SHIP "M. F. WHALEN (DEFENDANT)..... } APPELLANT.

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*Nov. 8.
*Dec. 15.

AND

POINTE ANNE QUARRIES LIMITED (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Contract—Towage—Barges—Scows—Rectification—Damages—Limitation—Canada Shipping Act, R.S.C. [1906] c. 113, s. 921.

The owners of the tug Whalen, by contract in writing, agreed to tow the respondent's "barges" between Pointe Anne and Toronto on the terms and conditions stated.

Held, reversing the judgment of the Exchequer Court (21 Ex. C. R. 99) Idington and Anglin JJ. dissenting, that the contract did not include an undertaking to tow "scows" and that the evidence at the trial of an action claiming damages for loss of a scow did not warrant a rectification to bring such towage within its terms.

Per Duff J.: The trial judge was wrong in holding that he could resort to the negotiations prior to the contract for evidence of warranty of the tug's capacity and that the contract could be rectified on a mere preponderance of evidence.

Per Duff J.: Qu. Has the Exchequer Court, setting as a Court of Admiralty, the equitable jurisdiction required to empower it to rectify instruments ?

The owners of the tug "Whalen" wished to sell her to the respondent and entered into a contract to tow the latter's barges from Pointe Anne to Toronto, thus giving respondent an opportunity to test her capacity. In sending her to Pointe Anne the owners instructed her master to take orders from respondent's manager who tendered a loaded scow for towage. The tug had not sufficient power for this towage in November (the time of performance) and on the voyage the tow was cast adrift and lost.

Held, per Duff J.: Under the circumstances the respondent's manager in tendering the scow for towage was not a wrongdoer; the master of the tug was guilty of improper navigation on the voyage, and for this act of negligence the owners were responsible to the respondent.

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*PRESENT:—Sir Louis Davies C. J. and Idington, Duff, Anglin and Mignault JJ.

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Per Davies C. J. and Duff J., Idington and Anglin JJ. *contra* and Mignault J. expressing no opinion. Such negligence of the master was without the fault or privity of the owners and the damages should be limited under sec. 921 of the Canada Shipping Act.

Owing to this difference of opinion the judgment appealed from could neither be affirmed nor reversed *in toto*. In the result it was varied by directing a limitation of the damages.

APPEAL from a decision of the Exchequer Court of Canada (1) affirming the judgment of the Local Judge of the Toronto Admiralty District in favour of the respondent.

The facts are sufficiently stated in the above headnote.

Holden K.C. for the appellant. The evidence shown that "scows" were not omitted from the contract by a mutual mistake and the trial judge should not have allowed the amendment.

As to limitation of liability see *"The Richard Q. Young"* (2).

Woods K. C. and G. M. Jarvis for the respondent. The findings of fact by the trial judge approved by the Exchequer Court should not be disturbed. To justify the rectification of the contract see *Dominion Trust Co.* v *New York Life Ins. Co.* (3).

In any event the damages should not be limited, *"The Minnehaha"* (4).

THE CHIEF JUSTICE.—After having given the facts of this case and the evidence a great deal of consideration, I have reached the conclusion that the reformation made by the trial judge of the written contract

(1) 21 Ex. C.R. 99.
(2) 245 Fed. R. 499.
(3) [1919] A. C. 254.
(4) Lush 335 at page 347.

contained in the letter of the respondent plaintiffs to the appellants dated October 27th, 1920, by the addition thereto of the words "and scows" after the word "barges" cannot be upheld, and that the towing contract must be read and be held to have been as stated in the plaintiffs' letter covering barges only. The letter reads as follows:—

POINTE ANNE QUARRIES LIMITED

TORONTO, ONT., Oct. 27th, 1920.

The Kirkwood Steamship Line,
14 Place Royale, Montreal, Que.

DEAR SIRS:—

This will confirm arrangement made with your Mr. T. R. Kirkwood this morning, whereby you agree to send the "M. F. Whelan" to tow our barges between Pointe Anne, Presqu'Ille and Toronto at the following rates:—

From Pointe Anne to Toronto—
General business..... 75c. per yard
Crib filling stone..... 90c. per yard
From Presqu'Isle to Toronto—
General business..... 60c. per yard
Crib filling stone..... 75c. per yard

It is understood that the tug will take her towing orders from the Superintendent Mr. Thompson, taking down whatever is light at this end and bringing up what is loaded at the quarry end; we to look after fuelling arrangements and purchase of supplies.

(Sgd.) J. F. M. STEWART.
Manager.

In the absence in the above letter of the words added by the trial judge I do not think this action against the defendants would lie at all as the towed scow damaged was not under any construction a barge. There is a broad and well understood distinction between the two the "scow" not having any rudder or steering gear or crew. So the contract as altered or amended or reformed by the trial judge was a much more onerous one on the tug and its owners than that entered into by the appellants.

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The difference between a barge and a scow is fully explained by Mr. Kirkwood, the appellants' manager, in his evidence. "One (the barge) has a rudder and crew which steer it, making it sure of navigation, towing behind, and the other (the scow) has no rudder, and is square built"; and as Mr. Lambert, the naval architect and marine surveyor, testified this scow is "a very lumbering, awkward heavy built boat" and a very tough proposition for towing in any case and in rough weather tougher still.

The defendants sent their tug the "M. F. Whalen" specifically named in the contract to Presqu'Isle to carry it out giving the captain instructions as provided in the contract to take his orders from the plaintiff's superintendent Thompson. The captain obeyed his instructions and Thompson attached a laden scow to the tug instead of a barge. The captain knew nothing of the terms of the contract. The fact that Thompson attached a loaded scow which was not within the contract cannot make or create a new and more onerous contract as against the defendants. I have reached the further conclusion that even if the reformation of the contract by the trial judge is justified on the evidence, section 921 of the Canada Shipping Act (R.S.C. c. 113) applies to and limits the owners' liability in this action. That section limits, to an aggregate amount not exceeding thirty-eight dollars and ninety-two cents per ton for each ton of the ship's tonnage the liability whenever inter alia "without their actual fault or privity" any loss or damage is, by reason of the improper navigation of such ship caused to any other ship or boat or its cargo. I am clearly of the opinion that in this case there was no such actual fault or privity on the part of the owners

of the tug which caused the damage complained of and in my opinion their liability, even under the reformed contract, must be limited to $4,389.01, and the judgment appealed from amended accordingly.

The tug was, as I have before mentioned, specifically named as the one defendants were to send to carry out the contract. If the loss or damage sued for occurred by reason of the improper or wrongful navigation of the tug that is just such a case as the statute expressly mentions and was intended to cover and even assuming the contract to have been rightly amended or reformed I cannot see how the specific thing, the tug "M. F. Whalen," having been selected and agreed to by the parties and named in their contract as the tug to be sent, her alleged unsuitability for the work the contract provided for her to do can be successfully argued as a reason for refusing the statutory limitation of liability.

In an ordinary contract of towage when the tug is not specifically named there is an implied obligation that the tug shall be efficient and properly equipped for the services required. (See *"The Undaunted"* (1) *"The West Cock "* (2) cited and relied upon by the learned trial judge). But these two cases relate to general contracts to supply tugs for towage purposes and do not apply to contracts where a tug is specially named and agreed upon as was the case in this action.

The learned trial judge based his judgment for an unlimited liability on the part of the defendants, the Kirkwood Steamship Lines and T. R. Kirkwood,

for any deficiency that might be found in the amount owing to the plaintiffs after crediting them with the net amount realized by the sale of the tug "M. F. Whalen"

(1) 11 P. D. 46. (2) [1911] P. D. 208.

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upon first, the want of proper seamanship and resource on the captain's part, and, secondly,

the inability of the tug to maintain its horse power at an efficient figure

which inability he thought was due

either to want of capacity to develop or to maintain sufficient power in bad weather or to do so with the crew on board

and he concluded that both factors were present on the occasion in question.

As I have already stated, the defendant owners' liability for damages arising from the improper or wrongful navigation of the tug by the captain and crew which are without the owners' fault or privity clearly come within the statute. With regard to the second ground of the judgment, the want of capacity of the tug to maintain sufficient horse power in the bad weather experienced, I am of the opinion that the implied rule or obligation which applies in an ordinary contract of towage, that the tug supplied should be sufficient as regards seaworthiness, equipment and power to perform the service she undertakes in weather and circumstances reasonably to be expected, does not apply to this case of the contract for the specially mentioned tug, the "M. F. Whalen." Bucknill, "The Law Relating to Tug and Tow," 1913, page 18 says:

> where a contract is made with reference to a specific thing, qualities in that specific thing which are in fact absent will not be implied by law. A tug cannot increase her size or power, and if a "named" tug is engaged to tow, there is no implied warranty by the tug-owner that the tug is different from her real nature, and the other contracting party must be taken to know the size and power of the tug which he has selected as the instrument of the towage.

(See also *Robertson* v *Amazon Tug Company* (1) Court of Appeal, 1881.)

(1) 7 Q.B.D. 598.

Brett L. J., page 606:

When there is a specific thing, there is no implied contract that it shall be reasonably fit for the purpose for which it is hired or is to be used. That is the great distinction between a contract to supply a thing which is to be made and which is not specific, and a contract with regard to a specific thing. In the one case you take the thing as it is, in the other the person who undertakes to supply it is bound to supply a thing reasonably fit for the purpose for which it is made.

Bramwell L. J. dissented upon another point, but he also dealt with this question as follows p. 602 :

Now the plaintiffs' complaint was not that the vessel was unfit for the voyage and work; that it was not properly built or strong enough. Nor did he complain that the machinery or boiler was inadequate, not of the best make, or a good make, or strong or large enough. Had such been his complaint, then I think it ought to have failed because his engagement was with respect to specific things, and he took them for better or worse.

See also Marsden, "Collision at Sea," pages 181, 186 and 187, *The Warkworth* (1) *The Diamond* (2).

IDINGTON J. (dissenting)—This appeal arises under the following circumstances: The owners of the appellant were desirous of selling her to respondent and negotiations opened by the son of the owner of the appellant with that in view; after conversations with someone on behalf of respondent and correspondence with respondent in course of which he wrote, on 11th September, 1920, a long letter describing her and a sister ship in laudatory terms at the conclusion thereof he says:—

They will stand very heavy weather, and therefore will not lose any money on that score. They are certainly an exceptional bargain at the price which, of course, is subject to being unsold.

That was followed by a submission to him of an account of what another vessel owned or managed by one Russell had done in the month of August

(1) [1884] 9 P.D. 145. (2) [1906] P. D. 282.

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from which it appears that said vessel had been engaged by respondent in the service it required and that set forth fourteen trips of towing service of which ten were towing scows and only four for towing barges.

Then ensued the bargain now in question which evidently was intended as a test of the suitability of the appellant for such a service as now in question.

Using that as a basis or rather guide of what might be reasonable in regard to charges for such an experiment, the said representative of the appellant's owner and the agent of respondent orally agreed upon the terms upon which she should do towing service for respondent.

Thereupon the respondent's agent dictated to a stenographer the following:—

POINTE ANNE QUARRIES, LIMITED

TORONTO, ONT., Oct. 27th, 1920.

The Kirkwood Steamship Line,
14 Place Royale,
Montreal, Que.

DEAR SIRS,

This will confirm arrangement made with your Mr. T. R. Kirkwood this morning, whereby you agree to send the "M. F. Whalen" to tow our barges between Pointe Anne and Toronto at the following rates:—

From Pointe Anne to Toronto:—

General Business.....	75c. per yard
Crib filling stone.....	90c. per yard

From Presqu'Isle to Toronto:—

General Business.....	60c. per yard
Crib filling stone.....	75c. per yard

It is understood that the tug will take her towing orders from our superintendent Mr. Thompson, taking down whatever is light at this end and bringing up what is loaded at the quarry end; we to look after fuelling arrangements and the purchase of supplies.

Yours very truly,

(Sgd.) J. F. M. STEWART,
Manager.

It is to be observed this is not signed by any one on behalf of the appellant but seems to have been given as evidence of the oral contract that preceded it.

It was argued before the learned trial judge that the word *barges* did not include *scows*. At first he seemed of the opinion that it would cover the towing of scows, but later allowed an amendment by way of reforming the contract, as he expressed it, and evidence was directed to that which taken with what appears above clearly demonstrated that towing of scows as well as barges was understood to have been the bargain in fact.

There was a conflict of evidence between the agent of appellant's owner and the signer of the above memo. as to whether scows as well as barges had been mentioned.

The learned trial judge accepted the latter's version of the facts, disregarded that of appellant's agent, and allowed the reformation of the contract, if such necessary to maintain respondent's action, for evidently in his own opinion it was not.

It seems to me not only from the foregoing but from that to which I am about to refer, that the evidence is overwhelmingly against appellant on this point.

Not only did the appellant entering upon the service accept the duty of towing barges, but towed also the scow, without any remonstrance as to the latter before towing the scow now in question but also when the master of the appellant cut loose her tow in a storm and went into port and refused to go next day after it when the storm had abated, there ensued the following correspondence by telegraph.

The master of the appellant early on the day following his cutting the scow adrift sent the following:—

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COBOURG, ONT., Nov. 12.

Kirkwood Steamship Lines,
14 Place Royale, Montreal, Que.

Lost scow last night about two miles west Port Hope south west gale.

Filed June 4th, 1921.
C. M., R.E.C.

H. MALLETTE.

That was apparently followed by a message from respondent as follows:—

TORONTO, Nov. 12-20.

Kirkwood Steamship Co.,
Montreal, Que.

Whalen threw big scow adrift off Port Hope twelve last night. Absolutely no reason except Capt. not control his crew. Scow still floating and have sent steamer from here but cannot reach scow till dark. Whalen in Cobourg wind off shore and crew refuses to go for scow.

POINTE ANNE QUARRIES LTD.

And that in turn by the following:—

MONTREAL, Nov. 12, 1920.

Captain Harry Mallette,
Tug Mary Francis Whalen,
Cobourg, Ont.

Pointe Anne Quarries wire that you threw scow adrift without reason and that scow still floating and you refuse to go for it. If you can save this scow without risk to your tug do so.

KIRKWOOD STEAMSHIP LINE

Which was followed by the following:—

TORONTO, ONT., Nov. 12-20.

Kirkwood Steamship Line,
14 Place Royale Montreal, Que.

The scow the Whalen lost was built last year and cost over thirty thousand dollars. She carried a cargo worth twenty-five hundred dollars. No reason why tug should not get it and you should give Captain orders to this effect.

POINTE ANNE QUARRIES LTD.

And again replied to by the following:—

MONTREAL, Nov. 12, 1920.

Pointe Anne Quarries Ltd.,
McKinnon Bldg., Melinda St.,
Toronto, Ont.

Wire received T. R. Kirkwood leaving for Cobourg first train to investigate have wired Captain to save scow if at no risk to tug.

KIRKWOOD STEAMSHIP LINE.

And the man who pretends he never would have undertaken to tug a scow with the appellant followed all the foregoing by an expensive trip to find out what became of this scow.

And in all this not a word of remonstrance or objection to the towing of a scow, though he pretends he contracted only to tow barges, whatever that may mean in English.

It requires more than usual boldness in face of such recognition of duty to try to support the contention that someone later on no doubt suggested as to *scows* not being covered by the generic word *barges*.

Such a surprising suggestion has induced me to look up the meaning of the words "barge" and "scow".

I find in the Century Dictionary the following, of many meanings:—

Barge. 1. A sailing vessel of any sort. 2. A flat-bottomed vessel of burden used in loading and unloading ships, and, on rivers and canals, for conveying goods from one place to another.

Scow. 1. A kind of large flat-bottomed boat used chiefly as a lighter; a pram. 2. A small boat made of willows, etc., and covered with skins; a ferry-boat.

Murray has the following :

Barge. 1. A small sea-going vessel with sails; used *specifically* for one next in size above the Balinger, and *generally* as—Ship, vessel (in which use it is now superseded by *Bark*) *Obs*. (except when historians reproduce it in a specific sense).

2. A flat-bottomed freight boat, chiefly for canal and river-navigation, either with or without sails; in the latter case also called a *lighter;* in the former, as the Thames barges, generally dandy-rigged, having one important mast.

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There are besides these two leading meanings in Murray five others which show how comprehensive the word barge is, and how it has been applied to a great variety of vessels by no means consistent with the local application of the term as suggested herein. Then follow illustrations from many authors.

Illustrative of what I have just said the following appears in the Encyclopedia Britannica, descriptive of a *barge*.

> *Barge*. Formerly a small sailing vessel, but now generally a flat-bottomed boat used for carrying goods on inland navigations. On canals barges are usually towed, but are sometimes fitted with some kind of engine; the men in charge of them are known as bargees. On tidal rivers barges are often provided with masts and sails ('sailing barges') or in default of being towed, they drift with the current, guided by a long oar or oars ('dumb barges'). Barges used for unloading, or loading, the cargo of ships in harbours are sometimes called 'lighters' (from the verb 'to light'—to relieve of a load). A state barge was a heavy, often highly ornamented vessel used for carrying passengers on occasions of state ceremonials. The college barges at Oxford are houseboats moored in the river for the use of members of the college rowing clubs. In New England the word barge frequently means a vehicle, usually covered, with seats down the side, used for picnic parties or the conveyance of passengers to or from piers or railway stations.

and no meaning is found in that work for the word "scow".

The word "scow" appears in Murray as a "large flat-bottomed lighter or punt", and a number of meanings cited from different authorities but nothing to justify the local description presented in argument herein.

It would seem from the evidence that there must be a local form of English and if that is resorted to and to be relied upon I prefer the conduct of the parties as above set forth as explanatory of what was intended by the use of the word *barges*.

I agree, in regard to other points made, fully with the reasoning of the learned trial judge and Mr. Justice Audette in appeal, but have thought it well to develop the foregoing as my own way of looking at what in the argument seemed to me rather a remarkable contention.

The appeal should be dismissed with costs.

DUFF J.—I am unable to say that the conclusion I have reached in this case is entirely satisfactory to my own mind. I can only say that of the three possible results, each one of which has met with acceptance by one or more members of this court, that conclusion appears to me to be supported by the weight of argument.

The first point for examination is whether the express contract between the parties is to be considered as embodied in the letter of the 27th October signed by Mr. Stewart, the manager of the respondent company, and addressed to the owners of the appellant ship whom I shall refer to as the appellants. That letter was dictated on the day of its date by Mr. Stewart in the presence of Mr. Kirkwood, the appellants' manager. Beyond question it was, as Mr. Stewart explicitly says, intended to record the arrangement between the two parties and it was dictated by him, as already mentioned, in the presence of Mr. Kirkwood as embodying that arrangement and it was afterwards received and accepted by Mr. Kirkwood as the authentic record of it.

This document therefore, *prima facie*, constitutes the exclusive evidence of the contract between the parties. On behalf of the respondent it has, however, been contended that in truth the contract was some-

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thing different; that the parties had agreed upon a contract in different terms and that it was through the common mistake of both of them that the letter does not express the terms of the bargain they had concluded. This contention raises perhaps the most important issue on the appeal. Before proceeding to discuss it I quote the letter, which is as follows:

POINTE ANNE QUARRIES LIMITED

TORONTO, ONT., Oct. 27th, 1920.

The Kirkwood Steamship Line,
14 Place Royale, Montreal, Que.

DEAR SIRS:—

This will confirm arrangement made with your Mr. Kirkwood this morning, whereby you agree to send the "M. F. Whalen" to tow our Barges between Pointe Anne, Presqu'Isle and Toronto at the following rates:—

From Pointe Anne to Toronto—
General Business..... 75c. per yard.
Crib filling stone..... 90c. per yard
From Presqu'Isle to Toronto—
General Business..... 60c. per yard
Crib filling stone..... 75c. per yard

It is understood that the Tug will take her towing orders from our Superintendent Mr. Thompson, taking down whatever is light at this end and bringing up what is loaded at the Quarry end; we to look after fueling arrangements and purchase of supplies.

Yours very truly,
(Sgd.) J. F. M. STEWART,
Manager.

The respondent company says that the agreement was one to tow scows and barges and that it was by mistake that Mr. Stewart used the words "to tow our barges" when to express the meaning of the parties the words should have been "to tow our barges and scows".

I refer for a moment to the suggestion that the word barge is in itself sufficient, that it denotes scow as well as barge. The distinction is drawn very clearly in the evidence.

What is more important to note is this: The evidence of Mr. Stewart, that of Mr. Lambert as well as that of Mr. Kirkwood establish (and indeed I should be surprised to hear it disputed) that the distinction is one regularly observed in common speech and Mr. Stewart gives point to this by insisting that during the interview at the conclusion of which the letter was written scows were specifically mentioned and that the distinction between barges and scows was present to the mind of Mr. Kirkwood as well as his own and implies that the word "barge" would not have been used by either of them as a common term designating scows as well as barges. In answer to a request for an explanation of the terms of the letter he says:

> I dictated it and there is no explanation except that that is the way the letter was written. It don't convey the intention.

The evidence negatives decisively this suggestion as to the scope of the word "barge".

My conclusion is that on this issue (as to the terms of the contract) the respondent company fails. I shall first give my reasons based upon the record as presented to us before discussing the judgments in the Exchequer Court. This, I think, is the more convenient course because I think effect ought not to be given to the findings of the two courts below. This is not a case falling within the general rule which gives an almost conclusive effect to such concurrent findings for reasons which will be discussed later. Before proceeding to discuss the facts it should be observed that the proposition of the respondents in the form it ultimately assumes is this: That the appellants warranted the sufficiency of the tug Whalen for all the purposes of their business in the transportation of

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stone from their quarries at Pointe Anne to Toronto and that this included a warranty of sufficiency to tow a scow of the type of that lost carrying a burden of 1875 yards of stone in the heavy weather of November.

By their statement of claim the respondents rested their cause of action upon the contract of the 27th October, paragraphs 2 and 3 being in the following terms:—

> 2. On October 27th, 1920, a contract was entered into between the plaintiff and the owners of the Ship "M. F. Whalen", an ocean going steam tug of 200 I.H.P. registered at Halifax, for towage by the "M. F. Whalen", of the plaintiff's barges, light and loaded, between Pointe Anne, Presqu'il and Toronto.
>
> 3. On the 11th day of November, 1920, in pursuance of the said contract, the "M. F. Whalen" left Presqu'il for Toronto at about 7 a.m. having in tow a barge of the plaintiff's laden with a cargo of stones. The tow was under control of the "M. F. Whalen" and the latter was manned and controlled by the servants of the owners of the "-M. F. Whalen" and no officer, agent or servant of the plaintiff was on board either the "M. F. Whalen" or the tow.

The appellants by their statement of defence set up the writing of the 27th October and denied that under the contract thereby disclosed they were under any obligation to assume the towage of scows. At the trial the letter of the 27th October was first put in by the defence and it was only in rebuttal that respondents produced the evidence of Mr. Stewart who signed the letter, to the effect that the agreement between himself and Mr. Kirkwood in the interview on the 27th October was an agreement to tow scows as well as barges. During the cross-examination of Mr. Kirkwood, counsel for the defence objected to cross-examination on the ground that the contract spoke for itself and that matter dehors the contract was inadmissible. The learned trial judge overruled the objection apparently taking the view that as

some evidence of this character had been received without objection it was too late for the appellants to insist upon the contract as it stood and thereafter the trial proceeded upon that footing. At the conclusion of the evidence counsel for the respondents asked for leave to amend by adding a plea for rectification. This application was reserved by the trial judge and granted by him in giving judgment in the action.

In discussing the point now under consideration it ought to be unnecessary to observe that where the parties have finally reduced their agreement to writing, a writing that is to say which is intended to be the record of the agreement between them, it was not at common law competent to either of them to resort to previous negotiations or contemporary conversations or other matters for the purpose of varying or adding to its terms as expressed in the writing; and where the language is unambiguous, that is to say, capable of only one necessarily exclusive signification, that it was not competent to refer to such extraneous matter for the purpose of giving colour to the plain meaning of the document. As Lord Bramwell, then Bramwell B. said in *Wake* v *Harrop* (1)

> they put on paper what is to bind them and so make the written document conclusive evidence between them.

The rule is obviously not a technical rule. It is founded upon the highest considerations of convenience and the value of it could hardly be better illustrated than by a case such as this where two men of affairs, thoroughly accustomed to transacting business, meeting after a negotiation with the object of making an agree-

(1) 6 H. & N. 768 at p. 775.

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ment upon business which had been the subject of full consideration by each and after discussion of the matter deliberately set down in writing in perfectly unambiguous language that upon which they have agreed. In commercial affairs it is of great importance that such documents should be regarded as final and on this principle the courts have uniformly acted recognizing that the very purpose of expressing agreements in writing is to reduce the terms of them to permanent form and to preclude subsequent disputes as to such terms.

Courts of equity on the other hand have from early times possessed and exercised authority to rectify documents in which parties have professed to express their contracts, a jurisdiction now exercisable by courts having equitable powers. The point was not argued and I express no opinion upon it but I am not prepared without further consideration to say whether the Exchequer Court of Canada in its Admiralty jurisdiction under the Admiralty Act of 1861 is endowed with the power to rectify instruments. Assuming that to be so it is important to note that an attempt to reform an instrument by invoking this equitable jurisdiction can only succeed where two conditions are fulfilled.

First, it must be shown not only that the agreement as stated in the writing, the agreement in this case to tow barges, was not the whole of the agreement between the parties and it must further be shown that the parties did agree upon something which did not appear in the writing, in this case to tow barges plus scows, and that the agreement, that is to say the intention to contract in this sense, continued concurrently in the minds of both parties down to the

time the document went into operation. The other condition relates to the character and probative force of the evidence required. Where one of the parties denies the alleged variation the parol evidence of the other party is not sufficient to entitle the court to act. Such parol evidence must be adequately supported by documentary evidence and by considerations arising from the conduct of the parties satisfying the court beyond reasonable doubt that the party resisting rectification did in truth enter into the agreement alleged. It is not sufficient that there should be a mere preponderance of probability; the case must be proved to a demonstration in the only sense in which in a court of law an issue of fact can be established to a demonstration, that is to say, the evidence must be so satisfactory as to leave no room for such doubt. *Hart* v *Boutilier*, (1) at page 630; *Fowler* v *Fowler* (2) at page 264; *Clarke* v *Joselin* (3) at page 78.

Here as in all such cases the fundamental fact is the existence of the document prepared and executed with the intention of stating the terms agreed upon by the parties so executing it; and the importance of that fact in the present case is increased by the cirsumstance that it was prepared on the very occasion on which the parties concluded their agreement and prepared in such circumstances as virtually to make it their joint production. I do not attach as much weight to the fact, although that is by no means without importance, that the letter was dictated by Mr. Stewart, as to the fact that it was dictated in the presence of Mr. Kirkwood when the very words of their conversation must have been fresh in the minds

(1) 56 D.L.R. 620. (2) 4 DeG. & J. 250.
(3) 16 O.R. 68.

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of both of them and in circumstances calculated to bring the attention of both to bear upon the phraseology used. I find it very difficult indeed to reconcile with these facts the statement of Mr. Stewart that he was mainly concerned as to the capacity of the tug in respect of the towage of scows and that this point had been the subject of specific discussion during the moments which preceded the dictation of the letter.

The circumstances mainly relied upon by the respondents in corroboration of Mr. Stewart's evidence may conveniently be commented upon in discussing the judgments in the Exchequer Court. As regards these judgments it should first be observed that there are cogent reasons why in this court the findings of fact cannot be regarded as decisive. The learned trial judge appears to have proceeded upon the view that even assuming the letter of the 27th October embodied the concluded contract between the parties he was still bound to give effect to a warranty which he conceived to be disclosed by the correspondence preceding the contract; and in deciding that the document of October 27th was to be rectified it seems reasonably clear that his attention was not drawn either to the rules by which courts of equity have governed themselves in granting this relief or to the force of the considerations derived from the circumstances in which the letter was written. The letter, indeed, is treated by the learned judge as only one of a series of facts of co-ordinate evidentiary value.

The question of rectification is thus disposed of:

The evidence makes it clear that these words were omitted by inadvertance, to use the language of Mr. Kirkwood, and also that he knew the equipment of the plaintiffs included 'scows' and that the "Whalen" was intended to do for the plaintiffs the work done by Russell's tug "Lakeside" whose place this tug was to take, and I so find.

There is no explicit finding that there was a concluded agreement made orally on the 27th October binding the respondents to employ the Whalen and the appellants to tow the respondent's scows with her. Rather excessive importance seems to be attached to a statement by Mr. Kirkwood at the trial that he had become convinced that Mr. Stewart had not intended "to deceive" him but had intended to provide for the towage of scows as well as barges. Mr. Kirkwood did, with a candour that does him no discredit, say that but at the same time he insisted explicitly that while he knew the barges of the respondents and was willing to undertake their towage and to warrant the capacity of the Whalen to tow them he would not have agreed to undertake the towage of scows of undefined weight and dimensions in the rough weather of November and he adds that he never would have agreed to tow a scow of the type of that which was lost since the Whalen, and this is common ground, was insufficiently powered for that purpose. He denies, moreover, that he knew that scows formed part of the "equipment" of the respondents although he admits that he was aware that scows had been used for the purpose of carrying the respondents' stone in August by one Russell whose account had been brought to his attention, adding however, that he was unaware whether or not these scows belonged to the respondent or to Russell himself; and stating moreover, that it was one thing to undertake the towage of such craft in August when steady weather would be assured and a totally different thing to consider the towage of them in November. He denies also in the most explicit manner that the scows were mentioned during the interview.

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The learned trial judge in finding that Kirkwood knew the intention of the respondents to be that the Whalen was intended to tow in November the same class of craft as Russell towed in August is drawing a conclusion from the evidence of Stewart alone; so likewise when he finds that Kirkwood knew scows were part of the "equipment" of the plaintiffs. It is not denied that Kirkwood had not seen the respondents' scows and it is not suggested that he had any information as to their weight or size. The view taken by the learned trial judge is in effect that the appellants being in ignorance upon these points undertook to tow whatever might be assigned for towage.

Stewart says that on the voyage in which the mishap occurred he was engaged in testing the capacity of the tug and the question at this point for consideration is: Is it conclusively (in the sense above mentioned) established that Kirkwood intended to enter into a contract and did enter into a contract warranting the capacity of his tug to tow in November successfully any scow which the respondents might see fit to provide for the purpose of giving her what they might consider to be a satisfactory test for the purposes of their business?

It is common ground, and indeed it is the basis of one branch of the respondents' case, that the Whalen was insufficiently powered for the towage of the lost scow in November and there seems little reason to doubt Kirkwood's statement that he would never have entered into a contract for the towage of such a craft at that season, that is to say a contract warranting the tug's capacity to deliver her tow safely; nor does there seem any reason to doubt his statement that he would not have entered into a contract for the towage of craft of that character of which he did not know

the weight or dimensions. One must assume that he is a normally prudent man; and in examining Kirkwood's evidence it should be remembered that it was on his cross-examination that for the first time he received notice that he was expected to discuss the allegation by the respondents that he had entered into a contract of the kind now set up and notwithstanding this his evidence on the various points made against him is clear and consistent throughout. Weighing against Stewart's oral evidence the fact of the document itself and the facts connected with the litigation—the allegation that the contract of the 27th was a contract to tow barges and only barges, and the basing of the plaintiff's claim upon that contract the failure to bring forward the suggestion of mistake in the writing of the letter until the latest possible moment—I am unable to discover anything to justify the conclusion that the prayer for rectification is supported by that kind of weighty proof which the law demands in such cases. One must bear in mind, in the language of Sir W. M. James in *MacKenzie* v *Coulson* (1)

> that it is always necessary for the plaintiff to show that there was an actual concluded contract antecedent to the instrument which is sought to be rectified * * * * * * * It is impossible for this court to rescind or alter a contract with reference to the terms of the negotiation which preceded it.

I cannot pass by the suggestion made during the argument founded upon a statement of Stewart's that the defence resting upon the terms of the contract was an afterthought of Kirkwood's and that Stewart became aware that these terms were limited only when the statement of defence was filed. That is an extraordinary and incomprehensible suggestion having regard to the terms of the second paragraph of the statement of claim.

(1) L.R. 8 Eq. 375.

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Independently of the letter of the 27th October the learned trial judge finds in the correspondence a warranty of capacity

> to tow whatever the plaintiffs had been in the habit of trusting to tug-boats.

I have already pointed out that the letter is the governing document. I am unable, moreover, to agree with the trial judge in his construction of this correspondence considered independently. Let us see what it discloses. The appellants had two tugs which they wished to dispose of, and with a view to a sale they had been pressing the respondents to inspect them and to make trials of them. After some delay the appellants were informed by the respondents that they were not likely to make a purchase before the following spring. At the same time the respondents suggest that they employ one of these tugs in their service between Pointe Anne Quarries and Toronto and they add that this will give them an opportunity of making a test. The fact that in August scows were employed seems to have been magnified beyond its real significance; it did not follow that the respondents would entrust their cargoes to scows in November.

The trial judge also proceeds upon the instructions given to the master. The master, he says, was given definite instructions to take orders from the plaintiffs and there was no limitation upon these instructions. This he seems to think is sufficient to fasten upon the respondents responsibility for everything undertaken by the master on the instructions of Thompson. It is important in considering the effect of this circumstance to bear in mind the terms of the contract. The contract provided that the captain of the Whalen was to take his towing orders from the respondents,

but this provision, it is quite plain, is a provision touching the execution of the contract, that is to say, it is a provision relating to the employment of the Whalen in the towing of barges. To enlarge the obligations of the contract by reason of a general provision of this nature is quite inadmissible. The instructions to the master were given pursuant to this term of the contract and in performance of it and can have no significance or effect as touching legal responsibilities of the parties.

The reciprocal rights and liabilities therefore of the parties to the appeal are to be determined by the application of the law to this state of facts. The appellants had undertaken to tow the respondent company's barges and for that purpose had placed their tug with its master and crew under the control of one of the respondent company's officers which officer used the tug for a service the appellants had not agreed to perform—a service admittedly more difficult and admittedly one which the tug was incapable efficiently to perform in the event which supervened—an event which might have been anticipated—heavy weather on Lake Ontario in November.

In these circumstances it seems clear, too clear for discussion, that the appellants are not responsible as for a warranty of sufficiency of power, of equipment or of crew. But a question arises, and it is this question which occasioned me the greatest concern in determining the appeal, the question whether, namely, having regard to all the circumstances of the case, the appellants are not in some degree responsible. Thompson, in so far as he professed to act under the contract, was doing an unauthorized thing when he directed the master of the tug to take the scow in tow, but I think, not without much hesitation, that having regard to the facts as a whole he was not, strictly

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speaking, a wrongdoer. I think there are facts in evidence pointing to the conclusion that the appellants, while they would not contract to tow scows and did not contract to tow scows, were not unwilling that Thompson should in any reasonable way test the capacity of the tug with reference to the possibility of purchasing her.

Looking at the relations between the parties and considering the object they both had in view, I have come to the conclusion that Thompson was not a wrong-doer in using the Whalen for the purpose of testing her with regard to the towing of scows. Admittedly that is what he was doing; Mr. Stewart, the manager of the respondents, says so explicitly. I think that, having regard to all the circumstances, Thompson might not unreasonably have assumed that he was at liberty to employ the tug in this way, but what is the legal relation arising from such employment? There was no contract by the owners of the Whalen respecting the capacity of their tug in relation to the towage of scows; the respondents employed the tug at their own risk, they took her as she was with her imperfections whatever they might be. At the same time while the captain was to take his towing orders from Thompson, he still was, in the navigation of the tug, I think, the servant of the appellants and therefore the appellants would be answerable for his negligent misfeasance in the course of such navigation. In the result the risk of deficiency of power must be borne by the appellants, and while adequate power would have saved the situation it is equally true that proper seamanship as the trial judge has found and I think satisfactorily found, would also have saved the situation. It follows, I think, that the appellants are responsible for the consequences of the negligent

navigation. With respect to the events of the 12th, I am unable to ascribe to the appellants responsibility for any wrong arising out of those events; the refusal of the crew to go out was due, no doubt, to the experience of the day before, which was the consequence largely of the fact that Thompson had exercised his discretion by assigning to the tug a task which she was incapable of performing. That must have been obvious to the crew and it is not surprising that they declined to go; and it was not an unreasonable thing I think for the appellants, having been informed of the fact that the crew had refused to go out, to attach the condition that the tug should not be put in danger. They had not contracted that the safety of the tug should be risked in the towage of scows.

In the result the appellants are responsible but are entitled to a declaration limiting their liability under the statute.

Having regard to the difference of opinion, I agree to the disposition of the costs proposed.

ANGLIN J.—For the reasons given by Mr. Justice Hodgins, sitting as local judge in Admiralty, I would affirm the judgment in favour of the respondents on the two matters to which the defendants restricted this appeal, viz., the reformation of the contract, or, more accurately, the determination of its scope, and the refusal of limitation of liability under section 921 of the Canada Shipping Act.

The question as to the terms of the contract depends chiefly on the respective credibility of the witnesses Kirkwood and Stewart. Giving to the letter on the 27th of October the weight to which it is undoubtedly entitled as evidence, nothing brought to my attention would lead me to boubt the soundness of the view

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on this aspect of the case, taken by the learned trial judge and affirmed on appeal. It would, I think, be a rash proceeding on our part to reverse the finding of the judge who tried the case and saw the witnesses on a pure question of credibility. *Nocton* v *Ashburton* (1) at page 945; *Wood* v *Haines* (2).

Assuming therefore that the contract included the towing of the plaintiff's scows, the evidence is abundantly clear that the owners of the defendant tug were fully cognizant of the inadequacy of her power and equipment to handle those scows in such weather as was to be expected on Lake Ontario during November. Indeed the witness Kirkwood himself says that he would not have undertaken that responsibility because

> she (the M. F. Whalen) was not capable for it at that time of the year. It was dangerous. She might land them in, but it was risky business.

The evidence supports the finding that the inadequacy of the Whalen's powers was a contributing cause—probably the chief cause—of her captain finding himself obliged to cut the plaintiff's scow adrift.

The Whalen was not chosen by the plaintiffs for the purpose of towing their vessels. She was selected by her owners and accepted for their towing by the plaintiffs who had never seen her, on the assurance of the owners that she was equal to the "Metax" for which they had asked. Admittedly the Whalen did not develop as much power as the "Metax" did and her crew was inferior to that carried by the sister tug. The owners when sending the Whalen knew

(1) [1914] A. C. 932; (2) 38 Ont. L. R. 583.

the capacity of the plaintiff's scows and, if they did not impliedly warrant that that tug was capable of handling them in such weather as might be expected at the season when it was employed, they at least undertook that she was as fit for that purpose as care and skill could render her. *The West Cock* (1). Their knowledge of her deficiency in power and probably likewise of the inefficiency of her crew, which seems also to have been a contributing cause in bringing about the situation that led to the sending of the scow adrift, constituted fault on their part and deprives them of the benefit of section 921 of the Merchant Shipping Act.

I also rather incline to accept the view put forward on behalf of the respondents that the refusal of the master of the Whalen to go out from Cobourg on the 12th day of November to pick up the plaintiff's scow, held to have been wrongful, was not "improper navigation" within sec. 921 (d) and that so far as it may have rendered the defendant liable the case is therefore not one for the application of that section.

The appeal should be dismissed with costs.

MIGNAULT J.—The appellant's counsel submitted his case on two points only:—

1. The learned trial judge should not have reformed the written contract by adding the words "and scows" after the word "barges," thus making the agreement one for the towage of the respondent's scows as well as barges.

2. The appellant is entitled to claim limitation of liability under section 921 of the Canada Shipping Act.

(1) [1911] P. 23, 208.

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On the first point we have the fact that the letter prepared by the respondent's manager, Mr. J. F. M. Stewart, on the 27th of October, 1920, after an interview of an hour's duration with Mr. T. R. Kirkwood, manager of the Kirkwood Steamship Line, owner of the appellant ship, mentions the towage of barges only. I must assume that this letter was deliberately prepared and that Mr. Stewart, who had dictated it, read it before he signed it. We have the further fact that when this action was started, the respondent, in its statement of claim, dated the 8th of January, 1921, alleged a contract made by the owners of the appellant ship for the towage "of the plaintiffs' barges, light and loaded." And when the statement of defence, dated the 15th of January, 1921, set out that the contract did not cover the towage of the plaintiffs' scows, but only of its barges, the plaintiff, on the 21st of January, joined issue on the statement of defence without otherwise referring to the contract.

Up to the time of the trial, it was therefore common ground between the parties that the contract was for the towage of the respondent's barges. During the trial, the respondent asked leave to amend its reply so as to claim that the towage included its scows as well as its barges, and by his judgment the learned trial judge rectified the contract accordingly.

On the issue of rectification of the contract, the evidence is restricted to the testimony of Kirkwood and of Stewart, the former of whom denied that the towage of the plaintiff's scows had been discussed. Stewart began by stating that the agreement with Kirkwood was that the tug furnished by him would tow all "our equipment." When the learned trial judge asked Stewart why he called it "equipment" all

the time, he answered " it was a floating plant," and to a further question whether that was the word used by him throughout, he replied "no, we would speak of barges by name and the scows by scows." Stewart cannot say whether Kirkwood ever saw the scows, but he says he certainly heard of the scows at that interview. He is unable to explain the letter of October 27th, except that "that is the way the letter was written, it don't convey the intention".

I would naturally give every weight to the finding of a trial judge on a question of fact. But here I cannot agree that a proper case was made out at the trial for adding to the contract, after the word "barges," the further words "and scows." With deference, this is permitting a plaintiff, who finds that the letter evidencing the contract which he himself prepared and which he alleges and produces does not support his action, to have it rectified at the trial on his own testimony so as to bring in something which the writing does not mention. I do not think that Stewart's evidence really goes further—and in this he is contradicted by Kirkwood—than to state that scows were discussed at the interview with Kirkwood, and to say that Kirkwood was mistaken when he stated that he did not know that the boat was to tow scows. Stewart entirely fails to explain why, if scows were discussed, they were not mentioned in the letter, and it is his own letter which he now attempts to contradict. In my opinion he has failed in his attempt to contradict it and I find no evidence explicit enough to show that the towage of scows was a part of the contract agreed to by the owners of the tug. And if such towage was not a part of the contract the action cannot be maintained.

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On this point, therefore, without it being necessary to discuss the second question, I would allow the appeal.

Judgment appealed from varied with a special direction as to costs.

Solicitors for the appellant: *Meredith, Holden, Hague, Shaughnessy & Heward.*

Solicitors for the respondent: *Rowell, Reid, Wood, Wright & McMillan*