In the Privy Council

1956

No. 27 of 1955.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA

BETWEEN

REARDON SMITH LINE LIMITED ... (*Plaintiff*) *Appellant*

AND

AUSTRALIAN WHEAT BOARD ... ... (*Defendant*) *Respondent.*

RECORD OF PROCEEDINGS

INDEX OF REFERENCE.

No.	Description of Document.	Date.	Page.
	IN THE SUPREME COURT OF WESTERN AUSTRALIA.		
1	Writ of Summons	9th October 1952 ...	1
2	Statement of Claim	9th October 1952 ...	2
3	Defence	20th October 1952 ...	4
4	Reply	24th October 1952 ...	7
5	Amendment of Statement of Claim made at hearing	... ...	8
6	Plaintiff's Interrogatories (limited to Interrogatories numbered 1, 2, 3, 4, 5, 13, 15, 16, 17, 18, 21, 22, 24, 26, 29 and 37) and	5th November 1952...	8
	Defendant's answers thereto	24th November 1952...	8
7	Notes of His Honour, Mr. Justice Wolff of Address of Plaintiff's Counsel in opening ...	... ...	11
	Plaintiff's Evidence ;—		
8	Robert Steele—		
	Examination	... ...	14
	Cross-examination	... ...	15
9	Charles Robert Cox—		
	Examination	... ...	15
	Cross-examination	... ...	19
	Re-examination	... ...	20

No.	Description of Document.	Date.	Page.
	Defendant's Evidence :—		
10	Cyril Joseph Sweett—		
	Examination	... ...	20
	Cross-examination	... ...	23
11	Albert Norman Boulton—		
	Examination	... ...	25
	Cross-examination	... ...	26
	Re-examination	... ...	26
12	James Henry Adam—		
	Examination	... ...	27
	Cross-examination	... ...	27
13	Notes of His Honour, Mr. Justice Wolff, of Final Address of Defendant's Counsel	... ...	27
14	Notes of His Honour, Mr. Justice Wolff, of Final Address of Plaintiff's Counsel in Reply ...	... ...	29
15	Reasons for Judgment of His Honour, Mr. Justice Wolff	30th January 1953 ...	29
16	Formal Judgment	30th January 1953 ...	35
	In the High Court of Australia.		
17	Notice of Appeal and Grounds	19th February 1953 ...	36
18	(i) Reasons for Judgment of His Honour, Chief Justice Sir Owen Dixon	2nd June 1954 ...	39
	(ii) Reasons for Judgment of His Honour, Mr. Justice Webb and His Honour, Mr. Justice Taylor	2nd June 1954 ...	51
19	Order	2nd June 1954 ...	62
	In the Privy Council.		
20	Order in Council granting Special Leave to Appeal	1st February 1955 ...	63

EXHIBITS.

Exhibit Mark.	Description of Document.	Date.	Page.
	Plaintiff's Exhibits ;—		
A	Affidavit of George Harvey and	20th October 1952 ...	66
	Documents exhibited thereto as follows :—		
	Exhibit G.H. 1. Charterparty	19th March 1951	*(In Pocket of Record)*
	Exhibit G.H. 2. Radio from Master to Wheat Board	3rd July 1951	68
	Exhibit G.H. 3. Radio from Wheat Board to Master	3rd July 1951	69
	Exhibit G.H. 4. Preliminary Storm Warning	... ...	69
B	Chart of Champion Bay	*Lodged separately.*	
C.	Plan of Geraldton Harbour	*Lodged separately.*	
D.	Australia Pilot, Volume V (p. 314 thereof only)	... ...	69
E.	Chief Officer's Log	7th to 12th July 1951	71
I.	List of Damage to Ship as noted by Robert Steele	... ...	73
J.	List of Damage to Wharf noted by Robert Steele	... ...	74
K. (1) & (2)	Two diagrams relating to Formula for determining movement of forces in the rolling of a ship	... ...	75
	Defendant's Exhibits.		
L.	List of Plaintiff's ships that have used Geraldton	... ...	77

DOCUMENTS NOT TRANSMITTED

Certificate of Incorporation of Plaintiff Company (Exhibit F.).

Certificate of Registration of M.V. " Houston City " (Exhibit G.).

Interrogatories and Answers (excepting those numbered 1, 2, 3, 4, 5, 13, 15, 16, 17, 18, 21, 22, 24, 26, 29 and 37) (Exhibit H.).

Notice of Change of Solicitors' Agents.

Notice of Entry for Trial.

Notice of Payment into Court of security for costs.

In the Privy Council.

No. 27 of 1955.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA

Between

REARDON SMITH LINE LIMITED ... (*Plaintiff*) *Appellant*

AND

AUSTRALIAN WHEAT BOARD ... ... (*Defendant*) *Respondent.*

RECORD OF PROCEEDINGS

In the Supreme Court of Western Australia.

No. 1. Writ of Summons, 9th October, 1952.

No. 1.

Writ of Summons.

ELIZABETH THE SECOND, by the Grace of God, of Great Britain Ireland and the British Dominions beyond the Seas, Queen, Defender of the Faith.

To

AUSTRALIAN WHEAT BOARD,
98 St. George's Terrace,
Perth, in the State of Western Australia.

10 WE COMMAND you, that within (10) ten days after the service of this Writ on you, exclusive of the day of such service, you cause a statement of defence to be filed for you in an action at the suit of the abovenamed Plaintiff; and take notice that in default of your so doing the Plaintiff may proceed therein and judgment may be given in your absence.

Witness: THE HONOURABLE SIR JOHN PATRICK DWYER, K.C.M.G., Chief Justice of Western Australia the 9th day of October in the year of our Lord 1952.

In the Supreme Court of Western Australia.

No. 2. Statement of Claim, 9th October, 1952.

No. 2.

Statement of Claim.

1.—THE Plaintiff is a Company incorporated in England, the objects of which include the owning of Steamers and the chartering thereof.

2.—THE Australian Wheat Board is incorporated under Wheat Industry Stabilisation Act, 1948 (Commonwealth) and is capable of suing and being sued and with power to charter Steamers.

3.—THE M.V. " Houston City " is a single screw steel motor vessel 428·8 ft. in length and 56·5 ft. beam owned by the Plaintiff.

4.—BY a Charterparty dated the 19th day of March, 1951, the Plaintiff chartered the M.V. " Houston City " to the Defendant. The type of Charterparty used is known as an " Australian Grain Charter."

5.—IN the said Charterparty the Plaintiff chartered the said M.V. " Houston City " to the Defendant for the purpose of loading a full cargo of wheat in bulk ex silo and transporting same to the Continent between Antwerp and Hamburg inclusive.

6.—IN the said Charterparty the Defendant agreed with the Plaintiff to order the said M.V. " Houston City " to one or two safe ports in Western Australia, and to a safe dock, pier, wharf, and/or anchorage thereat.

7.—IN this regard the Plaintiff will refer (inter alia) to Clause 1 of the said Charterparty which reads as follows :—

> " That the said vessel, being in every way fitted for the voyage
> " shall, with all convenient speed, after completion of her present
> " voyage and discharge of her outward cargo (if any) proceed, as
> " ordered by the Charterers, to one or two safe ports in Western
> " Australia, or so near thereto as she may safely get, and there
> " loading according to the custom of the port, always afloat,
> " at such safe dock, pier, wharves, and/or anchorage, as ordered,
> " but the vessel shall not be required to shift more than once at
> " each port unless at Charterers' expense, from the Charterers
> " or their agents, a full and complete cargo of Wheat in bulk,
> " ex silo, which the said Charterers bind themselves to provide,
> " not exceeding what the vessel can reasonably stow and carry
> " in addition to her tackle, apparel, provisions, fuel and furniture."

8.—ON the 3rd day of July, 1951, the Defendant, under the terms of the Charterparty, by written instructions, ordered the vessel to the bulk wheat loading berth at the port of Geraldton in the State of Western Australia.

9.—THE Plaintiff carried out such order and berthed at the bulk wheat loading berth, Geraldton Harbour, Starboard side to quay, heading east by north, at 5.45 p.m. on the 7th day of July, 1951.

10.—THE Defendant committed a breach of the contract contained in the said Charterparty by ordering the said M.V. " Houston City " to the port of Geraldton and/or to the bulk wheat loading berth at the port of Geraldton in that said port and the said berth were not a safe port and berth respectively.

PARTICULARS.

(*a*) The wharf at Geraldton is exposed to prevailing winds and swells.

(*b*) There are no spring piles provided for ships lying at the wharf.

(*c*) There is no Tug available at Geraldton.

(*d*) The bulk wheat loading berth is situated directly opposite the entrance of the Harbour and is directly exposed to northerly winds and swells.

(*e*) At relevant times the wooden horizontal fender (or waling piece) about 150 ft. in length was missing from the middle of the bulk wheat loading berth.

(*f*) The hauling-off buoy, intended for the use of the bulk wheat loading berth, was missing at all relevant times.

11.—ON the 9th day of July, 1951, at 8.50 a.m. the Defendant commenced loading bulk wheat.

12.—ON the 12th day of July, 1951, whilst the vessel was still loading the wind blew from the northward with gale force during part of the day.

13.—THE Plaintiff sustained damages owing to the Defendant's breach of contract in ordering the said M.V. " Houston City " to an unsafe port and an unsafe berth.

PARTICULARS.

As the result of the wind and swell on the 12th day of July, 1951, the said M.V. " Houston City " ranged and bumped heavily against the wharf doing considerable damage to vessel and wharf.

14.—THE Plaintiff claims damages from the Defendants for breach of contract.

In the Supreme Court of Western Australia.

No. 2. Statement of Claim, 9th October, 1952—*continued.*

PARTICULARS.

(*a*) Damages to the M.V. " Houston City " particulars of which have been supplied ... ... £9,517.3.4.

(*b*) Damages to Geraldton Wharf for which Owners are responsible under the Jetties Act, 1926, and the Harbours and Jetties Act, 1928 ... ... £665.10.0.

15.—ALTERNATIVELY, the owners suffered damage through the negligence of Charterers.

PARTICULARS OF NEGLIGENCE.

(*a*) The Charterers on the 3rd day of July, 1951, negligently ordered the M.V. " Houston City " to the Bulk Wheat Berth, Geraldton.

(*b*) The Charterers failed to make any or proper inquiries as to the safety of the Port of Geraldton, and of the Bulk Wheat Berth prior to ordering the M.V. " Houston City " thereto or alternatively ordered the M.V. " Houston City " thereto knowing the said port and berth to be unsafe.

(*c*) The Charterers owed a duty to the owners only to order the M.V. " Houston City " to a safe Port and a safe berth by virtue of the terms of the said Charterparty, and at common law.

PARTICULARS OF DAMAGE.

The Owners repeat the particulars contained in Clause 14 hereof.

N. DE B. CULLEN,
Counsel.

No. 3. Defence, 20th October, 1952.

No. 3.

Defence.

As to the Statement of Claim endorsed on the Writ herein the Defendant says :—

1.—THE Defendant does not admit paragraph 1 thereof.

2.—THE Defendant admits paragraph 2 thereof.

3.—THE Defendant does not admit paragraph 3 thereof.

4.—THE Defendant admits paragraphs 4 and 5 thereof.

5.—SAVE that the Defendant agreed with the Plaintiff to order the M.V. " Houston City " to one or two safe ports in Western Australia, the Defendant denies each and every allegation contained in paragraph 6 thereof. The Plaintiff will refer at the hearing to the said Charterparty for its contents true meaning and effect.

6.—THE Defendant admits that paragraph 7 thereof correctly sets out Clause 1 of the Charterparty.

7.—As to paragraphs 8 and 9 thereof the Plaintiff :—

(*a*) Admits that on the 3rd July 1951 it ordered the vessel to the port of Geraldton to load wheat pursuant to the terms of the Charterparty, and

(*b*) Admits that on the 7th July 1951 the vessel was laid starboard to alongside the wharf heading east by north at Berth No. 1 which is fitted for the loading of grain in bulk, but

(*c*) Denies each and every other allegation in these paragraphs, and

(*d*) Further says that the vessel was directed to the said No. 1 berth by the Harbour Master.

8.—As to paragraph 10 thereof the Defendant—

(*a*) Admits sub-paragraphs (*a*), (*b*), (*c*) and (*d*) of the particulars, and

(*b*) Admits the facts alleged in sub-paragraphs (*e*) and (*f*) of the particulars but says that at all material times prior to the 12th July 1951 it was unaware of such facts but says

(*c*) That the port at Geraldton is at all times a safe port within the meaning of the Charterparty.

(*d*) That No. 1 Berth is at all times a safe berth provided the Master of a vessel occupying such berth takes the proper and seamanlike precaution of running bow and stern hawsers to hauling-off buoys or puts out anchors for the same purpose so that in the event of a northerly blow the ship can be held away from the wharf.

(*e*) That northerly gales are prevalent between May and September.

(*f*) That the Master of the M.V. " Houston City " was familiar with the port at Geraldton having visited it on previous occasions to load wheat at No. 1 Berth and was well aware of the necessity for taking such usual and proper precautions.

In the Supreme Court of Western Australia.

No. 3. Defence, 20th October, 1952— *continued.*

(*g*) That before or at the time of berthing the Master knew that there were no hauling-off buoys in position opposite No. 1 Berth to which he could run hawsers and that portion of the horizontal fender at No. 1 Berth was missing. If for those or any other reasons the port was unsafe (which is denied) or the said No. 1 Berth was unsafe (which is denied) the Charterparty did not oblige the Master to enter the port or berth his ship at No. 1 Berth and it was his duty to report the circumstances to the Defendant and ask for further instructions.

(*h*) If the said port was unsafe (which is denied) or the said Berth was unsafe (which is denied) the Master with full knowledge of the conditions prevailing freely and voluntarily accepted the risk of entering the port and berthing his ship at No. 1 Berth.

(*i*) Save as herein admitted the Defendant denies each and every allegation in paragraph 10 of the Statement of Claim.

9.—THE Defendant admits paragraphs 11 and 12 thereof.

10.—THE Defendant denies each and every allegation in paragraphs 13 and 14 thereof and the particulars thereto.

11.—THE Defendant denies each and every allegation in paragraph 15 thereof and the particulars thereto and further says that if the Plaintiff suffered the alleged or any damage (which is denied) the same was caused or *alternatively* contributed to by the negligence of the Plaintiff and its servant or agent the Master of the said vessel.

PARTICULARS OF NEGLIGENCE.

(*a*) The Defendant repeats sub-paragraphs (*c*), (*d*), (*e*) and (*f*) of paragraph 8 of this Defence.

(*b*) At the time of berthing the said Master put out an anchor forward so that by hauling on the cable he could hold the bow of his vessel away from the wharf but he failed to take the proper and seamanlike precaution of putting out a stern anchor.

(*c*) The Master knew that the hauling-off buoy opposite the stern of his ship was about to be replaced and when he berthed he freely and voluntarily accepted the risk that the good weather then prevailing would continue until such time as the hauling-off buoy was replaced and he could run a stern hawser to it.

(*d*) When the weather began to deteriorate on the morning of the 12th July 1951 the Master again failed to take the proper and seamanlike precaution of putting out a stern anchor for the purpose aforesaid.

(*e*) The Master failed to provide protective covering to prevent his mooring ropes from chafing.

T. S. LOUCH,
Counsel.

FILED AND DELIVERED by David Dowson Bell of 8–10 The Esplanade, Perth, Commonwealth Crown Solicitor for the Defendant, this 20th day of October, 1952.

No. 4.

Reply.

1.—THE Plaintiff joins issue.

2.—As to paragraph 7 of the Defence, the Plaintiff will claim that if the Defendant omitted to order the M.V. " Houston City " to any berth at all (which is denied) this was in breach of the terms of the Charterparty wherein the Charterer agreed to order the ship " to a safe dock, pier, wharves and/or anchorage." The Plaintiff will refer to Clause 1 of the Charterparty, and to Clause 7 of the Charterparty.

3.—As to paragraph 8 of the Defence the Plaintiff will claim that there is compulsory pilotage at the Port of Geraldton, and the charge and navigation of the ship was compulsorily delivered to a compulsory Pilot. The Plaintiff will refer to the Harbours & Pilotage Act, 1855 and in particular to Section 7 thereof.

4.—As to paragraph 11 of the Defence the Plaintiff will claim it was a term of the Charterparty and agreed to by the Plaintiff and Defendant that the Plaintiff would not be responsible for any act, neglect or default of the Master or the servants of the Shipowner in the navigation or the management of the ship. The Plaintiff will refer to Clause 26 of the Charterparty.

In the Supreme Court of Western Australia.

No. 4. Reply, 24th October, 1952—*continued.*

5.—As to paragraph 11 of the Defence the Plaintiff will claim that the alleged negligence of the Master (which is denied) does not disentitle the Plaintiff from recovering damages following from any breach of contract on the part of the Defendant.

N. DE B. CULLEN,
Counsel.

FILED AND DELIVERED by Messrs. FRANK UNMACK & CULLEN by their Agents, Messrs. NORTHMORE, HALE, DAVY & LEAKE this 24th day of October, 1952.

No. 5. Amendment of Statement of Claim made at hearing.

No. 5.

Amendment of Statement of Claim made at hearing.

1.—*Paragraph* 8: Delete the word " written " in the second line and substitute " radioed."

2.—*Paragraph* 10: To the Particulars, add:

(*g*) The wharf is so constructed that ships lie broadside to winter winds and swells.

(*h*) There is no structure or device to break the force of winter winds.

(*i*) There is no suitable craft at Geraldton, or in vicinity, to enable maintenance and prompt repairs to be done in respect of mooring buoys.

No. 6. Interrogatories submitted by Plaintiff on 5th November, 1952 and Defendant's Answers thereto dated 24th November, 1952.

No. 6.

Interrogatories submitted by Plaintiff and Defendant's Answers thereto.

1.—QUESTION: Had the Defendant ever chartered vessels for the shipment of wheat from Geraldton prior to the 12th day of July 1951 ?

ANSWER: I say, Yes.

2.—QUESTION: If so, on how many occasions since the incorporation of the Defendant ? If too numerous to mention, the approximate number a year will suffice.

ANSWER: Approximately twenty yearly.

3.—QUESTION : Has the Defendant an office at Geraldton ?
ANSWER : Yes.

4.—QUESTION : If yes, where ?
ANSWER : Marine Terrace, Geraldton.

5.—QUESTION : If yes, how long has it had an office at Geraldton ?
ANSWER : Since 1948.

13.—QUESTION : Did the Defendant or any of its servants or Agents make or cause to be made any inquiries, or investigations, regarding the Geraldton Harbour or berths therein, prior to the 7th day of July, 1951 ?
ANSWER : No.

15.—QUESTION : How many wharves are there at the Geraldton Harbour ?
ANSWER : One.

16.—QUESTION : How many berths are there at each such wharf ?
ANSWER : Three.

17.—QUESTION : Is there not only one Bulk Wheat Loading Berth at Geraldton ?
ANSWER : Yes.

18.—QUESTION : Is not the Bulk Wheat Loading Berth known as No. 1 Berth ?
ANSWER : Yes.

21.—QUESTION : Is not No. 1 Berth fitted with mechanical contrivances for the purpose of loading Bulk Wheat into Ships ?
ANSWER : Yes.

22.—QUESTION : Are any other Berths so fitted ?
ANSWER : No.

24.—QUESTION : Is there any mechanical way of loading a ship at Geraldton with Bulk Wheat except at No. 1 Berth ?
ANSWER : To the best of my knowledge, information and belief No.

26.—QUESTION : Did the Defendant order the M.V. " Houston City " to Geraldton by a radiogram and/or letter reading respectively :—

In the Supreme Court of Western Australia.

No. 6. Interrogatories submitted by Plaintiff on 5th November, 1952 and Defendant's Answers thereto dated 24th November, 1952—*continued.*

(*a*) 3.7.51 To Master

"Houston City"

Loading Port Geraldton Full and Complete Cargo Wheat in Bulk Advise Eta and if Fitted Ready to Load

Wheat Board.

(*b*) The Master, "Houston City," Geraldton.

Dear Sir,

In terms of the Charterparty, I hereby nominate Geraldton as the loading position for your vessel to take a full cargo of bulk wheat.

Kindly note that Messrs. L. Dreyfus & Co. Ltd., have been appointed as Charterer's Agents for your vessel. This Company will attend to all documentary matters in connection with the loading of the vessel, therefore, kindly direct all communications regarding Notice of Readiness etc. to them.

Yours faithfully,

For: Superintendent Western Australian Branch Australian Wheat Board.

Answer: I say that the Defendant ordered the M.V. "Houston City" to Geraldton by a radiogram reading as set out in paragraph (*a*) of the twenty-sixth Interrogatory and that the said radiogram was the order given under the terms of the Charterparty.

29.—Question: Is there any berth at Geraldton Harbour other than No. 1 Berth where the M.V. "Houston City" could have berthed in compliance with the order given by the Defendant pursuant to the Charterparty?

Answer: No.

37.—Question: Has any ship chartered to the Defendant, or anyone else, and ordered to Geraldton for a cargo of wheat in bulk, ever loaded such cargo except at No. 1 Shed, since the constructing of the existing wharf, and the installation thereat of mechanical bulk wheat loading facilities?

Answer: I say No, in respect of ships chartered by the Defendant and in respect of ships chartered by others I say No to the best of my knowledge, information and belief.

No. 7.

Notes of His Honour Mr. Justice Wolff of Address of Plaintiff's Counsel in opening.

CULLEN opens—

Agreed that the question of damages stand over.
Arbitration waived on question of liability.
Evidence of master of ship taken on affidavit.
(That was agreed to in writing.)
Photostatic copies of material documents.
Notice of intention to amend statement of claim, para. 8.
New sub-paragraphs (*g*), (*h*), (*i*) added to para. 10 of Statement of Claim. No objection.
Plaintiff admits that Captain Harvey knew of the Australian Pilot Book, which refers to the port of Geraldton. (P. 315 of that book.)
The charterer and the owner can agree on a port or may reserve the right of nomination.
But if the right is not reserved the ship is known as an arrived ship provided it is ready to receive cargo.
When it arrives lay days commence to run, although a wharf is not available.
Where a ship is to receive bulk cargo special facilities are provided.
In modern practice the charterer reserves the right to select the wharf.
" . . . one or two safe ports in Western Australia . . . and there to " load . . . as ordered." (See para. 7 of the statement of claim.)
Limits are fixed outside of which the ship must not be ordered.
The " Houston City " is a single-screw motor vessel.
422′ long ; 62′ 6″ beam.
Owned by the Plaintiff.
Gross registered tonnage 7,287.
Para. 3 of statement of claim.
Para. 4 of statement of claim.
Captain Harvey's affidavit read.
Affidavit sworn 20th October 1952.
Telegram, Exhibit 2 to affidavit.
(Affidavit and 4 exhibits thereto put in—Exhibit A.) Ex. A.
Clause 1 of the charterparty read.
See extract statement of claim.
" Loading " altered to " load " in Clause 7.
Evidence will be given by Mr. Audsley of Gibbs Bright & Co. that the Wheat Board rang him and said the ship had been ordered to Geraldton to load bulk wheat.
(Chart of harbour put in—Exhibit B.) Ex. B.
(Plan of harbour put in—Exhibit C.) Ex. C.
(Australia Pilot put in (p. 315—Exhibit D.) Ex. D.
" Screw mooring." Nicholls on Seamanship, p. 118.

In the Supreme Court of Western Australia.

No. 7. Notes of His Honour, Mr. Justice Wolff of Address of Plaintiff's Counsel in Opening—*continued.*

The one illustrated on the right is the type at Geraldton.
The object is for the vessel to berth bow east and attach a stern hawser.
Shackle.
Screw mooring is in rock.
This is a very substantial mooring.
The fact that the buoy was provided indicates its necessity.
At the wharf no spring piles are provided.
Part of the wharf was not safe.
There are north-westerly winds in winter.
No. 1 berth is exposed to the winds.
The Australia Pilot draws attention.
There was a buoy missing.
And 50 feet of waling-piece was missing from the wharf.
The Australian Wheat Board has been functioning for 20 years.
Its officers must have known the position.
The Defendant should have made sure that the berth was safe.

(LOUCH Q.C. refers to top of page 315 of Australia Pilot.)

CULLEN continues—

Chief's Officer's log—starting from the entry of 7th July.
Records from 7th to 12th July.

Ex. E. (Put in—Exhibit E.)

Ex. F. (Photostatic copy of certificate of incorporation of the Plaintiff company put in—Exhibit F.)

Ex. G. (Photostatic copy of certificate of registration of the vessel " Houston City " put in—Exhibit G.)

Ex. H. (Interrogatories and Answers put in—Exhibit H.)

The following questions arise :—

I. Did the charterer contract that all ports and wharves to which the vessel should be ordered would be safe ?

(*a*) " *As ordered by the charterer* "—
See Bankes L.J. Carver 8th ed. p. 633.

(*b*) " *to one or two safe ports in W.A.*"
See *Ogden* v. *Graham* 31 L.J.Q.B. 26.

(*c*) " *to such safe wharves as ordered* "

(*d*) *Whether breach entitles only to refuse or damages.*
(i) *Brostrom* v. *Dreyfus* 38 Com. Cas. 79.
(ii) *Hall* v. *Paul*, 19 Com. Cas. 384.
(iii) *Temple S.S. Co.* v. *Sofvracht*, 79 Ll.L.L.R. 1.
See also 62 T.L.R. 43.

(*e*) *Position where berth not specially warranted.*
(i) *Lensen* v. *Anglo Soviet*, 40 Com. Cas. 320.
(ii) *West* v. *Wright*, 40 Com. Cas. 186.
(iii) Pass of Leny, 54 Ll.L.L.R. 288 ; 155 L.T.R. 421.
(iv) *Grace* v. *General* (1950) 1 All E.R. 206.
(v) Carver 9th Ed. p. 200 *et seq.*
(260, 263, 265)
p. 690 *et seq.*

II. Did charterer order vessel to bulk wheat berth ? Radiogram Ex. 3 to affidavit.
Interrogatories—Answer No.
Matter of fact. Failure to order to wharf would have been breach. Scrutton 15th ed. p. 136.

III. Was Geraldton a safe port ? Was bulk wheat loading berth a safe berth ? Was there a breach of contract ?
(*a*) Australia Pilot and Chart.
(*b*) *Smith* v. *Dart*, 14 Q.B.D. 105.
(*c*) *Johnston* v. *Saxon Queen* (1913) 108 L.T. 564.

IV. Was breach of contract an operating or proximate cause of damages suffered ?
(*a*) *Hadley* v. *Baxendale* (1854) 9 Ex. 354.
(*b*) Lord Porter (1934) Cambridge L.J. 176.
(*c*) Lord Wright (1951) 14 Modern L.R. 393.
(*d*) Professor Goodhart, 68 L.Q.R. 514.

V. Was master NEGLIGENT and if so was his negligence an operating or proximate cause of the damage suffered ?
Mainly matter of fact.
(*a*) Harbour and Pilotage Act, 1855, s. 7.
(*b*) Navigation Act, s. 351.
(*c*) *Rendall* v. *Arcos*, 43 Com. Cas. at 13 and 14.

VI. If master was negligent, did such negligence constitute contributory negligence ?
Is contributory negligence a defence to breach of contract ?
(*a*) Glanville Williams " Joint Torts, etc." p. 218.

VII. Does Clause 26 of charterparty relieve owner from negligence of master generally, or is this exception limited to cargo claims ?
Four (4) *preliminary points.*
(*a*) Words not to be construed as an act.
Dobell v. *S.S. Rosmore*, 1895 2 Q.B. 408. Arnould, 13th ed. 849.
(*b*) No reference to cargo claims. " Responsible " used wider than " Liable."
(*c*) Saying carrier not responsible for loss or damage from act, default or neglect is same as saying not responsible for act, default or neglect of master.
Dreyfus v. *Tempus S.S.* 1931 A.C. 726.
(*d*) Clause deals with culpability, not with cargo claims.
Dreyfus v. *Tempus.*

AUTHORITIES :

(*a*) Arnould, 13th ed. Sec. 918, p. 847.
(*b*) Carron Park (1890), 15 P.D. 203.
(*c*) *Milburn* v. *Jamaica* (1900), 2 Q.B. 540.
(*d*) *Dreyfus* v. *Tempus.*

In the Supreme Court of Western Australia.

No. 7. Notes of His Honour, Mr. Justice Wolff of Address of Plaintiff's Counsel in Opening—*continued.*

(*e*) *Smith Hogg* v. *Black Sea Ins.* 44 Com. Cas. 16.
(*f*) Do. do. 44 Com. Cas. 244.
(*g*) Do. do. 46 Com. Cas. 44.

If breach of contract a cause, damages follow—
(*a*) *Smith Hogg* v. *Black Sea Ins.*
(*b*) *Monarch S.S.* v. *A/B* (1949) 1 All E.R. 1.
(*c*) *Heskell* v. *Continental Express* (1950) 1 A.E.R. 1033.

VIII. Can Court apportion under Joint Tortfeasors Act when negligent breach of contract ?
Glanville Williams p. 328–329.

IX. Is it a defence that master voluntarily accepted the risk ?
(*a*) *Temple S.S.* v. *Sofvracht*, 70 Ll.L.L.R. 1 at p. 11.
(Accepting freight and not protesting is not waiver.)
(*b*) Carver, 9th ed. p. 690.
Carver, 9th ed. p. 263–264.

As to (1)—
Time charterparties.
Voyage charterparties.

Usual charterparty leaves it to the charterer to select the port, etc.
(*a*) " as ordered by the charterer "—See 8th ed. Carver 633, and 9th ed.
(*b*) " to one or two safe ports in W.A."

LOUCH : The ship went to the bulk berth under our implied direction.

2 *o'clock.*

CULLEN : The damages would flow naturally from the breach of contract. (See per Lord Porter Cambridge L.J. *supra.*)

No. 8. Plaintiff's Evidence.

PLAINTIFF'S EVIDENCE.

No. 8.

Evidence of Robert Steele.

Robert Steele. Examination.

Sworn
I was deputy for Lloyd's surveyor, Mr. Davies, in July 1951.
I went to Geraldton to inspect the wharf and the " Houston City."
When I inspected her the ship was steady.
I reported.

Ex. I. I produce a list of the damage I noted.
(Put in, Ex. 1.)

Ex. J. Also details of damage to wharf. (Put in, Exhibit J.)
The first crane rail would be back approximately 5 ft.

CROSS-EXAMINATION.

I could not say when the damage to the wharf was done.

There was a gap in the waling piece.

I would say about 20 ft. missing.

Some of the upper waling piece—I would say about 14 ft.—was broken away.

I did not notice a large section of waling piece missing.

I think I would have known if there was 50 ft. missing.

I could not say that the damage to the ship was caused by its rubbing against the shoulders of the gap.

I can't remember any such thing.

No re-examination.

No. 9.

Evidence of Charles Robert Cox.

Sworn.

I am a Marine Surveyor. Phillimore Street, Fremantle.

I have a British Board of Trade certificate for master of foreign going steamships.

I hold a certificate as a marine surveyor issued by the Harbour and Lights Department of Western Australia.

I am a member of the Younger Brethren of Trinity House, London.

I hold the appointment in W. A. as surveyor to the American Bureau of Shipping, N.Y.

I am a member of the Society of Metriciens, Paris, and a member of the Registro Italiano Navalo, Genoa.

And I am surveyor to the United Kingdom Mutual S.S. Association of London.

My sea experience extends over 20 years as officer and ship's master.

I have had over 12 years' surveying experience—6 as Nautical Surveyor and Examiner of masters and mates, London, and the last 6 as Chief Marine Surveyor to the Marine Underwriters' Association of W.A.

I have inspected the Geraldton Harbour.

I inspected it in January, 1951.

I was instructed to do so and report by the Marine Underwriters' Association.

As to a safe port—

Firstly, a safe port calls for a safe approach.

Secondly, within the port a ship should lie afloat at all times, loading or loaded.

And thirdly, provided reasonable seamanlike precautions are taken, the ship should be protected from prevailing winds, etc., and that includes seaways.

In the Supreme Court of Western Australia.

Plaintiff's Evidence.

No. 9. Charles Robert Cox. Examination—*continued.*

Although the harbour was dredged to 30 ft. I considered the approach unsafe.

There was a shoal in the approach.

The layout of the wharves—being east and west they were broadside on to the prevailing winds.

I considered that a ship could not lie safely at any berth all the year round.

The winter winds blow broadside on to the wharf.

The previous jetty extended north-west so that a vessel would lie end on to any weather and could get away very quickly with reasonable safety.

The breakwater is low and a considerable distance from the wharf, and the winter gales range quite freely into the harbour. No protection is given in regard to swell, except for a series of buoys which are provided parallel to the face of the wharf.

The breakwater consists of two arms—one from the east and one from the west.

The entrance is right opposite No. 1 berth, which is the bulk wheat berth.

I refer mainly to northerly swells.

In winter time all the wharf is exposed to west winds, the worst being the bulk wheat wharf at the west end.

There are no spring piles at the Geraldton wharf.

Spring piles are used to cushion the impact of ships against the main structure of the wharf or jetty.

They consist of a frame 2 to 3 feet in front of the main structure.

They are not fastened to the wharf.

They are bolted together and from them are horizontal beams that cushion the ship's impact on the wharf.

I consider there should be spring piles.

I do not consider the wharf safe in winter with the strong gales without these piles.

In January 1951 when I inspected the harbour the northernmost buoy opposite No. 3 berth was missing.

There is no vessel or suitable place for attending to these buoys.

They usually get the services of a vessel from Fremantle when available.

The Harbour and Lights Department has none.

The Commonwealth has a ship.

Sometimes small ships of the State Shipping Service do the work.

A hauling-off buoy would mitigate the danger of damage if a vessel rolled.

I don't think it would prevent a ship rolling.

The Geraldton wharf is cement.

There are waling pieces provided to prevent ships ranging against the cement.

There are two pieces—one 6 to 12 inches below the surface, and the second about 6 ft. below that.

Each is 12″ × 12″.

On the face of them is a rubbing piece of wood about 4″ thick.

I have never heard of a cement wharf not having these pieces.

I consider them to be essential.

A wharf would not be safe with a substantial part of an upper one missing.

Witness shown Steele's list.

The damage to the ship is very considerable.

The details indicate that the vessel has rolled heavily on to the wharf.

Strakes being indented shows very heavy impact.

Any damage to the concrete indicates a very heavy impact.

The bottom waling piece would keep the lower portion of the hull away from the wharf.

I do not consider a wharf safe unless there is spring piling.

Ranging is the motion fore and aft.

That is not so dangerous as rolling.

When dropping an anchor using chain—ship's chain—you use a length of chain or cable equal to four times the depth of water.

5 shackles of ship's chain for this type of ship would be 1″ chain.

That would be 5 to 7 tons.

You would need a much longer length of wire than of chain.

When the ship is broadside on to the wind she would need a greater length of cable.

The chain that, extended over the distance, acts as a spring is a catenary as it slopes to the anchor.

As the strain comes on, the cable lifts.

A bow anchor of a 7,000-ton ship would be between 3 and 4 tons.

A stream anchor is 30 to 32 cwts. normally.

There is no means of handling heavy ship's chain on the stern of that type of vessel.

The holding power of a stream anchor is 2 to 4 times its weight.

The wire at the stern is called a stream wire.

The normal wire used for that purpose is $3\frac{1}{2}$ to 4″ circumference.

It usually runs in lengths of 90 fathoms.

Insurance wire is greater in circumference, in shorter lengths, and hard to handle.

I do not consider a bow anchor and a stream anchor would be a safe means of holding a ship broadside on.

To get the greatest efficiency from such a line, you would have to have at least 600 feet of line out.

And that would not be effective against a winter gale.

The breaking strain varies with strands.

I quote from page 38 of Nicholls—

2 C^2 is the formula, i.e.,

$6^2 \times 2 = 36 \times 2 = 72$ tons..

Safe working load is one-sixth of the breaking strain.

With a wire rope of 24·5 tons breaking strain a safe working load would be 4·078 tons.

In the Supreme Court of Western Australia.

Plaintiff's Evidence.

No. 9. Charles Robert Cox. Examination—*continued.*

If a steel wire breaks, it is very dangerous.
In the case of a stream anchor it would be a tight strain.
If a ship rolls, it might snap such a wire.
If a ship were loaded you could get a very heavy moment of inertia.
According to Nicholls, the stiffer the ship the more violent the roll.
At p. 506 there is a formula given depending on the meter centre.
When a ship is at rest on the water the centre of buoyancy may be taken as a line from the keel.
When a ship rolls, the centre of gravity remains the same, but the centre of buoyancy changes to the lower part of the ship.
The movement of the ship when it rolls is very considerable.
With the rolling of the ship a chain of 24 tons breaking strain would not be enough to stop the rolling.
When attached to a screw buoy the buoy is above its mooring.
You attach your wire to the top.
When the pull takes place the buoy acts as a spring.
A 2 ft. swell is the maximum that one would like to meet in a harbour.
A 4 ft. to 6 ft. swell is getting dangerous.
I consider that the swell in this case was definitely over 2 ft. lift.
I consider the wharf at Geraldton with a fender missing and a buoy missing unsafe in winter conditions.

12*th December*, 1952.

I produce two diagrams.
They relate to formula for determining buoyancy and the movement of forces in the rolling of the ship.
One is of a ship at rest in upright position.
And the second illustrates the position and the forces set up when a vessel is rolling.
As to the first one—
K is the keel.
The vertical line is the centre line of the vessel.
B is the centre of buoyancy. That represents the centre of submerged section.
W.L. is the water line.
G. is centre of gravity.
With the ship rolling—
The vertical plane is inclined to the water plane.
The centre of gravity remains the same.
But the centre of buoyancy has moved to the low side to B1 on account of the changed water section.
We now have a couple of righting arms because the weight of the ship G operates down the line G.W., while the centre of bouyancy is now in a different line.
Between G.W. and B1—z up the line GZ is the righting lever and that is the couple which the movement operates.
Take, for instance, a ship of 10,000 tons operating on the lever GZ,

and supposing the distance moved is 2 feet, then the total force exerted would be 2 ft. by 10,000 tons = 20,000 tons—which is a tremendous force.

This force would be opposed to the breaking strain of the rope or wire.

This shows that a wire or rope could easily break, or an anchor drag, in these circumstances—and that is apart from any personal element which always comes into these matters.

Ex. K. (1) (2)

(Diagrams put in—Exhibit K (1) and (2).)

CROSS-EXAMINATION.

Cross-examination.

I copied the two diagrams in Nicholls.

I have been in W.A. 6 years.

I have been adviser to the Underwriters in that time.

I had only done Geraldton once in that time.

Captain Sweett's duties relate to the cleanliness of ships to receive cargo, and the question of damage to ships.

I have been the master of a cargo ship.

I was master first in 1934, last in 1940.

It was a general cargo ship.

I have operated under both voyage and time charters.

I should say you get a considerable choppy sea in the harbour as opposed to a swell.

I have never seen a 2 ft. swell in Geraldton Harbour.

Spring piles are used in enclosed harbour at Albany.

That is the only one I can call to mind which is relevant to this case.

I agree that spring piles are not provided as a rule in enclosed harbours.

The exception is where prevailing winds run athwart the wharves.

They are building a wharf in Albany the same as here.

Geraldton would be better if the wharf did not run east and west.

That is the fault in the harbour construction.

A stream anchor is for use in a stream.

It is usually used to hold a vessel in a stream ; or in berthing ; or in pulling off a bank.

A kedge anchor was used for kedging into the wind without power.

A stream anchor is fairly normal equipment.

It is usually housed at the stern.

When it is frequently used it is housed outside the stern rails on a special block and has a special winch. (On the Plate River, for example.)

The stream anchor in the case of the Houston City would be on deck.

They break it out, lift it over, and place it in position.

It would be taken in a ship's boat and dropped.

It would take 1 to 2 hours.

It is much easier getting it up than putting it down.

You pull your ship over to it and pull it up direct.

The stream anchor is mainly used in times of stress, i.e. in emergency, such as pulling the ship off a bank.

A ship carries an 8″ rope hawser.

I have never used one on an anchor.

In the Supreme Court of Western Australia.

Plaintiff's Evidence.

No. 9. Charles Robert Cox. Cross-examination—*continued.*

I would agree that a rope acts as a spring, but if you use a rope to an anchor you run a risk of getting it cut.

I have never seen it used.

I have visited Geraldton before I lived in W.A., when the old jetty was there.

Two ships were damaged at this berth—the Kirriemoor and, I believe, the Clan McTavish in 1934.

I don't know the circumstances relating to the Kirriemoor (24th February 1951).

I think the harbour was constructed about 1930.

I say it is not a safe port in winter conditions.

If I *knew* of some temporary danger or obstruction in a port I would not enter.

I would send for the Harbour Master and/or Pilot and the owner's agents.

Had I been in Harvey's place and seen the waling piece and buoy missing I would have objected and written a letter of protest.

I would have approached the Harbour Master and asked whether he had the means of putting an anchor out and if he said yes, I would have put one out.

Re-examination.

RE-EXAMINATION.

On the Hooghli you have tidal undulations which go right up and quite often tear the ship away.

The stream anchor gives extra strength in holding.

Defendant's Evidence.

DEFENDANT'S EVIDENCE.

No. 10. Cyril Joseph Sweett. Examination.

No. 10.

Evidence of Cyril Joseph Sweett.

Sworn.

I am the Harbour Master at Geraldton.

I am employed by the Harbour and Lights Department.

I act on behalf of the Marine Underwriters and on behalf of Lloyds.

I am Harbour Master/Pilot.

I have been Harbour Master 10½ years.

I have a foreign going master's certificate.

I was 30 years at sea.

I hold Government licences for all ports in W.A.

Prior to that I was with Overseas Shipping and then with the State Shipping Service, but only relieving master coming down on one occasion.

In the 10½ years I have been there, 1,100 ships approximately have used the harbour; and 250 wheat ships.

They would all be berthed at No. 1 berth, east or west depending on the weather when they arrived.

The " Houston City " arrived off Geraldton on 7th July 1951.

I brought the ship in.

When I berthed the master, I went forward and told them what moorings to put out.

I tell them to have a rope—an 8" manilla rope—to tie aft to the buoy.

On this occasion No. 2 stern buoy was missing.

I pointed that out to the captain.

He did not ask advice as to what he should do.

The horizontal fender had been missing for some months—about 50 feet at No. 3 bulkhead.

The Railways control the wharf.

About May I brought the " Westralia " in.

There was a strong easterly blowing.

I had a line out.

The wind got it.

The weight of the ship came on to the buoy and the shackle came out of the buoy.

The line parted.

For repairs to the buoy we appeal to the Commonwealth Lighthouse Services.

They lend the " Cape Otway."

She arrived at Geraldton at 1 a.m. on the 12th.

She was there earlier in the month.

But was delayed.

The " Maetsuycker " was due at 9 o'clock.

Captain Griffiths (" Cape Otway ") knew he could not come in until the " Maetsuycker " came in.

At 10.30 pratique was granted.

The " Cape Otway " came in.

She started to repair the buoy at 10.30.

We had to put a line down to get a lifting chain.

We worked until 10 to 12 when the crew knocked off for lunch till 10 to 1.

In the morning it was decent weather with a light southerly.

By 12 noon the wind was to the east with a southerly depression.

I saw the master of the " Houston City " after lunch at 10 past 1.

When I arrived on the wharf Captain Harvey was agitated.

He said—What shall I do ?

The damage had been done right under the bridge and on the corner of the missing waling piece.

I told the captain to slack away his lines fore and aft and take more weight on the anchor chain.

I did mention, did he think he could get a kedge or a stream anchor put out.

He said it would take too long.

In the Supreme Court of Western Australia.

Defendant's Evidence.

No. 10. Cyril Joseph Sweett. Examination—*continued.*

At that time the wind had come on in full force.
I saw her about the height of the blow.
She did have a quick roll.
We do not get 2 ft. swells in Geraldton Harbour in my experience.
We get a choppy sea and an undertow.
The 2 ft. is from the trough to the crest.
I have never seen that.
The disturbance was a sudden one.
When I berthed on the 7th, on the way in I dropped the port anchor and 5 shackles of chain—450 feet of chain.
She was quite all right for'ard.
She could have pulled out if there had been a line aft.
He could have put a stream anchor out at any time before, while he was alongside.
I knew the master.
I knew him as master of the " Atlantic City."
When the ship was berthed on the prior occasion she was berthed in the same manner but with a line aft to the buoy.
Judging by my experience—we have had exceptionally bad weather, I have had no trouble.
I have had no trouble when ships have had lines to the buoys.
I saw the incident with the " Kirriemoor."
She was loaded and ready to leave.
She had 2 shackles down to the starboard anchor.
She was port side to.
And a line from the starboard bow to No. 2 buoy.
She was a cruiser stern ship.
A sudden wind came up.
They started to heave the anchor up.
They got in 2 shackles and the anchor was aweigh when the weight came on to the buoy line and the line parted.
The ship blew back to the wharf.
The starboard anchor should have been dropped and the ship eased back.
Instead of that she hit the wharf full force.
There was a slight incident with the " Talibot."
The ship was berthed the same as the " Houston City."
The waling piece was missing.
She sustained a slight dent in the plate on the shoulder of the waling piece where part was missing.
I believe after the " Kirriemoor " there was a ship of the same company to come in but the master would not enter.
The " Avonmore " (same company as the " Kirriemoor ") put out a stream anchor as well as a line to the buoy.
The ship was port side.
I have prepared a list of vessels of the Reardon Smith line that use the port of Geraldton.

There were 13 ships up to the time of the " Houston City."
6 ships since then.
(List put in, Exhibit 1.)
The flow of ships in and out is fairly regular all the year round, summer and winter.
I have had no previous notice of the chafing of the mooring ropes at the No. 1 berth.
The bow chain passes over rocks.
I got canvas wrapped around and that prevents chafing.
The ship is responsible for the mooring ropes.
I should say that the damage was caused at the outset by the shoulder of the missing waling piece.
If the waling piece had been continuous there might have been a bulge but not the dents.
Assuming that the waling piece had been intact and the buoy there, there was no danger.
During the same blow there was no movement from the " Maetsuycker " at No. 2 berth.
If a blow comes we would haul on the lines and get a little clear of the wharf and put out an additional line if the line looks at all doubtful.
I did not have any storm warning.
The barometer moved very quickly.
I have not seen spring piles in an enclosed harbour, but the old jetties have them.

Ex. 1.

CROSS-EXAMINATION.

Cross-examination.

I prefer a rope line to hitch to mooring buoy—an 8″ manilla line.
An 8″ line never parts.
I grant there is a formula for breaking.
C 2/3 for good honest hemp or manilla rope.
A few weeks ago there was a line from the " Tacoma City "—from the stern to the buoy.
I can't say what kind of rope it was.
I believe it was a wire rope.
When the " Westralia " broke away it was the shackle that parted.
It would take about 2 hours to get a stream line out.
Such an anchor could have been dropped if it had been ready.
My pilot boat was handy and waiting.
I have no duty to advise him after he is safely berthed.
If there is a buoy there it is my duty to see that a line goes out to the buoy.
I agree with you that if the buoy were missing it would be part of my duty to advise the master to put out a stream anchor—but it was such a beautiful day.
The following day the buoy was restored and as soon as it was I ran a line from the buoy to the ship.
I did not think it was necessary to advise.

In the Supreme Court of Western Australia.

Defendant's Evidence.

No. 10. Cyril Joseph Sweett. Cross-examination—*continued.*

I don't think I could find any fault with his not putting out a kedge anchor.

I would not have put one out.

BY ME:

I agree you can expect such weather without warning at any time in May, June, July and August.

Continuing

The harbour is dredged to 31 feet.

Rock was reached.

The screw buoy consists of two 16 ft. screws with a 50 ft. bridle and a 3-inch chain.

The bridle is connected with a down chain.

With a light ship and heavy weather you could get a fairly direct strain.

The harbour is 30 to 31 feet at present.

There is a certain amount of mud on the bottom and the chain also helps to hold the ship.

I would say that silt in that harbour holds the anchor.

I have never failed.

I am speaking of a bow anchor.

I haven't had the experience of having to depend on a stream anchor, which is about 30 cwt. average.

I would not stream as I was approaching as I might get the rope around the screw.

If I had been doing the job, when the ship had been berthed I would have had an 8" good manilla line.

I would use it because it would float.

I consider 80 to 90 fathoms would be used.

Ships should carry that much line.

That line would be taut when the stern anchor hauled on it.

There would be a certain amount of spring.

I have seen a ship towing a ship with a manilla line.

I would not agree that such a line would snap if not in good position.

Had I attempted to take the ship away from the wharf—she had a cruiser stern and I would have damaged the stern, including the rudder and propeller.

I have not seen a ship at No. 1 berth behave like the "Houston City."

The height of the wave would be so short as to be imperceptible.

Probably the motion was due to the way the ship was moored.

Had the ship been in such condition that I could have taken her away I could have done so quite easily.

I think a stream anchor would probably be effective.

If a ship is broadside on it would increase the danger of dragging the anchor.

I think it is quite a reasonable thing to ask a ship owner to do—to put out a stream anchor.

It might take anything up to three months for a damaged buoy to be serviced.

I protest to the Government about the position.

The waling piece had been missing for some months.

I had spoken to the Railways about renewing it.

I would say that some of the damage to the concrete wharf was done by the " Kirriemoor," and the " Houston City " finished it.

There is nothing to protect a ship from the wind in Geraldton Harbour.

A well-constructed wharf should head into the prevailing wind.

Geraldton is a badly constructed wharf.

There are spring piles at the jetty at Albany.

I was at Albany recently and I saw no spring piles on the new construction.

It would have been impossible to have used a chain to the after deck.

The incident with the Clan McTavish was before my time.

Captain Wake was the master of the " Kirriemoor," which was berthed port side on.

I don't know why.

There was no buoy.

In that case they would run a line to the No. 2 buoy.

The " Westralia " is a Danish ship of about 6,500 gross tons.

The buoy parted in berthing and the joining chain to the 3" chain just pulled out.

The side buoys are serviced every 2 years.

Now the inner buoys are done more frequently.

It is only when something goes wrong that you notify the Department.

The weather conditions were excellent when the Cape Otway was over the buoy.

The ship was loading all the time she was bumping.

I would say that this ship was stiff by the way she was giving little short jerks.

The wind at No. 1 hits the shed and rebounds to the ship.

I agree that a stiff ship will roll more violently than a " tender " one.

If a cargo ship is half full it would be a stiff ship.

No re-examination.

No. 11.

Evidence of Albert Norman Boulton.

Sworn.

I am Deputy Director of Navigation, W.A.

I have a foreign going master's certificate.

I was at sea approximately 20 years, including 4 years in the navy.

I am examiner for master and mate for the Commonwealth and nautical surveyor.

The Australia Pilot is published by the Admiralty as the result of naval surveys and extensive merchant navy experience.

In the Supreme Court of Western Australia.

Defendant's Evidence.

No. 11. Albert Norman Boulton. Examination—*continued.*

There are four or five volumes.

One from Darwin to Esperance.

That volume gives all the information that a ship's master ought to know.

Every ship's master approaching a port would read that book.

In the circumstances I think the master should have consulted the Harbour Master and be guided by his advice.

I have never seen a stream anchor used.

They are for emergency.

I think that these circumstances justified a stream anchor.

If the weather had been fine I would not have felt it necessary to put out a stream anchor unless the Harbour Master advised me to do so.

I would have gone into the matter with the Harbour Master straight away.

The stream anchor is not usually kept ready for use.

It is usually stowed on deck.

It would take a couple of hours to get it ready.

It is usually bolted.

Undoing the bolts, which would probably be rusty, would be difficult. They would have to be loosened up.

This is the sort of emergency in which the stream anchor should be used.

I have seen spring piles at an open jetty such as Onslow, but I have never seen them inside.

I would sooner use the manilla rope.

Cross-examination.

CROSS-EXAMINATION.

I was first master of the " Manunda."

When I left the merchant navy I had minesweepers and corvettes.

A corvette is about the same size as the " Cape Otway."

One tender.

1,000 tons and about 200 feet long.

I was a lieutenant-commander.

I have never had experience of a ship laid broadside on to the wind.

I would say that would be a stupid performance.

You would never want to do that.

You would be likely to drag your anchor.

There would always be a danger of the stream line breaking.

The hazard would be increased at the wharf.

I think it was a reasonable risk to take, to berth in that way, if you were compelled to do so.

I agree that it is a fair risk.

A buoy is put there, and the stream anchor is there for emergency.

I agree there is a risk, but I think it is a fair risk to ask the ship's owner to take.

Re-examination.

RE-EXAMINATION.

I would not compare the conditions in the harbour with conditions in the open sea.

No. 12.

Evidence of James Henry Adam.

In the Supreme Court of Western Australia.

Defendant's Evidence.

No. 12. James Henry Adam. Examination.

Sworn.

I am the Assistant Superintendent of the Australian Wheat Board.

I have had experience in the grain trade since 1911.

I have sent vessels to Geraldton since about 1919.

I was responsible for ordering the " Houston City " to Geraldton.

We have a long list of ships.

We have three ports.

We consider stocks, availability of berths, labour.

I have been ordering vessels to Geraldton for years.

I have sent several hundred there.

No vessel has objected on the ground that it was unsafe.

I would not have occasion to consider the question of the safety of the harbour.

We have had several of their vessels into Geraldton since.

Cross-examination.

CROSS-EXAMINATION.

It is not my responsibility to make sure the wharf is safe.

No. 13.

Notes of His Honour, Mr. Justice Wolff, of Final Address of Defendant's Counsel.

No. 13. Notes of His Honour, Mr. Justice Wolff of Final Address of Defendant's Counsel.

LOUCH addresses.

It should be remembered that this case is a contest between ship owner and charterer.

The charterer is not responsible for the harbour or its appurtenances.

Wharf—Railways—Buoy—Harbour and Lights.

The charterer is not responsible for the default of the Harbour Master.

Rights depend on the charterparty.

Latham, C.J.—*A. U. S. N.* v. *Shipping Control Board*, 71 C.L.R. 508 at pp. 521, 522.

(Time and Voyage charters.)

This is a voyage charter for one voyage only.

Master and servants of ship remain the servants of owner.

All we acquired was the right to use of the ship and the right to use her carrying capacity.

The Australian Wheat Board acquired the Australian crop.

It has no knowledge of state of ships or of ports.

The charter assumes that the ship will ask for orders.

It did so.

In the Supreme Court of Western Australia.

No. 13. Notes of His Honour, Mr. Justice Wolff of Final Address of Defendant's Counsel—*continued.*

The Board considered requirements and sent a radio to the ship to go to Geraldton.

The record of Geraldton is such that it is safe in normal times.

The Wheat Board knew nothing of the particular circumstances.

It directed the ship to Geraldton.

30 Hailsham—423, 424 " arrival at port " ; at p. 425 " precise spot."

It must be taken for granted that the parties contemplated that the ship could only load at No. 1 berth.

The master could have consulted the Australia Pilot.

He would have seen that storms were likely.

If he had been prudent he would have made sure.

When he got there he must have become seized of the practice of the port.

He saw when berthed that the waling piece was damaged.

That the hauling off buoy was missing.

He inquired about the buoy and was told it was about to be replaced.

The weather was dead calm.

It may be that the absence of the mooring buoy did make the berth unsafe temporarily.

In that case the master should have said—

This berth is not safe.

He would have had to go outside and wait till the buoy was replaced.

That would have meant only a small dispute as to harbour dues and pilotage.

The master should have consulted the Harbour Master.

The stream anchor is the thing provided for such an emergency.

As to ports—15th ed. Scrutton, p. 121.

The position varies accordingly as the charter is a time charter or a voyage charter.

The law is vague. (Scrutton p. 122.) See cases listed at foot of page. And see per Madden C.J. 7 Argus Law Reports 241.

The Steamship " Boveric " Co. v. *Howard Smith.*

" Safe berth."

Hailsham 20, 525, para. 676.

Charterparty—Clause 26.

See Art. 11 Sea Carriage of Goods Act.

Lowndes 37.

General Average.

Incorporation of Harter Act.

See General Average clause. Jason Clause in front of charterparty.

York Antwerp Rules.

2 Arnould 1262.

The general average position is covered by the Jason clause.

The general average is covered by the charterparty.

As to damages—we should not have to pay for the master's default in face of some circumstances peculiarly known to him and not to us.

Carver, p. 263.

No. 14.

Notes of His Honour, Mr. Justice Wolff, of Final Address of Plaintiff's Counsel in reply.

In the Supreme Court of Western Australia.

No. 14. Notes of His Honour, Mr. Justice Wolff of Final Address of Plaintiff's Counsel in Reply.

In a time charterparty the master and crew are the servants of the owner.

See per Greer L.J. in the *Lensen* case, distinguishing *West* v. *Wright* (*supra*).

And see per Devlin J.—his criticism.

Clause 1 and indemnity clause.

Carver.

Stag Line v. *Ellermans* 82 Ll. L.L.R. 826.

The ship was ordered beyond the limits of the charterparty.

The master must obey the orders of the owners.

Hall v. *Paul* (*supra*).

Query whether the master should have got orders. He acted according to the exigencies of the circumstances.

Note instance of Craster Harbour in case of *Johnston* v. *Saxon Queen* (*supra*).

The only way in which a master's negligence can be of weight is when it is *novus actus interveniens*. *Grace* case (*supra*).

As to the Jason clause see the case of *Milburn* v. *Jamaica* (*supra*). 1900 2 Q.B. 540.

See beginning of judgment of Smith J. 863 (L.J.R.)

Carver p. 691.

Charterer must acertain safety of the berth.

Sofvracht case (*supra*).

C. A. V.

30th January 1953.

Judgment for Plaintiff on question of liability.

Liberty to apply.

Costs to be taxed, including costs of abortive arbitration proceedings as agreed.

No. 15.

Reasons for Judgment of His Honour, Mr. Justice Wolff.

No. 15. Reasons for Judgment of His Honour, Mr. Justice Wolff, 30th January, 1953.

In this action the facts are not in dispute. The only questions arising are the proper inferences to be drawn and the legal interpretation to be put on them.

The Plaintiff—a company incorporated in England—is the owner of a motor vessel named the " Houston City " of 7,287 g.r.t.

In the Supreme Court of Western Australia.

No. 15. Reasons for Judgment of His Honour Mr. Justice Wolff, 30th January, 1953—*continued.*

The Defendant is a statutory corporation having power to acquire and deal with the Australian wheat crop and do all things incidental to the disposal thereof, including the chartering of ships.

By a charterparty dated the 19th March, 1951, in the form of the Australian Grain Charter, the Defendant chartered the "Houston City" from the Plaintiff.

The charterparty provides (Clause 36) that any dispute arising about events happening in Australia shall unless the parties agree forthwith be settled by arbitration at the capital city of the Australian State in which the vessel loads.

The ship was damaged at Geraldton while under orders from the Defendant, and the question arises whether the Defendant is responsible at all for the damage sustained, and, if responsible, is liable in the circumstances to reimburse the Plaintiff for the expense incurred in making good the damage to the ship and certain damage to the wharf where the ship was berthed.

The parties agreed to waive their right to arbitration on these matters, and the question of the quantum of damages has been left in abeyance.

I give the material provisions of the charterparty, omitting unnecessary details—

> Clause 1—that the vessel proceed to one or two safe ports in Western Australia and there load, always afloat, at such safe wharves as ordered by the charterers, a full and complete cargo of wheat in bulk which the charterers agreed to provide to the reasonable capacity of the vessel.
>
> Clause 7—that if the ship was proceeding in ballast the master was to apply by wireless to the charterers for loading port orders 96 hours before arrival at the loading area, and orders for loading were to be given by the charterers by wireless within 48 hours of receipt of the master's application.

After having discharged a cargo in Japan the ship proceeded, in accordance with the charter, to Western Australia to load a bulk cargo of wheat for Europe.

On the 3rd July, 1951, the master, Captain Harvey, in accordance with Clause 7, applied to the charterers for loading port orders 96 hours prior to arrival in the loading area, and a radioed reply was received by him a few hours later instructing the ship to load a complete cargo of wheat in bulk at Geraldton. The ship proceeded to that port, and on arrival at the entrance on the 7th July it was met by the Pilot-Harbour Master, Captain Sweett, who pointed out the berth at which the ship was to load. The radiogram sent by the Defendant did not stipulate what berth the ship was to occupy. The berth pointed out by Captain Sweett is known as No. 1 grain berth. It is the only one equipped and suitable for the loading of bulk wheat and there can be no doubt that the Defendant intended that the ship should load at this berth.

The ship was berthed starboard side on to the wharf, which meant, as will be seen presently, that there was no hauling-off buoy to which the stern could be moored.

In the claim made against the Defendant it is alleged that the Defendant despatched the ship to an unsafe port, and some general criticism was offered of the lay-out of the port, in that ships are berthed broadside on to the prevailing winter gales, which puts them in danger of being blown against the wharf.

As regards general conditions and berthing, Volume V of the Australia Pilot has the following note for the guidance of mariners—

> " The anchorage in Champion Bay is well sheltered from all
> " winds except those between north-west through north to north
> " by east, from which direction gales sometimes blow with strength
> " between May and November. Vessels with good ground tackle
> " and a long scope of cable have ridden out heavy gales in this
> " Bay.
>
> " During bad weather it is necessary to keep vessels off the
> " wharf by means of bow and stern hawsers to hauling-off buoys.
> " No. 1 berth is the most exposed." (Pp. 314 and 315.)

There is divided control of this harbour, the wharf being under the control of the Railway Commissioners of the State, and the harbour and pilotage facilities being controlled by the State Harbour and Lights Department. Protection to a ship berthed at the wharf (which is of concrete) is given by two horizontal waling pieces, the upper one being just below the surface of the wharf and the other about 6 feet below that. These waling pieces are of stout 12″ by 12″ timber.

Over the years many ships have entered and used the harbour at Geraldton and no case was made out to demonstrate that the harbour constructed as it is offers undue hazards. Although there are certain features of the construction and lay-out open to criticism, I do not consider the evidence goes so far as to establish any general proposition of unsafety.

When the ship was berthed the port anchor was run out with about five shackles of chain leading in a north-westerly direction, and other necessary ropes were run out on the wharf side. There were also two 3-inch wire springs and a heavy $4\frac{1}{2}$-inch wire at either end.

Previously when Captain Harvey had been to Geraldton the two hauling-off buoys had been in position, but on this occasion when the vessel berthed the master noticed that the No. 2 or stern buoy was missing, and also about 50 feet of the upper waling piece in the centre of the berth. The waling piece had been missing for some months. The buoy had been damaged in the previous May and removed for repair. This harbour has no facilities for repairing a buoy and is dependent on outside sources. The absence of the buoy was discussed between Captain Harvey and Captain Sweett and the latter said it was expected back in position at any time. Apparently neither the master nor the pilot considered it necessary to take further steps in the absence of the buoy to cover any emergency which might arise through a sudden change of weather. In his affidavit Captain Harvey mentions that the weather was fine and that, with the ship held in position against the wharf he did not consider that the absence of the waling piece was a danger to the ship.

From the tenor of Captain Sweett's evidence I gather that he did not proffer any advice on the mooring of the ship because he was not asked by the master for his opinion, but he is now quite emphatic that the master should have run out an 8-inch manilla line attached to a stream anchor, immediately on berthing, to meet any emergency through bad weather. It was the pilot's duty to see that the vessel was safely berthed and, if the buoy were there, to see that the proper line (again he advocates a manilla rope) was attached to the buoy. He agreed that it was his duty, as the buoy was missing, to advise what precautions the master should take and that that course was the putting out of a stream anchor but he added (to use his own words) " It was such a beautiful day " ; he did not think it necessary to give any advice.

It is obvious that the hauling-off buoys, and particularly the stern buoy, were provided to meet the known conditions and obviate the dangers arising with the ship berthing broadside on to the prevailing weather—an undesirable practice in itself.

There is approximately 30 ft. of water at the buoys, the bottom of the harbour being of rock. The buoy consists of two screws of 16 ft. into the rock with a 50 ft. bridle and a 3-inch chain. The bridle is connected with a down-chain. The buoy acts as a very powerful counterforce for holding a ship against forces from the weather side.

In my opinion the absence of this buoy and of 50 ft. of the upper waling piece in the centre of the No. 1 berth made that berth unsafe during the winter months, and accordingly it did not answer the description of berth which was in contemplation of the parties under Clause 1 of the charter.

The mooring of the ship was completed on the afternoon of July 7th, and on the morning of the 9th loading of the cargo commenced and continued until the 12th. During this time there was nothing untoward about the weather. At 8 o'clock on the morning of the 12th there was a moderate south-westerly wind but the daily report from the Perth Meteorological Office indicated that the nearest weather disturbance was approximately 300 miles to the west. By 11.45 a.m. the wind freshened to northward, and soon increased to gale force. By that time it was too late to take any steps to avoid the damage. Up to then the buoy had not been replaced, although the Commonwealth Lightship " Cape Otway " was in the harbour preparing to replace it.

When seen by Captain Sweett at the height of the gale the ship had a quick roll from side to side and was striking the wharf with rapid frequency. It sustained considerable damage, indicating the extreme force of the impacts. The wharf also was extensively damaged. It is clear that much of the damage to the ship was caused through the absence of the waling piece where the ends of the waling piece on either side of the missing section had come into contact with the hull.

In the circumstances, it is suggested by the defence, the master should even at that late stage have run out either a stream or a kedge anchor attached to a substantial manilla rope of 8-inch circumference. This anchor in conjunction with the rope would, it is said, have acted as a spring and

steadied the ship. But to have got the anchor out then would have been a practical impossibility. It would have had to be placed on a tender, taken out to the appointed position and dropped, an operation which would have taken at least two hours and in that time the whole of the mischief had been done.

Furthermore, I accept the opinion of Mr. Cox that neither of these two comparatively light anchors would have been effective in the circumstances. The provision of hauling-off buoys suggests that. The employment of these suggested expedients might have increased the hazards, as evidence was given that either a stream or a kedge anchor might drag under the strain, or the line might break. Normally these anchors are attached to wire ropes of about 3-inch circumference. Mr. Cox, whose opinion I again accept, considers that if the wire rope broke that in itself would constitute a very grave danger. He seems to have been supported, tacitly if not expressly, by Captain Sweett, who propounded the use of the 8-inch manilla rope. To attach this rope, of course, would have meant detaching the wire, and I feel that Mr. Cox's contention is sound that while the rope has tremendous strength and would act as a spring, there would still be great danger of its cutting or a likelihold that the ship might drag the anchor. In this type of vessel, on account of the design of the stern, there is no means of handling heavy ship's chain and, while the bow anchors are attached to chains and weigh between three and four tons, the stream anchor is about $1\frac{1}{2}$ tons and its holding power, according to circumstances, ranges between approximately two to four times its weight. The wire to which it is attached has a circumference of 3 to 4 inches. To get the greatest efficiency for such a line about 600 feet would have to be put out. It would have approximately 24·5 tons breaking strain. A safe working load is computed at one-sixth of the computed breaking strain. It was pointed out by Mr. Cox that with the centre of buoyancy affected by the rolling of a stiff ship, as this was, the forces set up by the rolling of, say, 10,000 tons at a distance of 2-ft. would be 20,000 tons. This indicates the likelihood of snapping any rope, wire or manilla, or dragging an anchor of such comparatively light weight as the stream anchor. In the event of this happening the ship might have sustained much greater damage than she did. Captain Boulton, whilst advocating a counsel of perfection in suggesting that the master should have got in touch with the Harbour Master and sought his advice immediately on berthing, nevertheless considers that in the circumstances the master was justified in doing what he did. He agrees that with the laying of the ship against the wind there was a hazard of a stream anchor or a kedge anchor dragging, or the line breaking.

It is now contended that Captain Harvey had another alternative, namely, that when the situation presented itself to him on berthing he could have demanded to be taken out. That is a suggestion which it is easy to make after the event. There are certain formalities to be observed. Mr. Louch contends that all that would have been involved would have been a short wait and a small expense for additional harbour and pilotage

In the Supreme Court of Western Australia.

No. 15. Reasons for Judgment of His Honour Mr. Justice Wolff, 30th January, 1953—*continued.*

dues. There was no guarantee that the wait would have been a short one. As things happened, the buoy was not replaced until several days later; the cost of maintaining a ship from day to day is very great. The master was faced with all these perplexities. When he berthed he was given to understand that the buoy would be replaced at any moment, and in view of the weather and with no note of warning from the pilot I consider he acted for the best in staying where he was. Moreover, no mention is made of the replacement of the waling piece, whose absence was the cause of a substantial amount of the damage, and had he decided to wait for this to be replaced there is no saying how long the wait might have been. Bearing in mind the length of time it had been missing, he had no ground for believing that this matter would be speedily rectified.

The claim rests primarily on an allegation of breach of contract in that the charterer is said to have warranted the safety of the berth. The charter, as was pointed out, was a voyage charter, and some fine distinctions have been drawn as to the liability of the charterer for damage to the ship under a voyage charter and under a time charter. The distinction is said to rest in some cases on the greater degree of control vested in the charterer under a time charter but it is a distinction which, to my mind, can be pushed too far.

The two cases of *West* v. *Wright's* (40 Com. Cas. 186) and the Pass of Leny (155 L.T.R. 421) are apparently in conflict with the proposition that the charterer is liable in a case such as the present. In *Grace* v. *The General S.N. Co.* (1950 1 All E.R. 201) Devlin J. had to consider various authorities, including the two I have just mentiond. He found that the dictum of Branson J. in the first of these cases was unsatisfactory. I think the decision Branson J. can be supported, if at all, on the facts as found by the Judge. Neither case seems to be reconcilable with the trend of authority (see *Ogden* v. *Graham* 31 L.J. (Q.B.) 26 : *Brostrom* v. *Dreyfus* 38 Com. Cas. 79 : *Hall* v. *Paul* 19 Com. Cas. 384).

The words " as ordered " have been construed as words giving the charterer authority to order the master to take the ship nominated by the charterer. In the case of *Grace* v. *General S.N. Co.* Devlin J. had to consider a time charter in relation to similar words and, while he preferred to rest his decision on the ground that the charter was a time charter, whereas in *West* v. *Wright's* and the Pass of Leny the charters were voyage charters, it is quite clear that he considered that there was no rule of thumb which made the criterion of liability depend on whether the charter was a time charter as distinct from a voyage charter. Even in the case of a time charter the master may disregard instructions if he is directed to some place which is not within the term " safe wharf," and cases could be cited where this has happened and the owner has been held to be justified (*Johnston* v. *Saxon Queen* 108 L.T.R. 564). In the recent case of *Temple S.S. Co.* v. *Sofvracht* (62 T.L.R. 43)—a peculiarly worded charter which partook more of the character of a voyage charter than a time charter—it was held that if the charterer order the ship outside the limits of the class of port stipulated the charterer is liable to the owner in damages for

consequential losses. At p. 691 of Carver it is pointed out that where the person giving the order knows of the danger, or where it is to be considered as within his reasonable contemplation, he would on principle appear to be liable for loss caused in consequence of compliance with the order in any event. I should be inclined to doubt whether the charterer's knowledge is material in a case where the term " safe wharf as ordered " is to be construed as a warranty. But here the Defendant knew, or ought to have known, of the condition of the berth where it was intended that the ship should go and to which it was compulsorily piloted. The editor of the ninth edition of Carver draws attention to the statement in Section 460 of the previous editions, that " where the charterer designates the berth " he is bound to take reasonable precautions to ascertain that it is safe, and, " if necessary, warn the master." I think the statement is good law and applicable here. The necessary control was present, the order was given by the charterer, and it was obeyed. The act of the master in staying in the berth after he became aware of the defect was not unreasonable. His act was " lawful, reasonable and free from blame if he was merely doing " what an intelligent observer knowing how he was circumstanced would " have expected him to do ; any damage resulting would be the direct and " natural consequence of the breach of contract in giving the order." (See per Wright L.J., *Summers* v. *Salford* 1943 A.C. 283.)

That is the position as I see it with the " Houston City." The Defendant is responsible for the damage sustained by the ship and any loss which the ship suffers in making good the damage to the wharf.

As it was unnecessary to do so I have not thought fit to consider the argument advanced under Clause 26 of the charterparty.

JUDGMENT AS TO LIABILITY ACCORDINGLY

Liberty to apply. Costs to be taxed including costs of abortive arbitration proceedings as agreed.

No. 16.

Formal Judgment.

No. 16. Formal Judgment. 30th January, 1953.

Dated the 30th day of January, 1953.

This Action having come on for trial on the 11th and 12th days of December, 1952 before the Honourable Mr. Justice Wolff without a jury in the presence of Mr. N. de B. Cullen and Mr. R. W. Cannon of Counsel for the Plaintiff and Mr. T. S. Louch Q.C. and Mr. W. H. Johnson of Counsel for the Defendant and the Judge having reserved his decision and the action

In the Supreme Court of Western Australia.

No. 16. Formal Judgment, 30th January, 1953—*continued.*

standing in the list for judgment, on the 30th day of January, 1953 having ordered that Judgment be entered for the Plaintiff against the Defendant as to liability and having further ordered that the parties herein be at liberty to apply to the Court if necessary and that the costs of the action including costs of abortive Arbitration proceedings be taxed and paid by the Defendant. IT IS THIS DAY ADJUDGED :

(*a*) That Judgment be entered for the Plaintiff against the Defendant as to liability.

(*b*) That the parties herein be at liberty to apply to the Court if necessary.

(*c*) That the costs of the action including costs of abortive Arbitration proceedings be taxed and paid by the Defendant.

The above costs have been taxed and allowed at £ as appears by the Taxation Master's Certificate.

THIS JUDGMENT is taken out by Northmore, Hale, Davy & Leake, Solicitors, of 13 Howard Street, Perth, Agents for Messrs. Frank Unmack & Cullen of 45 Market Street, Fremantle, Solicitors for Plaintiff.

In the High Court of Australia.

No. 17. Notice of Appeal and Grounds, 19th February, 1953.

No. 17.

Notice of Appeal and Grounds

TAKE NOTICE that the Full Court of this Honourable Court will be moved by way of appeal at the first sittings of the Court for the hearing of appeals to be held at Perth in the State of Western Australia after the expiration of one month from the due institution of this appeal or so soon thereafter as Counsel may be heard on behalf of the abovenamed Appellant (Defendant) for an Order that the whole of the Judgment of His Honour Mr. Justice Wolff of the Supreme Court of Western Australia given and pronounced on the 30th day of January 1953 whereby the Respondent's (Plaintiff's) action against the Appellant (Defendant) was upheld with costs be set aside and that judgment be entered in favour of the Appellant (Defendant) and that the Respondent (Plaintiff) be ordered to pay the costs of the proceedings before the said Mr. Justice Wolff in the Supreme Court of Western Australia together with the costs of abortive Arbitration proceedings and the costs of this Appeal.

THE grounds for this Appeal are :—

1.—THE learned Trial Judge was wrong both in fact and in law in holding :

(*a*) That the Defendant ordered the M.V. " Houston City " to No. 1 berth at Geraldton.

(*b*) That No. 1 berth at Geraldton was at any material time unsafe.

(*c*) That the Defendant warranted the safety of No. 1 berth at Geraldton under the voyage charter.

(*d*) That the Defendant knew or ought to have known that No. 1 berth at Geraldton was unsafe.

(*e*) That where a charterer designates the berth he is bound to take reasonable precautions to ascertain that it is safe and if necessary warn the master.

(*f*) That the action of the master of the M.V. " Houston City " in staying at No. 1 berth at Geraldton after he became aware that the berth was unsafe (if such was the fact) was not unreasonable.

(*g*) That the Defendant was responsible for the damage sustained by the M.V. " Houston City " and any loss suffered by the ship owner in making good the damage to the wharf.

(*h*) That the putting out of a stream anchor in the absence of a hauling-off buoy would have been (i) impracticable (ii) ineffective or (iii) dangerous.

2.—THE learned Trial Judge should have found as a matter of fact and law that at all material times No. 1 berth at Geraldton was a safe berth within the meaning of the Charterparty.

3.—THE learned Trial Judge was wrong in law in attributing to the charterer any responsibility for the acts or omissions of the Harbour authorities or the Harbour Master.

4.—THE learned Trial Judge having found

(*a*) that the Master of the ship was familiar with the port of Geraldton and

(*b*) that before or at the time of berthing he was aware that the hauling-off buoy for use at the No. 1 berth was not in position and that the wharf at No. 1 berth was in disrepair

should have found that it was the duty of the Master—

(*c*) to refuse to occupy No. 1 berth while such berth was unsafe (if such was the case) and to wait at the anchorage in Champion Bay until the hauling-off buoy had been replaced, or

(*d*) having berthed his ship at No. 1 berth before becoming aware of these matters to return to the anchorage in Champion Bay and wait until the hauling-off buoy was replaced, and in either event

(*e*) to report to the charterers that the No. 1 berth to which he had been directed by the Harbour Master was temporarily unsafe and to apply for further orders.

In the High Court of Australia.

No. 17. Notice of Appeal and Grounds. 19th February, 1953— *continued.*

5.—THE learned Trial Judge should have found as a fact that the damage suffered by the M.V. " Houston City " was due to the negligence of the Plaintiff's servant Captain Harvey

(*a*) in berthing the ship at No. 1 berth when such berth was unsafe (if such was the case) and

(*b*) in failing at the time of berthing or subsequently to put out a stream anchor to hold the ship away from the wharf with a view to avoiding or minimising damage to the ship in the event of a Northerly blow.

6.—THE learned Trial Judge should have found that the Plaintiff by its servant the master of the ship knowing that No. 1 berth was unsafe (if such was the case) freely and voluntarily accepted any risk of damage to the ship by berthing there.

7.—THE learned Trial Judge was wrong in holding that the damages claimed in the action were the direct and natural consequences of the order given by the charterer to load wheat at Geraldton. His Honour should have found that it was not in the contemplation of the charterer that the ship would go to a berth which the Master knew to be unsafe or temporarily unsafe.

Dated the 19th day of February, 1953.

D. D. BELL,

Commonwealth Crown Solicitor and Solicitor for the abovenamed Appellant (Defendant) whose address for service is 8–10 The Esplanade, Perth.

To : Reardon Smith Line Limited.

And to its Solicitors,

Frank Unmack & Cullen,
45 Market Street,
Freemantle.

No. 18.

(i) Reasons for Judgment of His Honour, Chief Justice Sir Owen Dixon.

The questions which this appeal raises for determination are two. The first may be stated in general terms. It is whether under the form of charterparty known as the Australian Grain Charter the charterer is liable to the shipowner for damage received by the ship owing to being directed by the charterer to an unsafe port or an unsafe wharf for loading. The second depends on an affirmative answer to the first question and is of a particular nature. It is whether damage received by a certain motor vessel named the " Houston City " on 12th July 1951 while loading at Geraldton under such a charter falls under that description.

The Australian Wheat Board, which is the Appellant in this Court and the Defendant in the action in the Supreme Court, chartered the ship from the owner Reardon Smith Line Limited, which is the Respondent in this Court and the Plaintiff in the action. The charterparty was dated 19th March 1951 and was a voyage charter for the carriage of a cargo of bulk wheat from a Western Australian port. On 3rd July 1951 the charterers by radiogram to the master of the " Houston City " named Geraldton as the port and advised him that he was to load a complete cargo of wheat in bulk. There is only one berth at Geraldton for loading bulk wheat. It is No. 1 Grain Berth and lies at the eastern end of the quay. The quay is built of concrete and is about 1,500 feet long running east and west on the southern side of the inner harbour of Champion Bay. Champion Bay is described by the Australian Pilot as " well sheltered from all winds " except those between north-west through north to north-east, from which " direction gales sometimes blow with strength between May and November." Speaking of the quay, at which of course ships must be berthed broadside on to such winds, the same work says, " during bad weather it is necessary " to keep vessels off the wharf by means of bow and stern hawsers to hauling " off buoys. No. 1 wharf is the most exposed."

The " Houston City " reached Champion Bay on 7th July and, after waiting for a time while No. 1 berth was fully cleared, she was placed alongside by the pilot, who was also harbourmaster, about six o'clock in the afternoon of that day. She was moored starboard side to the wharf. Her port anchor was run out in a north-westerly direction to about 450 feet of chain. Unfortunately there was no hauling off buoy to which a line could be run from the stern of the ship to assist in holding her off the concrete wharf. It was missing. In addition there was a portion missing of the horizontal timber fender which ran along the side of the wharf to keep ships off the actual concrete. The wharf had been furnished with two parallel horizontal lines of waling as fenders and fifty feet of the upper section of the horizontal timbers had been missing for some months. The hauling off or mooring buoy had been torn out during May 1951. There was a rock floor and the buoy had been held in thirty feet of water by two sixteen feet screws with a fifty feet bridle of three-inch chain, but during

In the High Court of Australia.

No. 18. (i) Reasons for Judgment of His Honour, Chief Justice Sir Owen Dixon, 2nd June, 1954 —*continued.*

a blow a ship had torn it away. A tender was to come to effect the replacement and she was said to be daily expected. In fact she arrived on 12th July, five days after the " Houston City " berthed. The harbour-master told the master of the " Houston City " that the buoy had been damaged and removed and said, according to the latter, that its return was imminent, that it was expected at any moment. No suggestion was made by anyone then that the vessel's stream anchor should be unshipped and run out aft. It is unlikely that it would have been of much service in holding off the ship. At all events it was not done. The weather was fine and so long as it held there was no danger. But the weather did not hold. By about noon of 12th July, the day on which the tender actually began replacing the buoy, the weather had freshened from the northward and it rapidly increased to a gale. Before the gale subsided considerable damage had been done to the ship's starboard quarter, her plating had suffered and her mooring ropes had been chafed and strained and one had parted. It is to recover in respect of this damage that the shipowner sues the charterer. The suit was heard by Wolff J. who found that in the absence of the waling and the buoy No. 1 berth was unsafe during the winter months, that there was no fault on the part of the master of the ship and that he acted reasonably. His Honour held that under the charter damage suffered by the ship owing to lying in an unsafe berth to which she had been ordered was recoverable from the charterer.

The material parts of the leading provision of the charter party are as follows: " . . . the said vessel . . . shall, with all convenient speed, . . . " proceed, as ordered by the Charterers, to one or two safe ports in Western " Australia, or so near thereto as she may safely get, and there loading " according to the custom of the port, always afloat, at such safe dock, " pier, wharfs, and/or anchorage, as ordered . . . from the Charterers or " their agents, a full and complete cargo of Wheat in bulk, ex silo, which " the said Charterers bind themselves to provide." The charterparty does not contain a provision, such as is usually found in a time charter, placing the employment of the ship under the direction of the charterer, nor a provision requiring the latter to indemnify the shipowner for loss or damage occasioned by the master's complying with the charterer's order. The charterer is, of course, bound to provide a cargo and the owner is bound, if it is provided in accordance with the terms of the charter, to load the cargo and carry it. It is the purpose of the clause quoted to prescribe these obligations, that is up to shipment of the cargo. The charterer must provide the cargo at a safe dock pier or wharf in a safe port and he must give orders to the ship as to the port and the berth. In the present case, if the finding of the learned Judge be accepted, the charterer did not fulfil this obligation but provided the cargo at an unsafe wharf; by acting on the charterer's order, which *ex hypothesi* did not comply with the contractual obligation of the charterer, the master placed his ship at an unsafe berth and the ship was damaged.

Two views may be taken of the legal consequence of the naming of an unsafe port or berth by a charterer under obligation to provide a cargo

at a safe port and safe berth to which he must direct the ship. One is that he has simply failed to perform the condition upon the fulfilment of which the ship must berth and load and has failed to pursue the terms of the contract in providing a cargo. On this view his only breach of contract is in failing to supply a cargo in the appointed manner. The ship may refuse to proceed to the port or the berth and treat the charterer as in default in providing a cargo in accordance with the conditions of the contract. But if the ship proceeds to the unsafe port or berth that means there is no breach; the shipowner has waived fulfilment of a condition precedent, that is all. Having chosen to load the cargo, he cannot complain that it was supplied at a place where he need not have taken it.

The other view of the legal consequences, under such a provision, of the charterers directing the ship to an unsafe port or berth is that it goes further than a mere failure to fulfil a condition precedent to the shipowner's obligation and further than failure to pursue the condition of the contract in providing a cargo; it also amounts to a breach of the shipowner's obligation to direct the ship only to a safe port and a safe berth. Of course the master may disregard the order on the ground that the port or berth is unsafe. But on this view, if the master acts on the order, the charterer having broken a term of the charter in directing the ship to an unsafe port or berth is liable in damages for the consequence of the breach consisting in the giving of the direction.

It is apparent that the questions may arise with reference to the provisions governing the place of discharge just as they arise with reference to provisions dealing with the place of loading. It is not uncommon for a charter to give the charterer the right to direct the ship to a safe port or a safe berth there to unload the cargo. If the master considers a port of loading unsafe and the charterer refuses to provide a cargo at another port, he must go without a cargo and his owners must seek to recover dead freight or, if other employment for the ship is found, general damages. But if he considers a port of discharge is unsafe he may discharge the cargo elsewhere and justify the course he has taken by supporting the correctness of his opinion in fact as to the unsafeness of the port. But clearly enough a master is placed in a predicament in either case, for this opinion may be held to be wrong. Whether the charter is a time or a voyage charter the same situation may arise. But in a time charter for any extended period the employment of the ship falls so much under the direction of the charterer that it perhaps appears inevitably right that he should assume a responsibility to the owner for causing the ship to proceed to an unsafe port or to berth at an unsafe wharf. No doubt in a time charter as in a voyage charter theoretically the choice lies with the master to refuse to comply with directions as outside the charter. Probably even in a voyage charter it is not often a very real or practicable alternative but in a time charter it must appear even less real. Again in a time charter a provision is much more likely to be found by which the shipowner is indemnified by the charterer against the consequences of the master's obeying the charterer's directions to him. It is not clear that such a provision covers directions

In the High Court of Australia.

No. 18. (i) Reasons for Judgment of His Honour, Chief Justice Sir Owen Dixon, 2nd June, 1954 —*continued.*

which are outside the charterer's authority. No doubt it would be more in accordance with principle to construe such an indemnity clause as covering the lawful directions only of the charterer. To state the matter in another way, if the proper understanding of the principal clause be that it means only that a direction to proceed to an unsafe port is outside the contract and so unauthorized and void, then it would seem to follow that the indemnity clause should not naturally be interpreted as extending to the unauthorized direction. But perhaps it is not right first to interpret the principal clause under which the charterer obtains his right to order the ship to safe port or berth and then turn to the indemnity clause. If the two clauses are read in combination, the indemnity clause may be regarded as aiding the conclusion that the main clause means that an order to an unsafe port involves the charterer in responsibility for any consequent damage arising from the breach of obligation to provide a cargo at a safe port. But however this may be, it seems very unsatisfactory to place contrary interpretations on the provisions of a voyage charter enabling the charterer to order the ship to proceed to a safe port (whether for loading or discharge) and on the provisions in a time charter limiting her authorized employment to safe ports. It is difficult to find logical or verbal grounds for the distinction which will satisfy the mind that it corresponds with any actual intention. It is still more difficult to justify the distinction as a matter of history or of tradition. In the days before steam a shipowner who let his ship upon a voyage charter for a voyage from or to safe ports as ordered by the charterer would more naturally regard the latter as warranting the safety of the ports to which he ordered the ship. The merchant who chartered the ship might be supposed to have at his command more information than the shipowner as to the safety of the distant ports whence or whither he shipped his merchandise. The merchant had his correspondents and it was to them that a chartered ship was often consigned.

Of the two views I have described I think that which has the stronger support both in reason and in authority is that which interprets the restriction expressed in the words " safe port or safe wharf or berth " as imposing an obligation upon the charterer not to direct the ship to an unsafe port or wharf or berth, so that any loss caused by his doing so falls upon him. The considerations which seem to support it in reason arise from the character of the provision in which the restriction occurs and its purpose. To fix the port of loading and to fix the port of delivery are two of the most essential things in the chartering of the ship. Both loading and discharge are effected by the co-operation of the parties and that in turn depends, on the side of the charterer, on the availability of the cargo at a proper place of loading or upon the provision of a berth for discharge, and on the side of the shipowner, upon his ship proceeding to the place of loading or discharge and lying there safely. When the charterer is prepared at the time of taking the charter to specify the place where the cargo will be available or the place at which he desires it delivered, the shipowner must take the responsibility of ascertaining whether he can safely berth his ship there or will take the risk of doing so. If he agrees upon the place then, subject

to excepted perils, his liability to have his ship there is definite. But where the charterer cannot specify the place of loading or discharge at the time of the charter the shipowner must agree to submit his ship to the charterer's orders. The orders are normally given directly to the master. When the charter limits the choice to safe ports or safe berths the purpose is to impose upon the charterer the necessity of doing in the interest of the ship what the shipowner would have done if the charterer had been prepared to nominate to him a port of loading or discharge at the time of proposing the charter, namely avoiding an unsafe port. The fulfilment of the duty of naming the port of loading is inseparably connected with the fulfilment of the duty of providing the cargo. The charterer must provide the cargo at the named port and he must accordingly name a port where he can provide the cargo. If the safety of the port is in doubt, it seems better to suppose that the charterer must bear the responsibility of his choice, if it is a wrong one, and if the master is not prepared to take the extreme step of declining to lift the cargo because of the dubious security of the port. To place the master in the position of having to decide at his peril whether to take the risk of a doubtful port or berth as an alternative to refusing to come in and lift the cargo operates to the undue advantage of a charterer who in fact has named an unsafe port. For if the master of the ship decides not to frustrate the entire adventure but to take the risk, then on that construction of the clause, the master would, by his decision, relieve the charterer of all responsibility ; whereas, had the decision of the master been the contrary, the charterer would, because the port was unsafe in fact, be liable for all the damage flowing from failure to provide a cargo according to the conditions of the charter. The point may be stated concisely by saying that the charterer promises that he will provide a cargo and that it will be at a port which is safe or by saying that he promises that he will name a port which is safe. This conclusion appears to me to be in accordance with the weight of authority. It is true that the course of judicial decisions affecting the question has not been entirely uniform and decisions directly dealing with damage to the ship itself are few and comparatively recent. But decided cases have worked out gradually the general operation of the clauses in a charterparty which require the charterer to provide a cargo at a safe port or safe wharf or the shipowner to deliver at a safe port or safe wharf as directed by the charterer. The result is that their purpose has been made clear and their application in many respects has been settled. The point which appears to me to be of capital importance in the decision of the present case is whether the giving of an order to proceed to a port that is unsafe amounts to a breach of obligation on the part of the charterer and that point appears to me to be definitely covered by what has been determined by the general operation ascribed to such a clause.

It is convenient to begin with the decision in *Woolley* v. *Reddelien*, 1843 5 M. & G. 316 ; 134 E.R. 585. It was a voyage charter requiring the ship, after delivering an outward cargo at Malta, with all convenient speed to sail to one of several ports as should be ordered at Malta. The shipowner sued the charterer, averring in his declaration that the charterer did not

In the High Court of Australia.

No. 18. (i) Reasons for Judgment of His Honour, Chief Justice Sir Owen Dixon, 2nd June, 1954 —*continued.*

and would not within a reasonable time cause the ship to be ordered at Malta to sail and proceed to such port as aforesaid notwithstanding the shipowner's readiness and willingness to perform his obligations. It was decided that the charter implied a promise by the charterer to give such orders at the named port within a reasonable time, although no such promise was expressed. This decision may appear a little remote from the point at issue, but with it begins the progressive judicial explanation or exposition of the responsibility of the charterer for the preliminary steps which would result in the ship receiving a cargo at an appropriate place. The case was followed by *Rae* v. *Hackett*, 1844 12 M. & W. 465 : 152 E.R. 1390. There a voyage charterparty required the ship to sail and proceed in ballast to a safe and convenient port near Capetown and there load a full cargo of merchandise and therewith proceed to Cork or Falmouth. This was held to mean that the charterer must order the ship either to Cork or Falmouth. " It is clear that the charterer is the person to name the port because he is " to provide the cargo "—per Alderson B. In *Ogden* v. *Graham*, 1861 1 Best & Smith, 739 : 121 E.R. 901, there was a voyage charter of a ship to load at Swansea and proceed to a safe port in Chile with leave to call at Valparaiso. There was no express statement that the charterer should name the port, but at Valparaiso his agent did name a port in Chile and directed the master to proceed there to discharge. It happened that the port named was at the time closed by order of the Chilean Government because of some disturbances and the ship could not proceed thither without confiscation. She consequently remained for some time at Valparaiso until the port was open. She then sailed to the port named and discharged her cargo. The shipowner was held entitled to maintain an action against the charterer on account of the detention of the ship at Valparaiso. The port named was held to be unsafe at the time it was named, unsafe in the sense that it was a port into which the master could not take the ship without confiscation. The ground of the decision expressed by Wightman J. was that : " The charterers must pay the damage occasioned by the *breach* " *of contract* in not naming a safe port to which they have made themselves " liable by the specific terms of the contract." Blackburn J. said : " By " the charterparty it is agreed that the vessel shall sail for a safe port in " Chile with leave to call at Valparaiso, and although it is not in terms so " stated, it follows by necessary implication that the charterers are to name " a safe port to the shipowner, who will then be able to earn his freight by " proceeding thither." And again " . . . they are liable *for damages* " *for not naming a safe port* within a reasonable time, and the measure of " damages will be regulated by the detention of the ship at Valparaiso " beyond that time." It will be seen that although the damages were for detention and not for injury to the ship, they were attributable to the naming of an unsafe port, and the very naming of an unsafe port was considered a breach of contract. It is true that the master might have refused to go to the port at all and treated the charter as discharged by breach or regarded the condition precedent as unfulfilled by the naming of the port in question. That was the effect of " *The Alhambra*," 1881 L.R.

6 P.D. 68, a decision which sometimes has been treated as meaning that it is his only course : (see, for example, *S.S. Bovric Co. Ltd.* v. *Howard Smith*, 1901 7 Argus L.R. 241, at p. 246, per Madden C.J.) a deduction for which there appears to me to be no foundation.

There are several other decisions which are based on the view that a direction to proceed to a port in fact unsafe for the purpose of discharging a cargo is itself a breach of obligation under a voyage charter providing that the ship should proceed to a named port for orders to discharge at a good and safe port within certain geographical limits. It is the foundation of one part of the decision in *Evans* v. *Bullock*, 1877 38 L.T. 34. In that case a port was named by the charterer where it was found that the ship could not safely unload. The master proceeded to another place and there unloaded. The consignees then sued the shipowner unsuccessfully for the increased costs occasioned by the master unloading in the place chosen by himself. The shipowner, who had succeeded in the action as Defendant, then commenced an action against the charterer for damages comprising (1) the extra costs incurred by him in the suit brought against him by the consignees ; (2) the port dues incurred by him at the port of actual discharge in excess of the port dues he would otherwise have incurred ; (3) insurance. The shipowner failed to recover under the first head of damage because it did not flow legally from the breach and under the third because the costs of insurance were considered to be contained in the demurrage which he had received. But he did recover the excess port dues as damages. Now it appears to me that the significance of this is that the shipowner recovered them as an item of damage attributable to the naming of a port that was in fact unsafe, showing necessarily that to order a ship to a port that was unsafe was itself a breach of obligation imposed by the charter on the charterer. This was also decided by Sankey J. in *Hall Bros. etc. S.S. Co.* v. *R. & W. Paul*, 1914 111 L.T. 811 : 30 T.L.R. 598. It was a voyage charter requiring the ship " to call at Teneriffe for orders to discharge at a safe port " in the United Kingdom or so near thereto as she can safely get, always " afloat, and deliver such cargo in accordance with the custom of the port " for steamers." At Teneriffe she received orders to discharge at King's Lynn, Norfolk. She found, however, that her draught did not permit her to enter the dock at King's Lynn and she lightened by discharging part of her cargo about eleven miles off down the Wash before going on and discharging the remainder of the cargo in the dock at King's Lynn. The shipowners sued the charterers for the extra expense involved in lightening the ship. Sankey J. said : " For them it was contended that King's Lynn " was not a safe port within the meaning of the charterparty, that the " Defendants had *committed a breach of their contract in ordering the vessel* " *to proceed there*, and were, therefore, liable in damages." His Lordship upheld this contention, deciding that King's Lynn was not a safe port for the ship loaded as she was and that the fact that the master accepted the order to proceed there did not preclude the owner from recovering damages.

In *Limerick S.S. Co.* v. *Stott*, 1921, 1 K.B. 568, Bailhache J. had before him a claim by a shipowner against a charterer to recover the damage

In the High Court of Australia.

No. 18.
(i) Reasons for Judgment of His Honour, Chief Justice Sir Owen Dixon, 2nd June, 1954 —*continued.*

suffered by a ship through encountering ice on a voyage to and from the Finnish port of Abo. The claim depended on the provisions contained in a form of time charter which had been employed excepting ice-bound ports and excepting the steamer from any obligation to force ice. This, which was the principal matter decided, affects the present question, if at all, only remotely and indirectly. But a minor question arose, because after returning from Abo the ship was directed to proceed to Manchester. Although a form of time charter was employed, the charter was for one Baltic round voyage between good and safe ports or places, within the limits of one Baltic round as the charterers should direct. It was under this provision that the direction to proceed to Manchester was given. The ship did proceed to Manchester but found that after she had discharged her cargo her height from the waterline was such that she could not proceed down the canal and clear the bridges unless her masts were cut. Accordingly her masts were cut and the shipowners sued the charterers to recover the costs incurred through doing it. Bailhache J. held that the shipowners were entitled to recover the cost as damages. His Lordship said (at pp. 575–6): " In my judgment the expense of cutting the masts must " fall upon the charterers, because they were only entitled to order the " Innisboffin to a safe port, which means a port to which a ship can safely " get and from which she can safely return. It was therefore a breach of " contract for the charterers to order her to proceed to Manchester, and having " committed a breach of contract they must pay the damages which flow " from that breach of contract." There was no appeal by the charterers from this part of the judgment but the shipowners appealed from the decision against them on that part of their claim relating to damage by ice. In dismissing the appeal Scrutton L.J. did make the following observation : " The question was argued before us whether the charterers who requested " the ship to go to an unsafe or an ice-bound port, to which she was not " bound to go, were liable if she went for damage sustained on her voyage. " I desire to reserve my opinion on this point. The state of knowledge of " shipowner and charterer may be material when the point has to be " decided." I take the observation to refer to the charter before the Court and to mean no more than that the question was left undecided.

In *Axel Brostrom & Son* v. *Louis Dreyfus*, 1932 38 Com. Cas. 79, there was a voyage charter for the carriage of a cargo from Durban to a safe port in the United Kingdom. The charterers named Londonderry. The ship had a length too great to enable it to proceed up and down the winding River Foyle without tugs and these could only be procured from Glasgow. The shipowner obtained the tugs and sued the charterers to recover the cost of doing so. Roche J. held that Londonderry was not a safe port for that vessel because of the narrowness of the winding channel forming the access to a port where no tugs were available. The proceeding before his Lordship was an award in the form of a special case. The arbitrator had decided that Londonderry was an unsafe port and on that ground he held that the shipowners were entitled to recover from the charterers. But he made his award subject to the opinion of the Court upon the question

whether on the true construction of the charterparty and on the facts stated Londonderry was a safe port to which the charterers were entitled to order the ship under the charterparty. Roche J. confirmed the award, and, although the question whether unsafety of the port was a ground of liability was not specifically reserved for the Court but was assumed, the confirmation of the award appears necessarily to imply that ordering the ship to an unsafe port was a breach of obligation.

In *Samuel West Ltd.* v. *Wrights (Colchester) Ltd.*, 1935 40 Com. Cas. 186, the shipowners sought to recover damages for actual physical injury to the ship. The charter was of a motor barge to take a cargo of coal " to Colchester as ordered or as near thereto as she could safely get and there " deliver the cargo alongside any wharf vessel or craft as ordered where " she could safely deliver." The berth to which she was sent was one where she took the ground but it proved a foul berth and she was damaged. The shipowners claimed against the consignees under a bill of lading incorporating the charterparty. Branson J. decided against the shipowners on the grounds—(1) that they had failed to prove that an order to go to that berth came from the consignees ; (2) that by the word " safely " in the provision quoted the ship was simply excused from obeying an order of the consignee if the wharf was not one where she could safely deliver. His Lordship said : " The attempt to put as a matter of contract the safety " of a berth upon the consignee as distinguished from the ship is an attempt " which has not succeeded yet in any reported case." The second ground of this decision appears to me to be inconsistent in principle with the decisions to which I have already referred.

In *Lensen Shipping Co.* v. *Anglo Soviet Co.*, 50 Ll. L.R. 62 before Mackinnon J., and 1935 40 Com. Cas. 320 ; 52 Ll. L.R. 141 before the Court of Appeal, decided in the same year, the question arose under a time charter for a series of voyages between certain European limits. The charter contained provisions—(1) that the steamer should be employed between safe ports where she could lie always afloat or safe aground where steamers of similar size and draught are accustomed to lie safely ; (2) that the captain should be under the orders of the charterer as regards, *inter alia*, employment of the ship ; and (3) that the charterers should indemnify the owners against all consequences arising from the captain, officers, etc., complying with such orders. The ship was brought to a berth where she could not lie afloat or safe aground and was damaged. Mackinnon J. decided that the shipowners were entitled to recover the damages from the charterers and his decision was affirmed by Greer and Slesser L.JJ., Maugham L.J. dissenting. Greer L.J. based his decision on the grounds—(1) that the requirement that the berth should be safe formed part of the limitations on the employment of the ship ; (2) that as the berth was unsafe the protective and the Cesser clauses had no application ; and (3) that as the limitations on the employment had been exceeded the obligations of the charterer had been broken. But his Lordship referred to *Samuel West Ltd.* v. *Wrights (Colchester) Ltd.*, 40 Com. Cas. 186, and distinguished that decision, together with the decision in *The Empress*, 1923, P. 96, on the ground that those

In the High Court of Australia.

No. 18. (i) Reasons for Judgment of His Honour, Chief Justice Sir Owen Dixon, 2nd June, 1954. —*continued.*

cases did not relate to time charters and there was no clause that the master should obey the charterers' orders. It may be remarked that *The Empress* was not a decision under a charterparty at all and that while *Samuel West Ltd.* v. *Wrights* (*Colchester*) *Ltd.* (*supra*) was decided under a voyage charter, nevertheless for the reasons that I have already given the grounds of the distinction, although perhaps not in themselves insufficient, do not appear to be sound in principle.

In *The Pass of Leny*, decided in the following year, 1936 155 L.T. 431, there was a voyage charter of an oil tanker 190 feet long and 30 feet 6 inches in beam. The tanker was built to take the ground in the course of loading. The charter required the ship to proceed to Boston, Lincs., or as near thereto as she could safely get safely aground and there load a part cargo of 600 tons of petroleum. A clause in the charter provided that the tanker would load " at a place reachable on her arrival which shall be indicated " by charterers and where she can always lie afloat or safely aground." She went to a wharf where as the tide fell she took the bottom of a berth not more than 30 feet wide. She had been moored not quite parallel to the wharf and she pivoted on her stern and slipped off and was damaged. Bucknill J. held that the charterers were not liable for the damage because he found that the owners had not established that the berth was unfit to lie upon. But at the same time his Lordship found that the berth was not a place where this ship could always lie safely aground and load because there was a substantial element of risk about the operation. His Lordship held that there was clearly no express warranty that the berth was one where the ship could so lie safely aground and that none should be implied. There was no warranty as to the fitness of the berth, express or implied. This conclusion appears to me to depend entirely on the construction of the special clause relating to the place reachable on the arrival of the ship.

Finally, Devlin J. gave an elaborate decision in *G. W. Grace & Co. Ltd.* v. *General Steam Navigation Co. Ltd.*, 1950 2 K.B. 387, in which he reviewed the principal authorities. The case turned on a time charter in the Baltime form. The charterers apparently entered into a voyage sub-charter with the Board of Trade. Under the voyage charter the ship loaded a cargo of timber for London from Hamburg. On the voyage to and from Hamburg the steamer was damaged by ice in the River Elbe. The time charter provided that the vessel was to be employed in lawful trades between good and safe ports between the Elbe, the United Kingdom and Brest, and by another clause that the master was to be under the orders of the charterers as regards employment, agency or other arrangements, and the charterers were to indemnify the owners against all consequences or liabilities arising from the master's signing bills of lading or otherwise complying with such orders. It was held that Hamburg was not a safe port within the meaning of the charterparty because the ship could not reach it and return from it safely. Devlin J. held that the action of the charterers in ordering the ship to Hamburg as an unsafe port constituted a breach of contract. The learned Judge referred to *Hall Bros. Steamship Co. Ltd.*, v. *R. & W. Paul Ltd.* (*supra*) and *Axel Brostrom & Son* v. *Louis Dreyfus & Co.* (*supra*), to the judgment of Bailhache J. in *Limerick S.S. Co. Ltd.* v. *Stott* (*supra*)

and of Mackinnon J. in *Lensen S.S. Co* v. *Anglo Soviet S.S. Co.* (*supra*) and said that they all proceeded on the basis that the order to go to an unsafe port or berth was a breach of the charterparty. His Lordship said : " Once the breach of contract is established, it seems to me to follow that, " subject to the ordinary rule of remoteness, damages must result." His Lordship referred to the ground on which Greer L.J. distinguished *Samuel West* v. *Wrights* (*Colchester*) *Ltd.*, 40 Com. Cas. 186, namely the ground that it did not relate to a time charter and that the contract did not contain a term that the master should obey the orders of the charterers as to the employment of the ship. Devlin J. said (at P. 396) : " With the greatest " deference, I find this distinction difficult to follow. It implies that, " whereas under a voyage charter party the master is not bound to obey " the order of the charterer to go to a port or berth outside the contractual " limits, under a time charter party he is. I cannot think that the clause " in the time charter party which puts the master under the orders of the " charterer as regards employment is to be construed as compelling him " to obey orders which the charterer has no power to give."

For the reasons I have already given I respectfully agree that the distinction is not sound. It is, of course, true that, since a charter party is a contract the terms of which depend on what the parties write into it, each charter party must bear its own interpretation and its meaning must be derived from the full contents of the document and it is true that a time charter often contains clauses absent from a voyage charter such as a clause of indemnity and a clause enabling the charterer to give orders as to the employment of the ship. But I can see no reason why, in a voyage charter, as well as in a time charter, the traditional provision that the ship shall proceed to a safe port as ordered by the charterer or to a safe wharf, dock or berth as ordered by the charterer, should not be interpreted as imposing on the charterer an obligation to direct the ship only to a port or dock that is safe. No doubt it is one aspect of a total obligation resting on the charterer to provide a cargo at a safe port or safe berth to which he is to order the ship to proceed. But it does not follow that the breach of the obligation must be regarded always as consisting in the failure to supply the cargo at a safe port rather than in the sending of the ship to a port which is unsafe. The shipowner may reject the performance tendered of the obligation to provide a cargo and thus avoid danger to the ship at the expense of the loss of freight and his measure of damages will be determined accordingly. But he may accept the cargo though tendered in breach of the condition that it will be done at a safe port without relieving the charterer from the consequences, if they ensue, of his breach of that condition. Indeed that is the very point decided in *Hall Bros. S.S. Co.* v. *R. & W. Paul*, 1914 111 L.T. 811. The purpose of the provision is to protect the ship in both aspects.

For these reasons I am of opinion that the charterer is liable under the Australian Grain Charter to the shipowner for damage received by the ship owing to being directed to an unsafe port or an unsafe wharf for loading.

The question whether in this particular case the damage received by the chartered motor vessel " Houston City " on 12th July 1951 while

In the High Court of Australia.

No. 18. (i) Reasons for Judgment of His Honour, Chief Justice Sir Owen Dixon, 2nd June, 1954 —*continued.*

loading at Geraldton was received by the ship owing to being directed to an unsafe port or an unsafe wharf depends on a number of matters. The first of them is whether in fact the berth at Geraldton was unsafe. There can be little doubt that the ship when it berthed on 7th July lay in a position of great hazard in case of a change in the weather, unless in the meantime the hauling off buoy was repaired and replaced. What is an unsafe port or unsafe berth has been the subject of much discussion and no doubt the character of the charter and the contingency to which the given ship may be exposed must be taken into account in determining whether the port is unsafe: see *Johnston Brothers* v. *The Saxon Queen S.S. Co.*, 1913 108 L.T. 564. But the only serious question here seems to me to arise from the temporary character of the condition which made the port or berth so unsafe in northerly weather. The absence of a buoy was temporary no doubt but it must be remembered that the berth was one which because of the natural features, its situation and its construction, exposed a ship lying at it to considerable danger from northerly weather and that the buoy was an attempt to remedy this natural defect in the character of the port. There was no certainty as to when the buoy would be replaced, just as there was no certainty as to how long the good weather would last. I think the correct view is that while the buoy was absent the berth was definitely unsafe and that the learned Judge's finding was correct.

It was suggested that the learned Judge was not justified in holding that the Defendant ordered the ship to No. 1 berth. In this suggestion I cannot agree. No. 1 berth was the only berth at Geraldton at which bulk wheat could be loaded. When the charterer directed the ship to load bulk wheat at Geraldton it could mean only that she was ordered to No. 1 berth.

It was then contended that the damage to the ship was not the natural or probable consequence of her being ordered to the berth. The chain of causation was broken, it was suggested, because the decision of the master to rely upon the fine weather and not to put out a stream anchor intervened. The master knew the berth to be unsafe, so it was said, or liable to become unsafe on a change of weather. His action in going to the berth with that knowledge, it was said, was the true cause of the damage. I do not think that this view can be supported. The purpose of requiring the charterer to choose a safe port or berth is to avoid danger to the ship. By ordering the ship to an unsafe berth the charterer placed the master in a dilemma and the master's acquiescence in the order cannot relieve the charterer of his responsibility. If it is material the charterer may be taken to have known as much about the matter as the master. The charterer was represented by an agent who took charge of the loading and had the same opportunities for knowledge as the master. The master was guided by the harbour-master-pilot who did not advise any other measures. In these circumstances it is difficult to see why the course which was taken was not a direct and natural consequence of the breach of the provision of the charter in giving an order to go to the berth at Geraldton.

In my opinion the judgment of Wolff J. is correct and the appeal should be dismissed.

No. 18

In the High Court of Australia.

No. 18. (ii) Reasons for Judgment of His Honour, Mr. Justice Webb and His Honour, Mr. Justice Taylor, 2nd June, 1954

(ii) Reasons for Judgment of His Honour Mr. Justice Webb and His Honour, Mr. Justice Taylor.

This is an appeal from an order of the Supreme Court of Western Australia adjudging the Appellant liable to the Respondent for damages sustained by the Respondent's motor vessel " Houston City " in the port of Geraldton on the 12th July, 1951, and for damages which the Respondent, pursuant to the Jetties Act 1926 and the Harbours and Jetties Act 1928 of Western Australia, has become liable to pay in respect of damages to the wharf at that port.

At the time of the events out of which the dispute between the parties has arisen the " Houston City " was under charter to the Appellant pursuant to a charterparty dated 19th May, 1951, under which the vessel, after completion of her then present voyage and discharge of her cargo, was required, by Clause 1 thereof, to " proceed, as ordered by the Charterers, " to one or two safe ports in Western Australia, or so near thereunto " as she may safely get, and there load according to the custom of the port, " always afloat, at such safe dock, pier, wharves, and/or anchorage as " ordered, a full and complete cargo of wheat in bulk ex silo which the said " Charterers bind themselves to provide, not exceeding what the vessel " can reasonably stow and carry in addition to her tackle, apparel, provisions, " fuel, and furniture." The charterparty was in the usual form of the Australian Grain Charter and required the vessel after loading to proceed with all reasonable speed *via* certain alternative routes to discharge its cargo of wheat at one safe port on the continent between Antwerp and Hamburg both inclusive.

On the 3rd July the master of the vessel, having completed his then present voyage and discharged the outward cargo, informed the Appellant by wireless of his estimated time of arrival at Fremantle and applied for loading orders. In reply the Appellant, on the same day, nominated Geraldton as the port of loading for a full and complete cargo of wheat in bulk and thereupon the " Houston City " proceeded to that port arriving about 5.45 p.m. on the 7th July.

The port of Geraldton is situated on the southern extremity of Champion Bay where the foreshores of that bay curve from the eastern shores of the bay towards the west. The western end and a substantial portion of the northern side of the harbour is enclosed by a stone breakwater. Towards the end of this stone breakwater there extends from the curve of the bay on the eastern side a structure composed partly of a timber viaduct and stone breakwater. The entrance to the harbour, which is little more than 400 feet wide, is from the north and lies between the extremities of the breakwater and the structure referred to. The harbour's only wharf extends from the east to the west along portion of the southern extremity of the bay and provides berthing accommodation for a limited number of ships, but No. 1 berth, which is the only berth where there are facilities for

In the High Court of Australia.

No. 18. (ii) Reasons for Judgment of His Honour, Mr. Justice Webb and His Honour, Mr. Justice Taylor, 2nd June, 1954 —*continued.*

the bulk loading of wheat, lies directly to the south of the harbour entrance and distant therefrom about 2,000 feet. The evidence establishes that this berth is frequently used by vessels for bulk loading of wheat, and, indeed, that under earlier charters to the Appellant other vessels of the Respondent have, on occasions, used this berth. The harbour, however, is not sheltered from winds blowing from directions between north-east and north-west and it is from these directions that gales, on occasions, blow with strength between May and November. According to the Australian Pilot (Vol. V 4th Ed.), which was tendered in evidence, " during bad weather " it is necessary to keep vessels off the wharf by means of bow and stern " hawsers to hauling-off buoys," and No. 1 berth is said to be the most exposed. To avoid the obvious risks to which a vessel might otherwise be subjected hauling-off moorings had been provided in the harbour but on this particular occasion a screw mooring, normally situated approximately 750 feet to the north of the westerly extremity of No. 1 berth and to which, normally, a stern mooring would, or should be, made fast, was missing and not available for this purpose. It had been struck by a vessel some little time before and had not at this time been restored, though the arrival of a repair ship, the " Cape Otway," was expected at any moment. Notwithstanding the absence of this mooring, however, the master of the " Houston City " berthed starboard side on at No. 1 berth. Before doing so he dropped his port bow anchor some little distance from the wharf but he did not, as it was contended he should have, run out a stream anchor from the stern of his vessel. At the time of his arrival the weather was fine and neither he nor the pilot thought that such a precaution was necessary.

It was in these circumstances that the vessel commenced loading on the 9th July. But on the 12th July before loading was completed a wind of gale force commenced to blow from the north and the movement of the vessel during the period of the gale, which lasted a few hours only, caused considerable damage not only to the vessel itself but also to the wharf. The wharf was a concrete structure normally fitted with two horizontal fenders constructed of heavy timber but at this time, it should be observed, approximately 50 feet of the upper fender was missing at this berth. The Respondent in these circumstances claimed that Geraldton was not a safe port and on this basis contended that the Appellant was liable to make good to it the damage sustained by its vessel and also damages for its liability under the Acts referred to to make good the damage to the wharf. The substantial basis of the Respondent's claim was that since, in the circumstances as they existed in July 1951, Geraldton was not a safe port within the meaning of the charterparty, the Appellant's action in directing the master of the ship to proceed there constituted a breach of the latter's obligation under the charterparty. It was conceded that this voyage charter did not contain any undertaking on the part of the charterer to indemnify the shipowner against the consequences of the master's compliance with the orders of the former but it was contended that the effect of Clause 1 —or, rather, that one of its effects—was to impose upon the charterer an obligation to refrain from ordering the vessel to an unsafe port and

consequently that such an order constituted a breach of contract sounding in damages. For this proposition the Respondents relied strongly on the observations of Devlin J. in *G. W. Grace and Company Limited* v. *General Steam Navigation Company Limited* (1950 2 K.B. 383), to which reference will later be made.

The first question which arose on the case presented to the learned trial Judge by the Respondent was whether at the relevant time Geraldton was a safe port for the " Houston City." The learned trial Judge found that it was not, and though he was of the opinion that the evidence did not establish any general proposition that Geraldton was an unsafe port, he was clearly of the opinion that the absence of the hauling-off mooring and of a substantial portion of the upper fender made the bulk wheat loading berth an unsafe berth in July 1951 for a vessel of the dimensions of the " Houston City." The mooring was, as he said, a facility provided to meet the known conditions and obviate the dangers attendant upon the berthing of a vessel broadside on to the quarter from which bad weather might at that time of the year reasonably be expected. In these circumstances it is difficult to see how No. 1 berth could be regarded as a safe berth at the relevant time unless alternative steps might reasonably have been taken to avoid the very obvious risks involved in entering Geraldton harbour and berthing at that berth. It was, however, suggested that, in the absence of the hauling-off mooring a stream anchor should have been run out from the vessel's stern immediately after she berthed for use as a hauling-off mooring in an emergency of the type which arose. But the learned trial Judge accepted expert evidence to the effect that neither a stream nor a kedge anchor would have been effective in the circumstances which prevailed and we see no reason why this view should not be accepted. A review of the whole of the evidence leaves us with the conviction that no witness was prepared to assert that the taking of such a precaution would have obviated the risks involved though they may to some extent have been lessened. Nor could any witness suggest other precautionary steps which could or might have been taken either upon the berthing of the vessel or after the emergency had arisen which would have prevented or avoided damage to the vessel. The vessel itself could not have been moved from the wharf after the gale commenced without the probability of even greater damage and since the gale arose suddenly and without warning no attempt was made to move the vessel at an earlier stage. There is no suggestion that the gale was of unprecedented force or that it was of a nature not reasonably to be expected during the winter months and, if this be so, we fail to see how the berth to which the vessel was directed can be held to have been a safe berth on the occasion in question, and, accordingly there is no reason why the finding of the learned trial Judge on this point should be discharged.

The next question is whether the Appellant having nominated Geraldton as the loading port, is liable in damages to the Respondent. The claim that the Appellant should be held liable was, according to the learned trial Judge, founded on an allegation of breach of contract on its part.

In the High Court of Australia.

No. 18. (ii) Reasons for Judgment of His Honour, Mr. Justice Webb and His Honour, Mr. Justice Taylor, 2nd June, 1954 —*continued.*

" The charterer," he said, " is said to have warranted the safety of the " berth." In dealing with this contention the learned trial Judge referred to *Samuel West, Limited* v. *Wright's (Colchester), Limited* (40 Com. Cas. 186), and the *Pass of Leny* (54 Ll. L.R. 288), which he regarded as being in conflict with the proposition that the charterer is liable in such a case as the present. Thereafter his Honour referred to a number of other cases including *G. W. Grace and Company Limited* v. *General Steam Navigation Company Limited* (*supra*), and referred to the fact that in the latter case Devlin J. expressed the view that the dictum of Branson J. in *West's* case was unsatisfactory. But in the result his Honour did not apply the observations in either of these cases but adopted as governing the case a passage from Carver's " Carriage of Goods by Sea," 9th Ed. In so doing his Honour said :

> " At p. 691 of Carver it is pointed out that where the person " giving the order knows of the danger, or where it is to be " considered as within his reasonable contemplation, he would " on principle appear to be liable for loss caused in consequence " of compliance with the order in any event. I should be inclined " to doubt whether the charterer's knowledge is material in a case " where the term ' safe wharf as ordered ' is to be construed ' as a warranty. But here the Defendant knew, or ought to " have known, of the condition of the berth where it was intended " that the ship should go and to which it was compulsorily piloted. " The editor of the ninth edition of Carver draws attention to the " statement in section 460 of the previous editions, that ' where " ' the charterer designates the berth he is bound to take reasonable " ' precautions to ascertain that it is safe, and, if necessary, warn " ' the master.' I think the statement is good law and applicable " here. The necessary control was present, the order was given " by the charterer, and it was obeyed. The act of the master in " staying in the berth after he became aware of the defect was not " unreasonable. His act was ' lawful, reasonable and free from " ' blame if he was merely doing what an intelligent observer " ' knowing how he was circumstanced would have expected him " ' to do ; any damage resulting would be the direct and natural " ' consequence of the breach of contract in giving the order.' " (See per Wright L.J., *Summers* v. *Salford* 1943 A.C. 283.) That " is the position as I see it with the " Houston City." The " Defendant is responsible for the damage sustained by the ship " and any loss which the ship suffers in making good the damage " to the wharf."

It is difficult to see the precise ground upon which his Honour's decision was, in the ultimate analysis, based. If it was based on breach of contract constituted by a direction to the master to proceed to an unsafe port, it is we should think, immaterial that the Appellant knew or ought to have known of the unsafe condition of the Geraldton harbour and No. 1 berth in particular, whilst if it is based on the proposition that the Appellant

was bound to take reasonable precautions to ascertain that it was safe and, if necessary, warn the master the Appellant's liability must be regarded as arising from the breach of an extra contractual duty owed to the Respondent. The proposition that such a duty exists and that breach of it will give rise to an action for damages really negatives the proposition that the liability of a charterer in the circumstances of the Appellant arises from a breach of contract constituted by the giving of a direction to proceed to a port which is in fact unsafe. We do not think that there is any authority which requires us to hold that the charterer's liability in such a case as the present arises from breach of a duty to take reasonable precautions to ascertain that a designated berth is safe, " and, if necessary, warn the master." In our view the Appellant is either liable in damages for breach of contract or is not under any liability whatever and we should add that were it not for the observations of Devlin J. in *Grace's* case (*supra*), we would have little hesitation in holding that the Appellant is not in the circumstances of this case liable.

Clause 1 of the charterparty appears to us to be designed to define the obligations of the shipowner with respect to loading ports and to prescribe, consequentially, a limitation upon the charterer's *rights* to designate such ports though, no doubt, under that clause and Clauses 6 and 7 the Appellant was bound to give appropriate loading orders and provide the stipulated cargo. There is, of course, ample authority for the proposition that a failure or refusal, pursuant to such a provision, to designate a safe port will sound in damages and the nomination of an unsafe port may well be involved in such a failure or refusal. But it by no means follows that where the nomination of an unsafe port is involved in such a failure or refusal the shipowner may recover not only the damages which flow from the failure or refusal but also the damages sustained by the vessel after proceeding to the designated port and as the result of its unsafe nature or condition. Such damages do not flow from a refusal to nominate a safe port. The provisions of Clause 1 do not purport to impose upon the charterer any obligation other than that already indicated and there is no reason why any implication should be made having the effect of imposing upon it an obligation to ascertain whether a port which it desires to designate is safe or not, or, of giving rise to a warranty that any designated port is in fact safe. The view which we have expressed apparently commended itself to Branson J. in *West's* case (*supra*) where the consignee's bill of lading incorporated the terms of an existing charterparty which stipulated for the carriage of cargo to " Colchester as ordered or so near thereunto as she may " safely get, and there deliver the same alongside any wharf, vessel or " craft, as ordered, where she can safely deliver." The relevant contention of the shipowner in that case was stated by Branson J. in the following form :

> " It is said that under the charterparty, the terms of which " were incorporated in the bill of lading, there was a duty upon " the Defendants—a contractural duty—to order this vessel " alongside a safe berth, and as the Defendants were under that

In the High Court of Australia.

No. 18.
(ii) Reasons for Judgment of His Honour, Mr. Justice Webb and His Honour, Mr. Justice Taylor, 2nd June, 1954
—*continued.*

" duty, in the first place there is a presumption that the berth " alongside which the vessel went was the berth to which she was " ordered to go, and, secondly, that being so, and the berth being " an unsafe berth, there was a breach of contract on the part of the " Defendants."

After reviewing the facts his Lordship proceeded :

" It seems to me that the attempt to put as a matter of " contract the safety of a berth upon the consignee as distinguished " from the ship is an attempt which has not succeeded yet in any " reported case. I think, when one considers the construction " of this portion of the charterparty, it really means no more than " this, that it gives a right to the consignee to give an order to the " ship to go to Colchester and there ' deliver alongside any wharf, " ' vessel or craft, as ordered.' But that right is controlled by " the next words of the charterparty, ' where she can safely " ' deliver.' Who is to ascertain whether a particular berth is " one at which the ship can safely deliver is not precribed by the " contract at all. It is said by Mr. Holman that the duty must " lie upon the consignee because the ship cannot tell what sort " of a berth she will find alongside the wharf, vessel, or craft " alongside which she is ordered to go. But the consignee cannot " in the ordinary way tell what is the draft of the ship, what is " the shape of her bottom, and what sort of berth she wants in " order to be able to lie there without taking damage if she has to " take the ground. She may be a ship which can take the ground " safely, or she may not. It seems to me that the true position " is that the charterparty gives the consignee a right to order the " vessel alongside any particular wharf, but if the vessel does not " know what it is going to find there it can make inquiry, and if " it finds that it cannot safely deliver by going there, then it is " excused from obeying that order ; that is all, in my view, that " is intended by those words of the charterparty. I think that " view is supported by what is said by Hill J. in his judgment " in the case of The Empress."

The circumstances which gave rise to the litigation which led to the decision of Bucknill J. in the *Pass of Leny* (155 L.T. 421), may, perhaps, be said to be distinguishable from those in the present case, but it is a clear decision that where, under a charterparty which required that a vessel should proceed to " Boston (Lincs.) or as near thereto as she can safely " get (safely aground)," an order was given that she should proceed to a particular berth which was in fact unsafe the action of the charterer did not constitute a breach of contract.

The case of *Lensen Shipping Company Limited* v. *Anglo-Soviet Shipping Company Limited* (40 Com. Cas. 320), upon which the Respondent strongly relied in this appeal, is, however, markedly different from the present case and the last two mentioned cases. The facts in that case showed that the

vessel in question was chartered by the Lensen Shipping Company Limited to the Anglo-Soviet Shipping Company Limited for a series of voyages within certain European trade limits. Clause 1 of the charterparty contained printed words providing that the vessel should be employed between safe ports where she could lie safely always afloat followed by the typewritten words " or safe aground where steamers of similar size and draft are " accustomed to lie aground in safety." Clause 8 of the charterparty provided that the captain should prosecute all voyages with the utmost despatch and that he should be under the orders of the charterers as regards employment, agency or other arrangements. Further it provided that the charterers should indemnify the owners against all consequences or liabilities arising from the captain, officers, or agents signing bills of lading or other documents or otherwise complying with such orders. Finally Clause 12 provided, *inter alia,* that the charterers should be responsible for loss or damage caused to the steamer or to the owners by goods being loaded contrary to the terms of the charterparty or by improper or careless loading or stowage of goods or any other improper or negligent act on their part or that of their servants. A preliminary question arose as to whether the words " where she can lie safely always afloat or safe aground where steamers " of similar size and draft are accustomed to lie aground in safety " were part of the definition of the extent to which the charterers were entitled to employ the vessel during the whole period of her employment. Greer L.J. was of the opinion that this was the true interpretation, though he was prepared, alternatively, to hold that the same result followed by necessary implication. Accordingly he said, " it follows that the ship " was employed at a loading berth which was outside the limits in which " the owners agreed that she should be employed " and upon this, among other grounds, his Lordship considered the charterers liable for the damage which had been occasioned by reason of the vessel loading at an unsafe berth. He was also of the opinion that the charterers were, in any event, liable under the provisions of the indemnity clause and also under the provisions of Clause 12 to which we have already referred. In this appeal, however, the Respondents relied upon the observations made by his Lordship in relation to the first ground upon which he considered the charterers were liable and contended that there was no relevant distinction between the position of a charterer under a time charter of the nature under consideration in that case and that of the Appellant under the charterparty before the Court in the present case. In the course of the argument it was contended that, notwithstanding a provision that he shall be under the orders of the charterers as regards the employment of a ship, the master of a vessel under a time charter is not bound to obey an order, such as an order to proceed to an unsafe port, which takes the employment of the vessel outside the contractual limits. This being so, it is said, there is no real distinction between the situation which presented itself to the Court of Appeal in that case and the circumstances which we are called upon to consider. We think, and it seems to us that Greer L.J. must also have thought, that there is a very real distinction between the two sets of circumstances. In the

In the High Court of Australia.

No. 18. (ii) Reasons for Judgment of His Honour, Mr. Justice Webb and His Honour, Mr. Justice Taylor, 2nd June, 1954 —*continued.*

present case the master, as such, was under no obligation to accept orders from the charterer. No doubt as master of the vessel and as a servant of the Respondent he was bound as regards the latter to fulfil the terms of the contract evidenced by the charterparty so far as he was called upon to do so, but he was under no obligation to accept orders from the charterer generally as to the employment of his ship. In *Lensen's* case Greer, L.J. thought it necessary to refer to a number of the provisions of the charterparty for the purpose of determining the rights of the parties and it seems reasonably apparent that he attached importance to the circumstance that the charterers were entitled to give orders as to the employment of the ship, and it was a material circumstance that orders for the employment of the ship could be given only within the limits of the charterparty which included a limitation to ports " where she can lie safely always afloat or safe aground " where steamers of similar size and draft are accustomed to lie aground " in safety." The giving of an order to the master to proceed to an unsafe berth, though one which he may have been entitled to refuse to execute, was an order which he was entitled to carry out on the charterer's behalf and, undoubtedly, in such circumstances the shipowner was entitled to complain that the charterers had committed a breach of contract by ordering the master to take the vessel to an unsafe berth. In executing the order there could, we think, be little doubt that the act of the master must, as between the shipowner and the charterers, be regarded, in law, as the act of the latter, and, as such, as constituting a breach of contract giving rise to damages. Considerations such as these, it seems to us, were vital to the observations of Greer, L.J. on the first point upon which he based his decision and, that this was so, is evident from his concluding observations concerning cases such as *West, Limited* v. *Wright's (Colchester), Limited (supra)*. Concerning such cases his Lordship said :—

> " A number of cases were cited in support of the charterers' " contentions, but I do not think they have any relevancy to the " questions of construction that arise on this charterparty. Cases " such as *West, Limited* v. *Wright's (Colchester), Limited,* and " *The Empress* do not apply, for, among other reasons, they do " not relate to time charters, nor did the contracts in those cases " contain a term that the master should obey the orders of the " charterers or shippers as to the employment of the ship."

The same considerations we think are implicit in the reasons of Slesser L.J. who based his decision upon the implication " that it was the " intention of the parties, as derived from the charterparty, though not so " expressed in words, that the vessel should be employed not only between " good and safe ports and places where she could lie safely always afloat " or safe aground but also between good and safe berths with similar " qualifications—the word ' port ' or ' places ' to be deemed to include " that part of the port or places which is a berth." His Lordships' reference to the limits within which the vessel should be employed must be taken to mean the limits within which the vessel should be employed by the charterer.

In *G. W. Grace and Company Limited* v. *General Steam Navigation Company Limited* (*supra*) Devlin J. referred to the fact that *Samuel West, Limited* v. *Wright's* (*Colchester*), *Limited* (*supra*) was cited in the Court of Appeal and distinguished by Greer, L.J. on the ground that it did not relate to a time charter and on the ground that the contract did not contain a term that the master should obey the orders of the charterers as to the employment of the ship. " With the greatest deference," said Devlin J., " I find this distinction difficult to follow. It implies that, whereas under " a voyage charterparty the master is not bound to obey the order of the " charterer to go to a port or berth outside the contractual limits, under " a time charterparty he is. I cannot think that the clause in the time " charterparty which puts the master under the orders of the charterer as " regards employment is to be construed as compelling him to obey orders " which the charterer has no power to give." " But," his Lordship added, " it is perhaps sufficient for my determination in the present case that it " concerns a time charterparty and is therefore governed by *Lensen's* " *Steamship Company Limited* v. *Anglo-Soviet Steamship Company Limited* " and not by *Samuel West, Limited* v. *Wright's* (*Colchester*), *Limited.*" In referring to the fact that the charterparty in *West's* case did not contain a term that the master should obey the orders of the charterers as to the employment of the ship Greer L.J. was merely referring to the terms of the relevant contractual stipulation usually found in time charters. With deference to Devlin J. it seems to us that it was not suggested that the master of a vessel under a time charter containing such a clause is bound to obey an order of the charterer to go to a port or berth outside the contractual limits; what his Lordship appears to have had in mind was that where the master is placed under the orders of the charterer the action of the master in executing an order of the charterer to proceed to an unsafe port or berth is as between the parties, and notwithstanding the fact that the master may be entitled to refuse to execute the order, in law, the act of the charterer and that, as such, it constitutes a breach of contract on the part of the charterer.

In the course of the argument on the present appeal reference was also made to *Hall Bros. Steamship Company Limited* v. *R. & W. Paul Limited* (19 Com. Cas. 384), *Axel Brostrom & Son* v. *Louis Dreyfus & Company* (38 Com. Cas. 79), and the Judgment of Bailhache J. in *Limerick Steamship Company Limited* v. *W. H. Stott & Company Limited* (1921 1 K.B. 568). These cases were also referred to by Devlin J. in *Grace's* case (*supra*) after stating his own view of the point involved in the case before him. At p. 396 he said:

> " As the authorities are not clear and conclusive on the point " which I have to determine, I shall state my own view on it. " I think that it is necessary first to determine whether the giving " of the order constitutes a breach of contract. *Ex hypothesi*, " the order has no contractual force and is therefore of no greater " validity than an order given to the ship by a stranger. The " charterers in this case do not expressly warrant that their orders

" will be within their powers, and it might be argued that it is " for the recipient to determine for himself whether they are " binding on him or not. In some types of contract, that may be " so ; but in this case counsel for the charterers concedes that the " charterparty, either on its true construction or by implication, " forbids the giving by the charterers of orders outside their " powers, and accordingly that the giving of an order to sail to " an unsafe port is a breach of the charterparty. If this con- " cession had not been made, counsel would plainly have found it " difficult to explain *Hall Brothers Steamship Co. Ld.* v. *R. & W.* " *Paul, Ld., Axel Brostrom and Son* v. *Louis Dreyfus and Co.*, and " the Judgments of Bailhache J. in *Limerick Steamship Company* " *Ltd.* v. *W. H. Stott and Co. Ld.* and of Mackinnon J. in *Lensen* " *Steamship Company Ld.* v. *Anglo-Soviet Steamship Company Ld.*, " which all proceeded on the basis that the order to go to an unsafe " port or berth was a breach of the charterparty. The same " result might be reached, irrespective of the giving of any order, " by construing cl. 2 as a warranty that the ship would not be " employed otherwise than between good and safe ports ; but, in " view of the charterers' concession, I need not consider this."

We respectfully agree that it was implicit in the charterparty under consideration in *Grace's* case that orders should not be given by the charterer to the master to proceed to an unsafe port. The basis of such an implication is to be found in the limits within which it was agreed that the charterer should be authorised to employ the ship and in the stipulation that the master should be under the orders of the charterers as regards employment agency or other arrangements. The implication, it may be said, was necessary to carry out the clear intention of the parties with respect to the employment of the ship and, in relation thereto, the giving of orders to the master. But it does not follow that such an implication arises in all cases or that failure to make the concession which was in fact made by counsel for the charterers in that case would have caused difficulty in explaining the other cases referred to by his Lordship. As a general rule there is, we should think, no room for such an implication where the master is not, as between the shipowner and the charterer, subject to the orders of the latter and this is the position in the present case. In *Hall Bros. Steamship Company Limited* v. *R. & W. Paul Limited* (*supra*) the question concerning which Devlin J. expressed difficulty does not appear to have been raised. The questions which arose for decision were whether the Plaintiffs were estopped from alleging that King's Lynn was not a safe port, whether King's Lynn was in fact a safe port and whether the port itself included not only the dock but the place where the vessel was lightened before proceeding into the dock. The full terms of the charterparty do not appear in the report of the case and we should not have thought that that decision is an authority for any general proposition relevant to the present case. In *Axel Brostrom & Son* v. *Louis Dreyfus & Company* (*supra*), Roche J. was concerned with questions raised in a special case stated by an

arbitrator. The arbitrator had found that the port of Londonderry was not a safe port for the vessel mentioned in that case and on that basis he awarded a sum of money to the owners. The only question raised by the case for the opinion of the Court was whether on the true construction of the charterparty and on the facts set out Londonderry was a safe port. The case expressly provided that should that question be answered in the negative the award should stand but that if it should be answered in the affirmative there was to be substituted an award that the owners were not entitled to recover any damages against the charterer. Again, there is nothing appearing from the reasons in that case to assist in the solution of the present problem. The third case, that of *Limerick Steamship Company Limited* v. *W. H. Stott & Company Limited* (*supra*), was concerned with a vessel under time charter to the defendants and the shipowner sought to recover damages for breaches of the charterparty. One breach complained of was that the vessel had been ordered to an ice-bound port. A second complaint was that she had subsequently been ordered to proceed to Manchester and that, although she was able to pass through the Manchester Shipping Canal on her way to Manchester, she was unable, after having discharged her cargo, to proceed down the canal and clear the bridges without cutting her masts. In these circumstances it was contended that Manchester was not a safe port for this vessel. There was a finding for the charterers in respect of the first breach complained of, but in respect of the second breach damages were awarded. But this was a case where the vessel was let and the charterers agreed to hire the steamer for one Baltic round voyage and where the vessel was to be employed in lawful trades between good and safe ports or places within the limits of a Baltic round voyage. The charterparty further provided that " although appointed by " the owners the captain shall be under the orders and direction of the " charterers as regards employment agency or other arrangements." (See 1921 2 K.B. at p. 614). This being so, the principles applied in the *Lensen Shipping Company's* case (*supra*), were applicable and there is, we think, no difficulty in reconciling the view in that case with the views in *West's* case (*supra*).

We have been unable to find any case where, in the circumstances such as the present, a charterer has been held to warrant the safety of a port nominated by him, or, where the nomination of an unsafe loading port or berth pursuant to a charterparty in the form of that which is before us has been held to constitute a breach of contract giving rise to damages where the master of the vessel has accepted the order and proceeded to the port and there sustained damage. There is, as we have already said, no doubt that a refusal or failure to provide the stipulated cargo at a safe port is answerable in damages but such a conclusion depends upon principles which do not assist in the solution of the problem which arises in this case. In all the circumstances we prefer to adopt the observations of Greer, L.J. in the *Lensen Shipping Company's* case (*supra*) and those of Branson J. in *West's* case (*supra*) rather than those of Devlin J. in *Grace's* case (*supra*) and to hold that where under a charterparty in the form of that which is

In the High Court of Australia.

No. 18. (ii) Reasons for Judgment of His Honour, Mr. Justice Webb and His Honour, Mr. Justice Taylor, 2nd June, 1954 —*continued.*

before us an unsafe port or berth is nominated by the charterer he does not, merely by reason of such nomination, become liable for damages sustained as a result of the master proceeding to such unsafe port or berth. Nor, do we think, that in the circumstances of this case there is any other ground upon which the charterer should be held liable. Accordingly we are of the opinion that the appeal should be allowed.

No. 19. Order. 2nd June, 1954.

No. 19.

Order.

THIS APPEAL coming on for hearing on the 19th, 20th and 21st days of October, 1953, at Perth in the State of Western Australia, UPON HEARING Mr. T. S. Louch Q.C. and Mr. W. H. Johnston of Counsel for the Appellant and Mr. N. de B. Cullen and Mr. R. W. Cannon of Counsel for the Respondent and the Court having reserved its decision and such reserved decision having been delivered at Melbourne in the State of Victoria on the 2nd day of June, 1954 IT IS ORDERED that the Appeal be and the same is hereby allowed AND THIS COURT DOTH FURTHER ORDER that the Order of the Supreme Court dated the 30th day of January, 1953, be discharged and in lieu thereof there be judgment for the Defendant (the Appellant herein) with costs including the costs of the abortive arbitration proceedings AND THIS COURT DOTH FURTHER ORDER that the costs of the Appeal be taxed and paid by the Respondent to the Appellant.

BY THE COURT.

G. J. BOYLSON,
District Registrar.

THIS ORDER was taken out by DAVID DOWSON BELL of 8–10 The Esplanade, Perth, Commonwealth Crown Solicitor and Solicitor for the Appellant.

No. 20.

Order in Council granting Special Leave to Appeal.

AT THE COURT OF BUCKINGHAM PALACE.
The 1st day of February, 1955.

Present

THE QUEEN'S MOST EXCELLENT MAJESTY.

LORD PRESIDENT. MR. SELWYN LLOYD.
LORD PRIVY SEAL. MR. MILLIGAN.
MARQUESS OF READING. MR. BIRCH.
MR. PEAKE.

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 21st day of December, 1954, in the words following, viz. :—

" WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Reardon Smith Line Limited in the matter of an Appeal from the High Court of Australia between Reardon Smith Line Limited Petitioners (Plaintiffs) and Australian Wheat Board Respondents (Defendants) setting forth (among other matters) that by a Writ of Summons No. R. 1952 No. 22 dated the 9th October 1952 the Petitioners instituted proceedings against the Respondents in the Supreme Court of Western Australia claiming damages for breach by the Respondents of a contract contained in a charterparty in that the Respondents ordered the Petitioners' vessel ' Houston City ' (thereinafter called the vessel) to proceed to an unsafe port dock pier wharf or anchorage whereby the vessel's plates and the quay alongside which she berthed were damaged: that the facts admitted or proved to the satisfaction both of the Supreme Court of Western Australia and of the High Court of Australia were that by a charterparty dated the 19th March 1951 on the terms of the Australian Grain Charter commonly used for shipments of grain between Australia and Europe the Respondents chartered the vessel from the Petitioners for a voyage from Western Australia to the continent between Antwerp and Hamburg: that Clause 1 of the charterparty provided ' that the vessel . . . should with all convenient speed . . . proceed as ordered by the Charterers to one or two safe ports in Western Australia or so near thereunto as she may safely get and there load according to the custom of the port always afloat at such safe dock pier wharves and/or anchorage as ordered . . . ': that on the 3rd July 1951 the master of the vessel applied to the

In the Privy Council.

No. 20. Order in Council granting Special Leave to Appeal, 1st February, 1955—*continued.*

Respondents for loading port orders and in reply received a wireless message instructing him to load a complete cargo of wheat in bulk at Geraldton where there is only one berth (known as No. 1 berth) suitable for the loading of wheat in bulk: that the vessel arrived off Geraldton on the 7th July 1951 and on the instructions of the Pilot-Harbour Master berthed starboard side to the quay at No. 1 berth which berth is exposed to winds from the North-East to North-West which prevail between May and November such winds tending to force a vessel against the quay and for this reason hauling-off buoys had originally been provided to which vessels could attach lines from forward and aft: that the side of the quay which was made of concrete had originally had two horizontal wooden waling pieces attached to its face as additional protection both to the quay and to any vessels berthed there and when the vessel berthed on the 7th July 1951 No. 2 hauling-off buoy which would have been opposite the stern of the vessel was not in position having broken away from its moorings and about 50 feet of the upper waling piece in the centre of the berth was missing: that the mooring of the vessel was completed on the 7th July 1951 and the loading of grain began on the 9th July and continued until the 12th July 1951 when during the morning and early afternoon of the 12th July 1951 the wind changed direction from the South-West to the North and suddenly increased in force from moderate to gale and as a result the vessel began to roll and to strike the wharf with considerable frequency and force causing extensive damage to both the vessel and the wharf: that after a hearing limited to the issue of liability the Court found in favour of the Petitioners: that the Respondents appealed to the High Court which on the 2nd June 1954 allowed the Appeal (Dixon C.J. dissenting): And humbly praying Your Majesty in Council to grant the Petitioners special leave to appeal from the Judgment of the High Court of Australia dated the 2nd day of June 1954 or for such further or other relief:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioners to enter and prosecute their Appeal against the Judgment of the High Court of Australia dated the 2nd day of June 1954 upon depositing in the Registry of the Privy Council the sum of £400 as security for costs:

"AND THEIR LORDSHIPS do further report to Your Majesty that the proper officer of the said High Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioners of the usual fees for the same."

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Commonwealth of Australia for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

W. G. AGNEW.

In the Privy Council

No. 20. Order in Council granting Special Leave to Appeal 1st February, 1955— *continued.*

Exhibits.

EXHIBITS.

A. Affidavit of George Harvey, sworn 20th October, 1952.

A.—Affidavit of George Harvey and Documents exhibited thereto.

I, GEORGE HARVEY, make oath and say as follows:

I have been at sea for the past twenty-four years and obtained my Master's Certificate in December 1939.

I have been in command of the M.S. "Houston City" for the past 18 months and was her Chief Officer for the three months previous thereto.

The M.S. "Houston City" is a vessel of 7287 g.r.t. overall length 422′ 11″, and 56′ 6″ in beam.

After discharging a cargo in Japan she had to proceed to one or two ports in Western Australia to load a bulk cargo of wheat for the Continent under a Charter Party dated 19th March 1951, made with the Australian Wheat Board (Exhibit marked G.H. 1). I had a copy of this Charterparty on board the ship. In accordance with the provisions of the Addendum—Clause 7—I had to apply to Charterers for loading port orders by Wireless 96 hours prior to arrival in loading area and on the 3rd July 1951 I radioed the Wheat Board, Perth, for orders (Exhibit marked G.H. 2) and received a reply (Exhibit G.H. 3) a few hours later that I was to load a complete cargo of wheat in bulk at Geraldton.

In compliance with such instructions the vessel duly proceeded to that port where we arrived on July 7th and were met at the entrance to the Harbour by a Captain Sweet who indicated the Berth at which we were to load. This was the No. 1 Grain Berth at the eastern end of the Quay but which at the time was partially blocked with a Coastal Ship and we had to wait from 2 p.m. until 5 p.m. when this vessel left before we could proceed towards our berth. I had been to the Port of Geraldton on two previous occasions to load grain and on each of them the vessel had been put into the same berth which was the only one suitable for loading bulk grain as it was alongside a silo or storage shed and where there was also an elevator on rails which did not extend beyond this particular berth. While I am quite satisfied that the vessel must of necessity have been sent to this particular berth I would point out that in accordance with the provisions of Clause 1 of the Charterparty she had to load at such dock, pier, wharf or anchorage as ordered by Charterers and I naturally assumed that in giving instructions as to the berthing of the vessel Captain Sweet was acting as Agent for the Charterers for the purpose of complying with their obligations. There was no tug available to assist the berthing and we duly proceeded under our own steam to this easternmost berth where we made fast starboard side to the Quay. The port anchor was run out with about 5 shackles of chain leading in a N'W'ly direction and we had out two 3″ wire springs, one fore and one aft, together with four mooring ropes forward and the same number aft. There was also a heavy $4\frac{1}{2}$″ wire at each end. Upon the two previous occasions there had been a buoy in position off the Wharf but which was now absent. Captain Sweet informed me that it had been damaged and removed but that its return was imminent.

As and when it had been restored in place it was my intention to have run a line to it from the ship and which would have assisted in holding her off the Quay in case of necessity. There was no such necessity at the time of berthing in view of the fine weather which then prevailed and continued for the next few days, and I had no apprehensions as to the safety of the berth at the time we were making fast. While the berthing of a vessel would be the responsibility of a Master, the safety in berthing must be within the knowledge of the Harbour Master and a Ship's Master would naturally give all due attention to his advices. The absence of this buoy did not give rise to the necessity for considering the putting out of a stern anchor at the time of coming alongside the Quay. Such an operation would have been possible. There was, however, never any suggestion by Captain Sweet that such a step would be advisable in view of the anticipated immediate reinstatement of the buoy.

The berth was faced with two heavy horizontal fenders running I believe the whole length of the Quay. A section of about 50′ of the upper fender was missing in way of the centre of the berth where we lay but with the vessel held up against the fenders I did not think that the missing section was a defect which affected the safe mooring of the vessel in good weather.

There was a discussion with Captain Sweet about this at the time but in his view the buoy was expected back at any moment so that the defect would not affect the safe berthing of the vessel.

Mooring was completed on the afternoon of July 7th and on the morning of the 9th we commenced loading wheat. This continued until 12, fine weather having so far prevailed.

On the 12th when we resumed loading at 8 a.m. the weather was a moderate S.W. wind but in accordance with the daily report issued by the Perth Meteorological Office the nearest weather disturbance was approximately 300 miles to the W. so that worse weather was not anticipated (Exhibit marked G.H. 4). About 11.45 a.m. however, it freshened from the northward and soon increased to gale force. By that time it was too late to take any further steps. It was only on that day that a tender was lying in the Harbour in process of replacing the buoy so that it had not yet been possible to run out any line to it from the ship. To have put out the stern anchor would have required the assistance of craft and none was available in the Harbour for this purpose. Even had it been, such an operation would have involved lowering the anchor into the craft utilising a ship's winch and derrick and the craft subsequently carrying it the requisite distance from the vessel before lowering it overboard. An operation of this nature would have involved at least two hours. While such an operation would have been possible by using a ship's lifeboat this could only have been done in fine weather, but not at any time after the weather had worsened. I would emphatically state that at no time did Captain Sweet make any suggestion that such a stern anchor should be run out nor is it true to say that I refused to do this upon the grounds that it would take too long.

Exhibits.

A. Affidavit of George Harvey, sworn 20th October, 1952—*continued.*

About 1.10 p.m. the vessel began bumping heavily up against the Quay with such force that the concrete started to crack and break up. I had the head lines slackened and the port anchor cable tightened in an endeavour to reduce the bumping, but later the back spring parted which had to be replaced and I then increased the moorings putting out further ropes, but deemed it inadvisable to impose any further strain upon the port anchor cable as this would tend to throw the starboard quarter of the vessel against the Quay with a risk of serious damage.

In an endeavour to reduce the ship's movements I had the starboard anchor dropped on the bottom between the ship and the Quay and later considered with Captain Sweet the advisability of leaving the Quay under our own steam and proceeding to an anchorage, but we both agreed that any attempt to do so might have resulted in severe damage to our starboard quarter, and at that time the weather commenced to moderate so that the need for any further precautions did not arise.

After the gale had subsided, as a result of the vessel's ranging it was found that in addition to the broken spring, all the mooring ropes out had become strained and chafed. I also made an inspection of the vessel from the shore and found that her plating had suffered damage where she had ranged alongside the Quay. I accordingly contacted Lloyd's Agents forthwith and requested the attendance of a Surveyor and a Mr. Steel arrived from Fremantle the next evening and carried out a survey. I had read his report and agreed with its contents.

Pending the survey, in view of the fact that damage to the plating was close to the water line and would therefore have been submerged if further loading had taken place, I informed the Stevedores that it would be unwise to continue loading and this was accordingly suspended ; it had however continued throughout the gale.

The temporary repairs referred to in the Survey Report were carried out on the 15th July following which a Certificate of Seaworthiness was issued. Loading was then resumed on the 16th, completed on the 17th and on the 18th we sailed from Geraldton. Permanent repairs were subsequently done at Sunderland.

A. Exhibit G.H. 2 to Affidavit of George Harvey. Radio, Master to Wheat Board, 3rd July, 1951.

A.—Exhibit G.H. 2 to Affidavit of George Harvey—Radio, Master to Wheat Board.

SIR WILLIAM REARDON SMITH & SONS, LTD.
CARDIFF.

3.7.51. TRANSMISSION.

TO WHEATBOARD PERTH

"HOUSTON CITY" FULLY FITTED ETA FREMANTLE 6 AM EIGHTH REQUESTS LOADING PORT ORDERS

MASTER

Exhibits.

A.
Exhibit G.H. 3 to Affidavit of George Harvey. Radio, Wheat Board to Master, 3rd July, 1951.

A.—Exhibit G.H. 3 to Affidavit of George Harvey—Radio, Wheat Board to Master.

3.7.51.

TO MASTER " HOUSTON CITY "

DARWIN RADIO

LOADING PORT GERALDTON FULL AND COMPLETE CARGO WHEAT IN BULK ADVISE ETA AND IF FITTED READY TO LOAD

WHEATBOARD

A.
Exhibit G.H. 4 to Affidavit of George Harvey. Preliminary Storm Warning.

A.—Exhibit G.H. 4 to Affidavit of George Harvey—Preliminary Storm Warning.

PRELIMINARY STORM WARNING ISSUED FROM PERTH WHR BUREAU AT 112330Z STOP AREA AFFECTED SOUTH OF LAT 23 STH AND BETWEEN LONGS 103 AND 120 DEG E STOP A COMPLEX DEPRESSION WITH MAIN CENTRE BELOW 1004 MBS IS LOCATED APPROX LAT 28 DEGS S AND LONG 109 DEGS E STOP A SECOND CENTRE IS INTENSIFYING AT ABOUT LAT 35 DEGS W AND LONG 115 DEGS STOP MOD TO ROUGH SEAS AND FRESHENING N.E. TO N W WINDS THROUGHOUT AREA EAST OF LONG 108 DEGS E AND BACKING W TO S W TO THE WEST STOP WHR PERTH

D.
Australia Pilot, Volume V, Fourth Edition (page 314).

D.—Australia Pilot, Volume V—Fourth Edition (page 314).

Anchorage.—Prohibited anchorage. The anchorage in Champion Bay is well sheltered from all winds except those between north-west, through north, to north-by-east, from which direction gales sometimes blow with strength between May and November. Vessels with good ground tackle and a long scope of cable have ridden out heavy gales in this bay. The wind, as a rule, hauls more quickly south-west than in gales experienced farther southward. With the wind from west-south-west, at which point these gales are most severe, the sea breaks heavily on Four-fathom banks, but these banks shelter the anchorage to a great degree. With a falling barometer, accompanied by an unusual rise of the sea level, a north-westerly gale may be expected.

Anchorage is prohibited in the Inner harbour in an area northward and westward of an imaginary line drawn from the light structure on the head of the island breakwater 233° for $3\frac{1}{2}$ cables, and thence 180° to the shore.

Exhibits.

D. Australia Pilot, Volume , Fourth Edition (page 314). —continued.

Berthing.—Geraldton wharf, on the southern side of the Inner harbour, is built of concrete and is 1,510 feet (460m2) in length; there are usually three berths available, with a depth of 30 feet (9m1) alongside in January, 1950. During bad weather it is necessary to keep vessels off the wharf by means of bow and stern hawsers to hauling-off buoys; No. 1 berth is the most exposed. The wharf is connected with the Commonwealth railway system. There is a travelling crane with a lifting capacity of 10 tons. There is a boat landing stage with a depth of 12 feet (3m7) alongside.

The Town jetty, at the eastern end of Geraldton wharf, is partly demolished. The ruins of the Railway jetty extend north-westward from a position on the shore about $3\frac{1}{2}$ cables north-eastward of the eastern end of Geraldton wharf.

There is a small jetty on the southern side of the Inner harbour, about $1\frac{1}{2}$ cables westward of the western end of Geraldton wharf. Charts 1725, 1723.

Directions.—Approaching Champion Bay from southward the locality can be easily identified, when not capped by clouds, by the flat-topped mountains northward, and by Mount Fairfax and Wizard peak.

Moore Point lighthouse (Lat. 28° 47′ S., Long. 114° 35′ E.) should be kept bearing more than 020° until Wizard peak bears 080°, when a vessel can steer to pass not less than 3 miles westward of the lighthouse. The vessel should enter the bay with the leading light-towers situated about one mile southward of Chapman river or their lights at night, in line bearing 074°, which leads through the channel between Moore Point reefs and Four-fathom banks in a least depth of $5\frac{1}{4}$ fathoms (9m6), and thence northward of Outer and Inner Knolls; as previously mentioned, care must be taken not to mistake the church for the rear light-tower. This leading line leads only a short distance northward of the black conical buoy marking Outer Knoll.

When the lighthouse on the head of the western breakwater bears 156° the vessel should steer about 141° and anchor in a depth of $5\frac{1}{2}$ fathoms (10m1), sand, with Moore Point lighthouse bearing 215°, or nearer the coast in less depths.

If proceeding alongside the wharf, the vessel should pass between the light-buoys at the entrance to the dredged channel, and then steer through this channel with the leading beacons, or their lights at night, in line bearing 180°.

At night, a vessel approaching from south-westward should keep in depths of not less than 20 fathoms (36m6) until Moore Point light bears more than 040°; she should then steer a northerly course until the leading lights on the eastern side of the bay are in line, bearing 074°, when she should proceed as previously directed.

From the northward, Four-fathom banks should not be approached within a depth of less than 20 fathoms (36m6), nor Moore Point light brought to bear more than 152°, until the leading lights on the eastern side of the bay are in line bearing 074°.

E.—Chief Officer's Log.

AT GERALDTON—VOYAGE 20

Hours	Course	Distance	Wind	Compass Error	Bar.	Ther.	Remarks, etc.
4	153°	—	SE4	5°W	30.31″	61°	Moderate sea and swell, vessel rolling and pitching easily. Cloudy and clear.
7/00	A/C 137°	—	ESE5	8°W			Moderate rough sea, low swell.
8	137°	—	ESE5	—	30.32″	60°	Vessel rolling easily. Fine and Clear.
11/00	A/C 132°						
12	132°	—	E4	11°W	30.32″	61°	Similar weather and conditions.

1 PM — 1.08 PM. Approaching Geraldton stand by engines.

1.12 PM — Reduced speed. 1.37 let go port anchor. 1.40 vessel brought up.

4.37 PM — Pilot on board. 4.38 S.B.E. commenced to weigh anchor. 4.47 PM anchor aweigh. 4.50 PM Full ahead.

5.14 PM — Vessel enters harbour. 5.15 PM Let go port anchor. 5.40 PM vessel alongside berth.

6.00 PM — Vessel securely moored in No. 1 berth F.W.E.

7.00 PM — Night watchman on duty.

12 — Day closes light NE breeze. Fine and clear.

SUNDAY, 8TH JULY, 1951.

1 AM — Day opens with light airs. Fine and clear.

7.00 AM — Night watchman relieved.

11.30 AM — All holds passed by surveyor.

6.00 PM — Night watchman on duty.

12 — Day ends with light Ely breeze. Cloudy and clear.

MONDAY, 9TH JULY, 1951.

1 AM — Day opens with moderate NE breeze. Cloudy and clear.

6.00 AM — Night watchman relieved.

Exhibits.

E.
Chief Officer's Log, 7th to 12th July, 1951 —*continued.*

8.00 AM	Cargo workers on board, preparing to load No. 2A hatch.
8.50 AM	Commenced loading No. 2A hatch.
10.00–10.15 AM	Tea interval.
Noon–1 PM	Meal interval.
3.00–3.15 PM	Tea interval.
5.00 PM	All cargo work ceased for this day.
6.00 PM	Night watchman on duty.
12	Day ends with light SE breeze. Cloudy and clear.

TUESDAY, 10TH JULY, 1951.

1 AM	Day opens with fresh NE breeze. Fine and clear.
6.00	Night watchman relieved.
8.00–8.15 AM	Shifting elevator from No. 2A hatch to No. 2 hatch.
8.15 AM	Commenced loading No. 2 hatch.
10.00–10.15 AM	Tea interval.
Noon–1 PM	Meal interval.
3.00–3.15 PM	Tea interval.
4.00 PM	Ceased loading No. 2 hatch. Elevator shifted to No. 4 hatch.
4.15 PM	Commenced loading No. 4 hatch.
6.00 PM	All cargo work ceased for this day Night watchman on duty.
12	Day ends with moderate NE breeze. Cloudy and clear.

WEDNESDAY, 11TH JULY, 1951.

1 AM	Day opens with light Ely breeze. Overcast with light rain.
6.00 AM	Night watchman relieved.
8.00 AM	Resumed loading No. 4 hatch.
10.00–10.15 AM	Tea interval.
Noon–1 PM	Meal interval.
3.00–3.15 PM	Tea interval.
3.15–3.30 PM	Power failure. Stopped cargo.
4.00 PM	Ceased loading No. 4 hatch. Elevator shifted to deep tanks.
4.15 PM	Commenced loading deep tanks.
6.00 PM	All cargo work ceased for this day. Night watchman on duty.
12	Day ends with moderate Ely breeze. Overcast with rain at times.

THURSDAY, 12TH JULY, 1951.

1 AM	Day opens with moderate Sly wind. Overcast, light rain. Vessel lying starboard side to quay, heading E by North.
8.00 AM	Wind back to E force 4.
8.00 AM	Resumed loading deep tanks. Commenced trimming at No. 2 hatch. (12 trimmers.)
10.00–10.15 AM	Tea interval. Elevator shifted to No. 1 hatch.
10.30 AM	Commenced loading at No. 1 hatch.
11.45 AM	Wind freshened to force 6 from the Northward.
Noon–1 PM	Meal interval.
1.00 PM	Elevator shifted to No. 5 hatch. Wind increased to gale force.
1.10 PM	Vessel bumping heavily on to waling pieces on quay over whole length to starboard side. Concrete quay commenced to crack and break up. Headlines slackened and port anchor cable tightened to endeavour to reduce bumping. Both backsprings doubled up.
1.15 PM	Commenced loading No. 5 hatch.
2.55 PM	Commenced bunkering.
3.00 PM	One after backspring carried away. Spring replaced and extra moorings placed fore and aft. Starboard anchor lowered on to bottom. Wind continues at gale force, squally. Vessel rolling heavily and bumping the waling pieces on quay continuously. Moorings chafing badly fore and aft.
5.00 PM	Forward moorings slacked slightly and port anchor cable further tightened.
6.00 PM	Ceased loading for this day. After moorings tightened, wind backing to NW and commencing to moderate. Night watchman on duty.
9.00 PM	Completed bunkering. Day ends with moderate NW'ly wind. Overcast. Light rain.

I.—List of Damage to Ship as noted by Robert Steele.

SHIP :

1. Five rivets in 2nd Strake below sheer in No. 3 Hold and two rivets in No. 2 Hold leaking.
2. Approximately 24′ of 1st–2nd–3rd Strakes below sheer indented in way of No. 2 Hold.
3. Approximately 12′ of 1st–2nd Strakes below sheer indented in way of No. 3 Hold.
4. First and Second 'Tween Deck beams aft of No. 2 Hatch and also third 'Tween Deck beam forward of W.T. Bulkhead in No. 3 Hold slightly buckled.

Exhibits.

J. List of Damage to Wharf as noted by Robert Steele.

J.—List of Damage to Wharf as noted by Robert Steele.

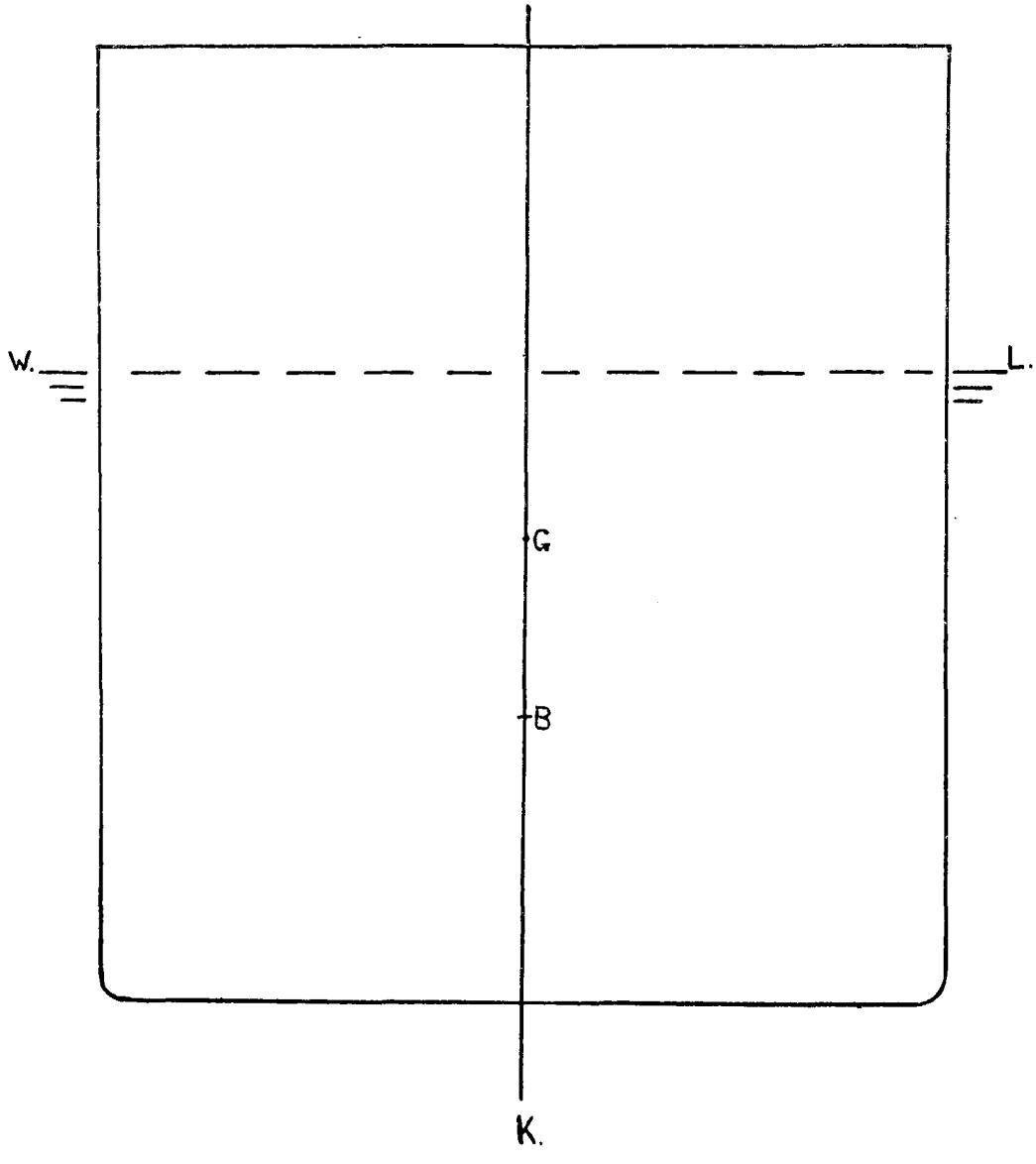
WHARF :

1. The concrete decking of the wharf was badly broken up for a distance of approximately fourteen feet in length and extending in breadth from the edge of the wharf back to the first Crane rail. The steel reinforcement in this locality also being badly buckled and distorted. No distortion of the Crane rail itself was noticeable.
2. The concrete decking being damaged and cracked to a lesser extent for a distance of approximately thirty feet either end of the worst damage.
3. The top piece of the wharf was broken badly and bruised in way of item No. 1 also two wood facings on upright piles broken away.
4. Approximately eighteen to twenty feet of the lower waling piece broken away from uprights and hanging down into the water suspended from the fastening at one end.

K.—(1) Two Diagrams relating to Formula for determining movement of forces in the rolling of a ship.

Exhibits.

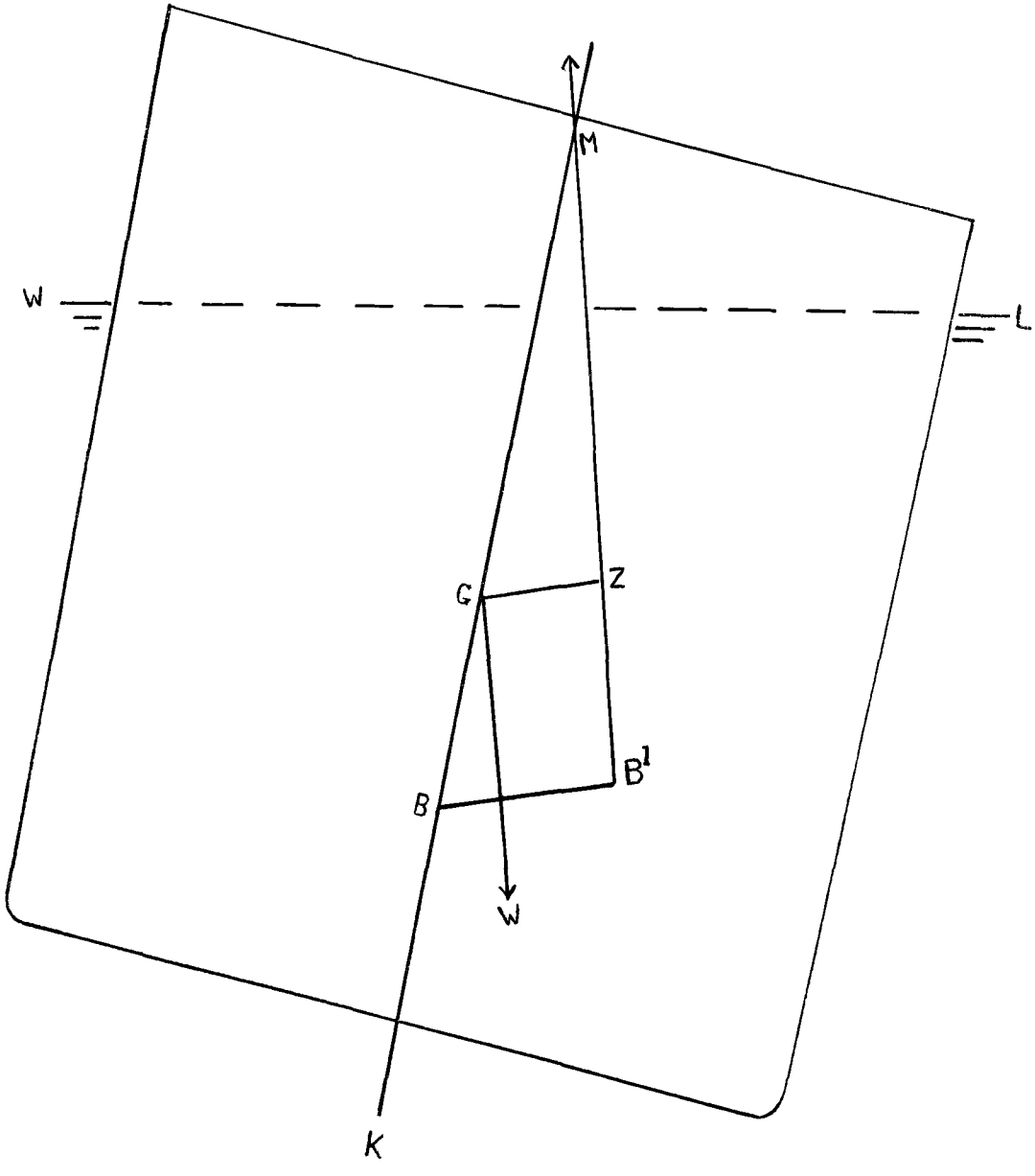
K.
(1) Two Diagrams relating to Formula for determining movement of Forces in the rolling of a ship.



Exhibits.

K.
(2) Two Diagrams relating to Formula for determining movement of Forces in the rolling of a ship.

K.—(2) Two Diagrams relating to Formula for determining movement of forces in the rolling of a ship.



Exhibits.

1. List of Plaintiff's Ships that have used Geraldton.

List of Plaintiff's Ships that have used Geraldton.

May 1942	" Madras City "	4 days.
November 1944	" Atlantic City "	11 ,,
February 1946	" Indian City "	9 ,,
January 1947	" Atlantic City " (2)	8 ,,
February 1947	" Great City "	4 ,,
March 1947	" Jersey City "	4 ,,
January 1948	" Indian City "	6 ,,
January 1948	" Eastern City "	8 ,,
February 1948	" Orient City "	9 ,,
April 1949	" Indian City " (3)	13 ,,
August 1950	" Homer City "	9 ,,
March 1951	" Houston City "*	11 ,,
July 1951	" Houston City " (2)	11 ,,
July 1951	" Great City " (2)	9 ,,
August 1951	" Vancouver City "	11 ,,
September 1951	" Jersey City " (2)	5 ,,
September 1951	" Frisno City "	11 ,,
October 1952	" Dallas City "	5 ,,
November 1952	" Tacoma City "	

*Thirteenth visit of this Company's ships.
Six visits since accident to " Houston City."

In the Privy Council.

No. 27 of 1955.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

BETWEEN

REARDON SMITH LINE LIMITED ... (*Plaintiff*) *Appellant*

AND

AUSTRALIAN WHEAT BOARD ... (*Defendant*) *Respondent.*

RECORD OF PROCEEDINGS

HOLMAN, FENWICK & WILLAN,
1 Lloyds Avenue,
Fenchurch Street, E.C.3,
Solicitors for the Appellant.

COWARD, CHANCE & CO.,
St. Swithin's House,
Walbrook, E.C.4,
Solicitors for the Respondent.

GEO. BARBER & SON LTD., Printers, Furnival Street, Holborn, E.C.4, and Cursitor Street, Chancery Lane.
(A66404)