the rest."

Parke, B., in *Metzner* v. *Bolton*, 9 Ex. 518, at p. 521, says—"Where persons enter into contractual obligations with one another under circumstances governed by a particular usage, then the usage when proved must be considered as part of the agreement." And Lord Blackburn in *Tucker* v. *Linger*, 8 A.C. 508, speaking of an agricultural usage in reference to a lease of land, at p. 511, expresses himself thus—"Now is this custom excluded by the terms of the agreements? The custom when proved is to be considered as part of the agreement, and if the agreement be in writing, though the custom is not written, it is to be treated exactly as if that unwritten 'customary clause' had been written out at length; but if upon the face of the written agreement there is some clause which expressly says, 'We exclude the unwritten customary incident,' of course it is excluded, and if there is any written clause which is inconsistent with it to such an extent as impliedly to exclude it, then, too, the unwritten clause must yield to, and is excluded by, the written one."

This inclusion or exclusion of the so-called "customary clause" is thus necessarily involved in the determination of what is the contract of the parties, and the existence or non-existence of the custom is necessarily involved in determining whether the "customary clause" is to be included or not.

I do not know that it was disputed by Mr Leslie Scott on behalf of the respondents that a "customary clause" not expressly or impliedly excluded in the manner pointed out by Lord Blackburn would form part of the contract of the parties, or that when included the language of the so-called "customary clause" is not to be taken as the language of the contracting parties. He took his stand rather on the two decisions of the Court of Appeal already referred to, and contended that the decisions of the arbitrators under such a submission to arbitration as exists in the present case on the question of the existence of the custom alleged was like, and should be treated in the same way as, the decision of an inferior tribunal in their own favour upon some question of fact or law which gave them jurisdiction to decide a case or make an order.

I am quite unable to accept that view. It is quite true that under this reference disputes may arise for the decision of the arbitrators if the "customary clause" be incorporated, which would not arise had it been excluded, and in that sense the field of their judicial investigation might be extended to additional members of the class of matters referred, but that is a wholly different thing. If the contract of the parties were contained in a number of letters, some of which were ambiguously worded and capable of two or more different constructions, it could not, I think, be contended that the arbitrators would not, under such a reference as the present, be entitled to decide finally that a particular construction of the ambiguous letters was their true construction, though on that construction a greater number of points in dispute might arise for decision than would arise on any other construction. It could not be objected that by deciding as they did they gave themselves jurisdiction over the additional matters of dispute, and that therefore their decision on the construction of the letters was not final, but subject to review by the Court on a motion to set aside their award. The answer of the arbitrators to such an objection, if made, would naturally and rightly be—"We got full authority to decide all disputes arising out of the contract of the parties; that necessarily involved deciding what the contract was; we have done this by construing their letters; the

extra number of disputes arising on the construction we have adopted is immaterial."

For my part I am entirely unable to see upon what ground arbitrators who are expressly or impliedly authorised by the terms of a reference to determine finally what are the terms of a contract into which parties have entered, are not authorised to determine finally whether the language, written or verbal, which they have employed constitutes by itself their contract, or, to use Erle's, C.J., words, whether that language only expresses what is peculiar to their bargain, leaving some trade usage to supply the rest. As a non-existing usage cannot supply anything, it follows that they must have authority to decide finally if the alleged usage exists. I think therefore that the two authorities by which the Court of Appeal felt themselves bound in the present case were wrongly decided. Upon that point the reasoning, especially that of Buckley, L.J. (as he then was), is, in my opinion, as I have already said, quite convincing. The appeal should, I therefore think, be allowed with costs, and the judgment of the Court which it affirms should be set aside, the parties to be at liberty to proceed as they may be advised to litigate the other points raised in the motion to set aside the award, other than those mentioned in paragraphs 3 and 4 of the notice of motion, which have been abandoned during the argument.

I approve of the motion suggested by my noble and learned friend Lord Loreburn on the Woolsack.

LORD PARKER—I agree that this appeal ought to be allowed.

The binding force of an award must depend in every case on submission. If the question which the arbitrator takes upon himself to decide is not in fact within the submission the award is a nullity. The arbitrator cannot make his award binding by holding contrary to the true facts that the question which he affects to determine is within the submission. For example, if disputes arise under any particular contract and the parties thereupon agree to refer all disputes arising under that contract, the arbitrator cannot give himself jurisdiction by deciding that any particular dispute arises under the contract in question when it does not in fact so arise. This seems reasonably clear when the submission is subsequent to the contract. Where, however, the submission is contained in the contract it may be a question of construction whether such expressions as "all disputes arising under this contract" include questions as to the ambit of the submission itself. *Prima facie* I do not think that they would, though it is unnecessary to decide the point.

In the present case the submission covers all disputes arising out of the contract, including disputes on questions of law. Questions as to the true meaning and effect of the contract with the possible exception of questions as to the ambit of the submission itself are therefore left to the arbitrator. In order to ascertain the meaning and effect of the contract, the arbitrator is bound to admit evidence of and consider all relevant facts. The existence or non-existence of any state of circumstances which, if proved, would be relevant in any issue as to the true meaning and effect of the contract, must consequently be within the submission. Clearly, mercantile contracts such as the one in question fall to be interpreted by the light of any custom prevailing in the trade. "It has long been settled," says Parke, B., in *Hutton* v. *Warren*, 1 M. & W. 475, "that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters in respect to which they are silent. The same rule has also been applied to contracts in other transactions of life in which known usages have been established and prevail, and this has been done upon the principle of presumption that in such transaction the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages." It follows that existence or non-existence of the custom alleged in the present case is relevant to the true meaning and effect of the contract, and is therefore within the submission.

The respondents endeavour to displace this conclusion in two ways. First, they contend that the expression "this contract" in the submission means this written document taken apart from all extrinsic facts which might be relevant in determining its true meaning and effect. Such an interpretation of the submission would, in my opinion, defeat the primary object the parties must have had in view. It would be no use to anyone to arbitrate and obtain an award as to what the contract would mean if all relevant extrinsic evidence were excluded. The object of every such clause is to determine the liabilities of the parties having regard to all relevant facts.

Secondly, the respondents argued that the effect of the award is to subject them to a liability which does not arise under or by virtue of the contract, but which arises out of the custom either taken alone or in connection with the contract. This again appears to me to be fallacious. The liability of any party to a contract is none the less a liability arising under the contract because the contract itself has to be interpreted with reference to a custom prevailing in the trade.

I therefore concur in the motion proposed by my noble and learned friend on the Woolsack.

LORD SUMNER—I agree. The question in this appeal is purely one of construction. Clause 13 says—"All disputes from time to time arising out of this contract . . . shall be referred to arbitration, according to the rules endorsed on this contract." Your Lordships have to decide how much is included in this submission.

The words are less precise than they look. In strictness disputes arise not out of a contract but out of conflicting views taken by

the parties to the contract. The determination of such disputes may involve the determination not only of the meaning of the language used but of a variety of subordinate issues of fact, and it is clear that the jurisdiction which the submission confers is, and is intended to be, wide.

The precise dispute which arose and was referred to in this case is stated in the document of the 9th May 1913, in which the arbitrators record their inability to agree and call on their umpire to decide. It is this—"A dispute has arisen . . . as to whether the appropriation of about 6600 tons soya beans per steamer 'Canterbury,' under contract dated the 30th May 1912, is a good appropriation in the terms of the contract, and as such to be accepted by the buyers." On the face of it this dispute arises "out" of some contract, which can be no other than that of the 30th May 1912. So far the dispute and the whole of the dispute seems to be within the submission.

It must be taken on the affidavits that at some stages of the hearings, whether only before the Committee of Appeal or at the earlier stage may not be clear, the sellers affirmed that a custom existed which was applicable to this transaction and conclusive in their favour. The buyers, if they did not actually deny the existence of such a custom, at anyrate put it in issue. The matter was validly raised. Admittedly it was the duty of the tribunal to investigate it. The question is whether their decision on the existence of the custom was final or is open to review. The difference is between deciding facts on an issue submitted to the tribunal and investigating facts to see whether they fall within the jurisdiction conferred by the submission.

Nobody doubts that arbitrators have a limited jurisdiction conferred by the submission which they cannot exceed, and that equally they cannot amplify that jurisdiction by erroneously finding facts which the submission does not authorise them to decide as arbitrators. Such questions, however, do not arise if on the true construction of the submission it extends to and includes authority to decide as arbitrators this incidental issue as to the existence of the custom in question.

The argument for the respondents, which gained point by its brevity, may be put in a nutshell. It was said that this dispute does not arise out of the contract, but out of the contract plus something else, to wit, the custom. One asks what is meant by "the contract" according to this argument? If it is the terms written and printed on the piece of paper and no more the argument might be good. Whether the words of the contract as a whole are or are not inconsistent with the incorporation of the custom, in either case the words of the submission would then exclude it. Questions of custom are not referred on this hypothesis, but it is to be supposed that the parties meant to refer part only of their possible disputes when they adopted the trade tribunal. The result is that they chose to refer to trade arbitrators for their final decision the construction and effect of the written contract, although involving questions of law about which they might know nothing, but to reserve to the High Court the ultimate decision of any issue as to the existence of a trade custom, I suppose because the High Court would know little about it, while trade arbitrators might know too much.

This seems to me an impossibly narrow construction, none the less that in the latter part of the same sentence the "contract" evidently is the piece of paper—something with a back to it on which rules are endorsed. Besides, the logical result would be that in this case the arbitrators would have no jurisdiction at all, since there is no dispute of which it can be predicated that it arises—that is, wholly arises—only out of the terms written and printed on the piece of paper. The actual dispute is indivisible. The point about the custom is an integral part of it. It could only be decided without raising this point at the cost of real injustice to the sellers. On the other hand, if a dispute which only in part arises out of the terms written and printed on the piece of paper is within the submission the respondents have no case.

Rather inconsistently, as I think, it is admitted that the arbitrators had some authority to inquire into the existence of the custom, and having informed their minds had jurisdiction to give effect to it if it existed—that is, if it existed in the opinion of the High Court or of any tribunal of appeal therefrom, not if it merely existed in their own. This seems to dwell on the limited character of the jurisdiction of arbitrators, while overlooking the real question, which is the definition of the limits as expressed in the submission. If "this contract" in the arbitration clause means the real bargain between the parties, expressed in the written and printed terms, though, where trade customs exist and apply, not entirely so expressed, then the jurisdiction is complete. The custom, if any, was part of the bargain. Whether there is anything in the expressed terms inconsistent with it, and therefore controlling or excluding it, is not before your Lordships, nor is any question of its reasonableness. If the bargain is partly expressed in ink and partly implied by the tacit incorporation of trade customs, the first function submitted to the arbitrators is to find out what it is—to read the language, to ascertain the custom, to interpret them both, and to give effect to the whole. If so, the reasoning founded on the analogy of the jurisdiction of County Courts fails. The dispute which arose in fact and which raised a question of custom did not arise out of the contract and something else; it arose out of the contract itself, and involved the contract by raising the custom, and so was within the submission.

It may be that the decisions in *Hutcheson* v. *Eaton* and *The North-Western Rubber Company* v. *Hüttenbach*, which bound the Court of Appeal, can be supported on other grounds, but in so far as, to employ the language of Brett, M.R., in the former case, they answer in the negative this proposition

—"Can a question whether a custom is to be added to the written contract be 'a dispute arising upon this contract?'" I think them erroneous. The proposition is really a *petitio principii*. Of course the arbitrators cannot add to the contract, but their admitted power to inquire into the existence of the custom provisionally is due to the very fact that in so doing they add nothing to the contract, but are rightly finding out what the contract is before interpreting and applying it. No doubt the expression that customs of trade add terms to written contracts is often used. Lord Mansfield spoke of a custom as neither altering nor contradicting an agreement, but only super-adding a right, as long ago as *Wigglesworth* v. *Dallison*, 1 Douglas 201. It is more exact to say that the contractual terms which the custom imports are already tacitly incorporated as a part, though an unexpressed part, of the agreement between the parties. The maxim is *In contractibus tacite insunt ea quæ sunt moris et consuetudinis.* "Usage," says Baron Parke in *Hutton* v. *Warren*, 1 M. & W. 466, at p. 475, "is admissible to annex incidents to written contracts, in matters with respect to which they are silent . . . upon the principle of presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages." The ground is the same as if the admissibility of evidence of a custom were in question. "The principle on which the evidence is admissible," says Lord Campbell in *Humfrey* v. *Dale*, 7 E. & B. 266, "is that the parties have not set down on paper the whole of their contract in all its terms, but those only which were necessary to be determined in the particular case by specific agreement, leaving to implication and tacit understanding all those general and unvarying incidents which a uniform usage would annex."

On these grounds I think that the Court of Appeal, though bound to follow the earlier decisions, were right in indicating objections to them, and further that in your Lordships' House those objections should prevail. It would have been matter for regret if the construction for which the respondents contend had succeeded. During the last thirty or forty years most wholesale trades dealing in imported produce have formed trade associations, adopted standard forms of contracts which are invariably used, and created arbitral tribunals formed exclusively of members of the association, which yearly settle thousands of trade disputes to the satisfaction of the trade. Arbitration clauses, substantially the same as that before your Lordships, are characteristic of all these forms of contract. The system has been devised by mercantile men to suit their needs, and they have found it highly beneficial; they have been naturally anxious to establish trade control over the transactions of the trade as completely as possible. A construction which would have conferred on the Appeal Committee a true arbitral function as to the interpretation and performance of the printed contract, and a provisional and appealable function over so important a matter as the customs of the trade itself, would have been equally anomalous and inconvenient.

Further, I think that the transaction in question is pre-eminently one with which the established arbitral tribunal is fitted to deal in its entirety. The transaction, as I understand it, is this. The present sellers had bought back from their buyers an equal quantity of soya beans for the same time of shipment but at an increased price, and, as they contended, had done so on the understanding that the one contract should be set against the other. If the contracts stood they were losers to the extent of a difference of some £1850. As the contracts were for the purchase and sale of unascertained goods they provided for the delivery of particulars of the shipments, which the sellers elected to appropriate to the contracts. They provided further that "in case of re-sales" (no doubt a most common case) copy of original appropriation shall be accepted by buyers and passed on without delay." There was also a clause providing that the contract "should be void as regards any portion shipped that may not arrive by the ship or ships declared against the contract." When the present sellers received a declaration from their sellers of the cargo per the "Canterbury," and before passing it on to their buyers learnt that the "Canterbury" with her cargo was lost, they conceived that they could pass on the declaration and that their buyers would be bound to accept it, and that as the portion shipped would never arrive by the "Canterbury" or at all, the contract would automatically be avoided. The return of the same declaration by the buyers on the second contract, that of repurchase, which they considered had to be set against the first, would automatically cancel that contract also. Thus, profiting by the ill-fortune of the "Canterbury," they would escape their loss of £1850. Of the merits of such a transaction and such an argument I say nothing, but the matter seems to me to be pre-eminently one to be settled in its entirety by a trade tribunal. If your Lordships had felt constrained to decide that on the true interpretation of the arbitration clause the appeal committee had power to decide the question of custom only provisionally, while deciding everything else finally, I make no doubt that it would have been imperatively necessary for this and all similar associations forthwith to alter the wording of their form of contract so as to make its effect correspond to what I am sure was their intention.

LORD PARMOOR—By a contract in writing of the 30th May 1912 the appellants agreed to sell to the respondents about 6000 tons of soya beans to be shipped from an Oriental port during Dec. 1912 and (or) Jan. 1913. The contract contained an arbitration clause that "all disputes arising out of this contract shall be referred to arbitration according to the rules endorsed on this contract." The third clause of the contract provided that "in case of re-sales copy of

original appropriation shall be accepted by buyers and passed on without delay." A dispute having arisen whether a good appropriation and tender had been made under the contract, it was referred to the arbitration tribunal.

On the 25th June 1914 the arbitration committee of appeal made their award in favour of the appellants, and found that by the long-established and well-recognised custom of the trade in case of re-sales, buyers under this form of contract impliedly agree with their sellers that they will accept the original shipper's appropriation if passed on without delay.

On the 11th July 1914 the respondents gave notice of motion to set aside the award, on three grounds, but only one is material in the present appeal. This ground is that the appeal committee had exceeded their jurisdiction in determining whether the custom mentioned in the award had any existence in fact or in deciding that the respondents were bound by the alleged custom to accept the appropriation therein referred to which was invalid under the terms of the contract.

The Divisional Court decided in favour of the respondents, and made an order adjourning the motion to enable the parties to file further evidence on the alleged custom set out in the award, and to be at liberty to give notice requiring the attendance of the deponents before the Court for cross-examination. The effect of this order is to withdraw the question whether the alleged custom existed from the arbitration tribunal, and to bring it before the court for determination. This order was confirmed by the Court of Appeal. In giving their judgments the Lords Justices expressed a strong opinion that unless they had been bound by authority they would have come to a different conclusion. I would refer especially to the words used by Lord Justice Buckley at the commencement of his judgment.

I agree in the opinions expressed by the Lords Justices in the Court of Appeal and in Lord Justice Buckley's criticism of the cases of *Hutcheson* v. *Eaton* (13 Q. B. Div. 861) and of the *North-Western Rubber Company* v. *Huttenbach & Co.* (1908 2 K. B. D. 907). It is unnecessary to refer further to these cases, but I desire to express my concurrence with the dissenting judgment of Fry, L.J., in the earlier case, and can see no answer to his view that an arbitration tribunal cannot decide a dispute arising under a contract without first ascertaining what the contract is, and that to enable the tribunal to ascertain the interpretation of the contract it is competent for it to have regard to all customs, if any, which affect its construction.

In my opinion the respondents fail to establish the initial step on which their contention is based. They are unable to make good the allegation that there has been any excess of jurisdiction. It is not sufficient to suggest that the arbitration tribunal has gone wrong, having made an error on some matter of fact or law. Under the procedure of the Arbitration Act questions of law which arise in the course of an arbitration can be brought before the Court either in a consultative case or by stating the final award in the form of a special case. In the present instance a consultative case was brought before the Divisional Court, and the arbitration tribunal states that it has followed the directions which the Court gave. The question of jurisdiction depends on different considerations. It is not denied that a dispute did arise under the contract within the meaning of the submission in the arbitration clause. The dispute was whether under the terms of the contract the seller had made an appropriation and tender of the goods sold to the buyers. It is not possible for the arbitration tribunal to determine this dispute, which it is within their jurisdiction to determine, without construing the contract and ascertaining the nature of the bargain between the parties.

In the present instance the appellants alleged a mercantile custom which, if reasonable in itself and not contradictory to the written language in the contract, directly affects the construction of the contract.

The respondents, however, contended that it is not within the jurisdiction of an arbitration tribunal to determine the existence and effect of a mercantile custom, or at least not to determine it conclusively, although such mercantile custom is included in the contract, and it is impossible to determine the dispute which has been referred if the inquiry into the existence and effect of such custom is excluded from the consideration of the tribunal. In other words that whenever the existence of a mercantile contract comes in question it is for the decision not of the arbitrator but of the courts, and that the Divisional Court was right in directing an inquiry before itself by affidavit and cross-examination.

I cannot assent to this proposition. The plea of want of jurisdiction cannot be maintained unless the determination of the arbitration tribunal as to the existence of the alleged mercantile custom can be said to be an alteration, either by omission or addition, of the contract under which the limit of the jurisdiction of the arbitration tribunal has been agreed between the parties. There is no question that an arbitration tribunal has no authority to exercise jurisdiction outside the conventional limit agreed in the terms of the submission. It is quite unnecessary to emphasise a point which is beyond controversy. The answer is that a mercantile custom cannot in any way alter the bargain made either by omission or addition, but that it is included in the bargain, and affects and regulates the rights and obligations of the parties to the bargain. In the present instance the language used in the written contract is said to have a conventional meaning based on mercantile custom. The meaning and intention of the parties as expressed in the contract cannot be ascertained without first determining whether the language used should be conventionally interpreted in accordance with the implication which the custom would introduce if its existence is proved. It is a matter of the

proper interpretation of the language which the parties have used which is always a matter of construction. I have stated above that if an error in law is made there are the remedies provided by the Arbitration Act, and the further remedy of direct application to the courts if an award is bad on its face.

In order to meet this difficulty Mr Leslie Scott argued that the words "the contract" in the arbitration clause were limited to so much of the contract between the parties as appeared in the actual written language, although this did not contain the true bargain between the parties or regulate their rights and obligations in reference to the dispute which had arisen. I think that to import such a limitation is inconsistent with the terms of the submission, and that the parties did not agree to refer a dispute except one which had arisen in reference to the bargain which they had made, and the decision of which would affect their mutual rights and obligations.

In my opinion the appeal should be allowed.

The order was as follows:—That the House declares that the motion of which notice was given on the 11th July 1914 ought to be dismissed as to grounds two, three, and four contained in the notice, and the case remitted to the Divisional Court to determine it upon the first ground contained in the notice.

Counsel for the Appellants—Sir R. Finlay, K.C.—Leck, K.C.—Mackinnon, K.C. Agents—Walton & Company, Solicitors.

Counsel for the Respondents—Leslie Scott, K.C.—Dunlop. Agents—W. A. Crump & Son, for Andrew M. Jackson & Company, Hull, Solicitors.

HOUSE OF LORDS.

Friday, January 21, 1916.

(Before Earl Loreburn, Lords Atkinson, Shaw, Parmoor, and Wrenbury.)

HORLOCK *v.* BEAL.

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

Ship — Master and Servant — Contract — Impossibility of Fulfilment — Wages of Seaman — Voyage Ended by Seizure of Vessel and Internment of Crew.

Claim for wages by the representative of a seaman whose ship was detained at a German port after declaration of war between Great Britain and Germany.

Held (*diss.* Lord Parmoor) that no wages were due after the date on which the crew were removed from the ship to prison.

Decision of the Court of Appeal *reversed.*

Appeal by the shipowner from a decision of the Court of Appeal (Swinfen Eady and Bankes, L.JJ., Phillimore, L.J., dissenting) which affirmed a judgment of Rowlatt, J.

The action was brought by the wife of an interned seaman upon an allotment note.

The *facts* appear from their Lordships' considered judgment—

Earl Loreburn—This is a case of great importance at the present time. A seaman had the misfortune to be serving on a British ship which entered the port of Hamburg on the 2nd August 1914. The ship was detained by the German authorities when on the 4th August war broke out.

Ever since that date the ship and the crew have been detained in Germany. We do not know whether the ship has been condemned or not, but we know that she has been kept and her crew imprisoned. From the 4th August till the 2nd November they were kept as prisoners on their own ship, and on the 2nd November were removed to other places of confinement.

In these circumstances this seaman's wife sues on an allotment note. Her right to recover admittedly depends on the question, was the seaman entitled to his wages for the period from the 2nd August to the 10th April 1915? His contract of service required him to serve on the ship "Coralie Horlock" for a voyage not exceeding two years in duration. These articles were signed on the 21st May 1914. An allotment note was issued in favour of the present plaintiff for a monthly payment of £4, 15s.

In my view the first question to be decided is whether or not and at what date the performance of this contract of service became impossible, which means impracticable in a commercial sense. It was at first possible that she might be released in accordance with a practice which has been common in former wars and is recommended though not required by the Hague Convention.

But the removal of the crew from their ship and their imprisonment elsewhere, and the lapse of time, made it clear that whatever hope there may have been of restoration could no longer be entertained. Looking back upon what happened, we may think that there was never any hope, or we may think that there was a period of suspense during which it was not determined whether there should be in accordance with common practice a release on both sides of ships so situated. There is hardly anything to help us except the fact that the men were detained on their own ship until the 2nd November. On the whole it seems to me that there was a period of suspense, and, judging as best I can, I take the 2nd November as the date. It is a surmise, but the opposite view also is a surmise, on what is a question of fact.

Assuming this to be so, does that impossibility of performance dissolve the contract of service and disentitle the seaman to wages from that time onwards? The law, both as it is found in the statute book and as it has been administered in Admiralty Courts, has always been in some respects peculiarly tender and benevolent towards seamen in