they thought that the act of Congress did not warrant the granting of a new trial on a petition filed subsequent to an appeal and the return of the mandate from the court.

INSURANCE COMPANY *v.* THWING.

1. Merchandise, carried under bill of lading and paying freight is cargo and not dunnage, although stowed as dunnage would be stowed for the purpose of protecting the rest of the cargo from wet, and put on board by the shipper with knowledge that it would be so stowed.
2. A warranty in a ship's policy "not to load more than her registered tonnage," will be broken by carrying more cargo in weight than such tonnage, though the excess be used as dunnage; whilst, if such excess had been mere dunnage, and not cargo, the warranty would not have been broken.

IN error to the Circuit Court of the United States for the District of Massachusetts.

This was an action of assumpsit for money had and received, brought by The Great Western Insurance Company, of New York, against W. Thwing, a citizen of Massachusetts, to recover certain insurance money which the company had paid to him in ignorance (as they alleged) of a breach of warranty by him. They had made him a policy on his ship Alhambra, on a voyage from Liverpool to San Francisco, which policy was dated the 6th of October, 1863, and contained, amongst other things, this clause:

"Warranted not to load more than her registered tonnage with lead, marble, coal, slate, copper ore, salt, stone, bricks, grain, or iron, either or all, on any one passage."

The registered tonnage was 1285 tons, and the vessel took on board at Liverpool, among other things, 1064 tons of iron, 6 tons of brick, and 238 tons of cannel coal, being an excess over the registered tonnage of 23 tons. The ship having sustained a partial loss on the voyage, the insurance company paid the money in question in ignorance of the amount

of cargo, and based their claim to recover it back on the ground that the payment was made under a mistake of fact.

The defence set up was, that the 238 tons of cannel coal was not cargo, but dunnage.

The defendant showed a charter-party with James Starkie, of Liverpool, by which the charterer was to have the full reach of the vessel's hold, and was to pay 51 shillings for every ton of freight put on board; that the master agreed with the charterer, in addition to the agreement in the charter-party, that the latter should furnish 250 tons of cannel coal for dunnage of the ship for the voyage, and that under this agreement he received the said 238 tons as dunnage, and that it was used and placed along the ship's bottom, fore and aft, as dunnage; that the captain signed a bill of lading for it; that it was on his freight list; that he collected freight, 51 shillings per ton, for it, and delivered it in San Francisco the same as he did the rest of his cargo; that it was better for dunnage than plank. The defendant also offered evidence of experts to show that a cargo was not properly stowed unless properly dunnaged, and that in cargoes from Liverpool cannel coal is frequently used for dunnage, and, when so used for certain cargoes, is liable to be crushed; that when cannel coal is received for cargo it is usually, though not always, stowed in a different manner from what it is when used as dunnage, and that it is sometimes taken as dunnage on ship's account, and then is sold at the port of discharge on ship's account.

Upon this testimony the plaintiffs' counsel asked the court to instruct the jury that, if freight was received and paid for this coal, it came within the warranty, although used as dunnage. The court declined so to rule; but ruled that if the jury believed, from the evidence, that the cannel coal was received and used as dunnage, and not as cargo, it would not amount to a loading under the clause of the policy referred to, and the plaintiffs could not recover. Under this ruling the jury found for the defendant. The bill of exceptions brought up the question as to the correctness of this ruling.

The case was very well argued; orally by Mr. R. H. Dana (briefs of Messrs. M. E. Ingalls and C. L. Woodbury being filed), and by Mr. Sydney Bartlett on a brief, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

There is considerable analogy between dunnage and ballast. The latter is used for trimming the ship, and bringing it down to a draft of water proper and safe for sailing. Dunnage is placed under the cargo to keep it from being wetted by water getting into the hold, or between the different parcels to keep them from bruising and injuring each other. Webster's definition of dunnage is "fagots, boughs, or loose materials of any kind, laid on the bottom of a ship to raise heavy goods above the bottom, to prevent injury by water in the hold; also, loose articles of merchandise wedged between parts of the cargo to prevent rubbing, and to hold them steady." Lord Tenterden says: "It is, in all cases, the duty of the master to provide ropes, &c., proper for the actual reception of the goods in the ship. . . . The ship must also be furnished with proper dunnage (pieces of wood placed against the sides and bottom of the hold) to preserve the cargo from the effects of leakage, according to its nature and quality."*

It seems to be conceded by the plaintiffs that if the cannel coal can be regarded as dunnage, there was no breach of the warranty. In other words, it is conceded that when the assured warranted "not to load more than her registered tonnage," ballast and dunnage were not included in the warranty. And it is not pretended that the cannel coal used on this occasion was more than was proper for dunnage. Had some useless articles been employed for that purpose, such as chips or blocks of wood, though weighing precisely what this coal weighed, and had no freight been paid for it, the insurance company could not have complained.

It is the master's duty to provide both ballast and dunnage when necessary for the safe and proper transportation of his

* Abbott on Shipping, Pt. IV, c. 5, § 1.

cargo. And it has been held that, in selecting materials for these purposes, even when he has chartered the entire capacity of his ship for articles which require ballast or dunnage, he is not precluded from taking articles on which he can realize freight. Thus, in the case of *Towse* v. *Henderson*,* where, upon a charter-party, it was agreed that the vessel should proceed from Singapore to Whampoa, and there load from the agents of the affreighters a full and complete cargo of tea, and the master took in as ballast eighty tons of antimony ore, for which he received freight as merchandise, it was held that, if it occupied no more space than ballast would have done, he was entitled to do it. In that case a full cargo of tea (which was all that the charterer stipulated for) still needed ballast, which it was the duty of the ship-master to supply. Hence it could make no difference to the charterer what material was used for ballast, if it did not encroach upon the loading capacity of the vessel for tea.

The question still recurs, however, whether merchandise used for the purpose of ballasting a ship, or for the purpose of dunnage, and paying freight as merchandise, can be considered as part of the ship's loading within the meaning of a warranty against an excess of loading beyond a limited amount, it being conceded that an equal quantity of ballast or dunnage proper would not be so regarded? Has the court a right to import into the contract an implied qualification that a reasonable amount of merchandise proper for ballast or dunnage shall not be reckoned as loading within the meaning of the contract? It is clear that the law does make the implied qualification that ballast and dunnage shall not be regarded as loading within the contract. Is it reasonable to extend that qualification to merchandise used as ballast or dunnage? If so, then, in the case of a cargo consisting of only one article, which needed no ballast or dunnage, the ship-owner would be entitled to deduct a reasonable amount for those purposes; and if there were a government regulation, that no ship should carry more cargo in

* 4 Exchequer, 890.

weight than the amount of her registered tonnage, she would on the same principle be entitled not only to carry ballast and dunnage (properly such) in addition to her legal amount of cargo, but, where ballast and dunnage could be dispensed with, she would be entitled to carry an additional amount of cargo, beyond the legal allowance, equivalent to reasonable ballast and dunnage.

Such a construction could not be a sound one. It would be an arbitrary modification of the words of a law or contract. If the legislature in the one case, or the parties in the other, were willing that such a qualification should be made, it would always be very easy to make it in express terms. It would seem to be a dangerous practice for the court to make it for them.

It is not every cargo that requires ballast. Many cargoes will themselves sufficiently ballast the ship. Cargo may be so assorted that certain portions of it may act as ballast. And where a ship is doing a miscellaneous carrying business, it would seem to be the dictate of sound business judgment so to assort and arrange the cargo (if practicable) as to dispense with the use of ballast properly so called. For by this means the whole carrying capacity of the ship is saved for cargo. And when this idea is acted on, those portions of the cargo which are selected and used for trimming and settling the ship, may, in a loose and popular sense, be called ballast. But, nevertheless, they are not ballast in a legal or proper sense. They remain cargo.

Precisely the same may be said with regard to dunnage. Many kinds of cargo require no dunnage whatever. They are composed of articles which will not be injured by water, nor by contact with each other. A cargo may be so assorted that some portions of it may be placed so as to keep the other portions dry, or prevent them from coming into mutual collision. It is manifest in this case, as in that of ballast, that a prudent and skilful master of a vessel will (if practicable) so assort and arrange his cargo as to dispense with dunnage proper. And yet, in a loose sense, the articles of merchandise which he uses to perform the office of dun-

nage, may be called dunnage. Still they are not legally nor properly such. If they are merchandise, they are cargo, and form part of the vessel's lading. They will be subject to duties, and they will be covered by insurance on the cargo.

It is true that ballast or dunnage, even when clearly such, as shingle from the beach, wooden slabs, chips, or brush, may be sold for some small sum after the voyage is ended; but that will not make it any the less ballast or dunnage as contradistinguished from merchandise. No person of ordinary intelligence would find any difficulty in making the distinction. Had such articles been used in the case before us, though of the same weight as the cannel coal, the insurance company could not have complained; for it would not have been cargo. But when merchandise is used in lieu of dunnage, or to perform the office of dunnage, it does not lose its character as cargo; and the insurance company have the right to treat it as cargo. And it is evident that no form of words which the captain and the charterer might use on the subject can affect the rights of the insurance company. It would be *res inter alios acta*.

In view of these considerations it seems to us that the charge of the court was calculated to mislead the jury on the question at issue. It was "that if they believed that the coal was *received and used as dunnage, and not as cargo*, it would not amount to a loading under the warranty of the policy."

The evidence justified and required the instruction asked by the plaintiffs, namely, that if freight was received and paid for the coal, it *was* cargo, and came within the warranty. Here was an admitted fact, which gave character to the article, stamping it as merchandise. Freight is never paid for mere dunnage, any more than for the sails and rigging of the ship.

The argument that it made no difference to the insurance company whether coal or any other article was used as dunnage, is unsound. It does make this difference: if coal paying freight is merchandise, it is within the warranty; if mere dunnage were used, it would not be within the warranty. And the company were entitled to the benefit of those re

sults which the mutual self-interest of the parties would lead them to adopt. The company made their contract in view and in anticipation of all these considerations.

Our attention has been called to another case between the same parties on the same policy of insurance, decided by the Supreme Court of Massachusetts, and reported in 103 Massachusetts Reports, p. 401, in which a decision was made adverse to the views which we have expressed. With all due respect for that intelligent and learned tribunal, and after giving full consideration to the views presented in the opinion given in that case, we cannot bring ourselves to a different conclusion from that to which we have come.

JUDGMENT REVERSED, with instructions to issue a

VENIRE DE NOVO.

Mr. Justice CLIFFORD, with whom concurred the CHIEF JUSTICE and Mr. Justice SWAYNE, dissenting.

Unable to concur in the views of the majority of the court in this case, and regarding the question presented as one of considerable practical importance, I deem it proper to state very briefly the grounds of my dissent.

Insurance was obtained by the defendant on his ship Alhambra, from Liverpool to San Francisco; she received injuries by perils of the sea during the voyage, and the plaintiffs, as insurers, paid the loss under protest and brought this suit to recover back the amount. The policy contained the warranty described in the opinion of the court, and the claim to recover back the amount paid for the loss is based solely upon the fact that the ship took on board twenty-three tons of the excepted articles mentioned in the warranty, in excess of her registered tonnage. Two hundred and thirty-eight tons of the loading consisted of cannel coal, which the proofs showed was often used as dunnage, and that much more in quantity of the coal than the excess mentioned was used for dunnage on this occasion. Dunnage is required in every case, and it is not shown nor pretended that any more was used in loading the cargo than was necessary for the purpose.

Deduct from the loading the amount of the coal used as dunnage, and it is conceded that the loading of the ship did not exceed her registered tonnage, and the jury have found that the excess beyond her registered tonnage was used as dunnage, and I have no doubt it was properly so used.

Beyond doubt the ship-owner in ballasting his chartered vessel may take freight-paying merchandise for that purpose, provided the merchandise occupies no more space than the ballast would have done if ordinary ballast had been used instead of merchandise paying freight, and I am of the opinion that the same rule should be applied in respect to the dunnage used in stowing the cargo.* Such was also the opinion of the Supreme Court of Massachusetts in a suit between these same parties which arose out of an insurance on the same voyage.†

Much discussion of the question is unnecessary, as the views which I entertain and the authorities to support them are very fully given in that opinion and in the opinion of the district judge, in which I also concur.

WATSON *v.* JONES.

1. When in courts of concurrent jurisdiction, the pendency of a suit in one is relied on to defeat a second suit in the other, the identity of the parties, of the case made, and of the relief sought, should be such that if the first suit had been decided it could be pleaded in bar as a former adjudication.
2. In such cases, the proceedings in an appellate court are part of the proceedings in the first court, and orders made by it to be enforced by the court of primary jurisdiction are, while unexecuted, a part of the case in the first suit, which may be relied on as *lis pendens* in reference to the second suit.
3. Hence an unexecuted order of this kind, made by a State court to restore possession to the parties who had been deprived of it by a decree which had been reversed, cannot be interfered with by another court by way of injunction, especially by a court of the United States, by reason of the act of Congress of March 2d, 1793. (1 Stat. at Large, 334, § 5.)

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* Towse *v.* Henderson, 4 Exchequer, 890.

† Thwing *v.* Great Western Insurance Co., 103 Massachusetts, 401.